



**G.E Karachwalla (Properties) Limited v National Land Commission & 7 others
(Constitutional Petition 17 of 2021) [2022] KEELC 12597 (KLR) (1 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 12597 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
CONSTITUTIONAL PETITION 17 OF 2021**

AE DENA, J

JULY 1, 2022

(ORIGINALLY MOMBASA CONSTITUTIONAL PETITION NO 14 OF 2019)

IN THE MATTER OF: ARTICLES 10,20,21,22,23,27,40,47,258 OF THE CONSTITUTION

AND

IN THE MATTER OF: DEPRIVATION OR ATTEMPTED DEPRIVATION OF THE

TITLE NO. PLOT NUMBER 1041

AND

**IN THE MATTER OF: THE CONTRAVENTION OF FUNDAMENTAL RIGHTS
OVER PROPERTY UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA**

BETWEEN

G.E KARACHWALLA (PROPERTIES) LIMITED PETITIONER

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT

**MINISTRY OF LANDS, HOUSING AND URBAN DEVELOPMENT 2ND
RESPONDENT**

CHIEF LAND REGISTRAR 3RD RESPONDENT

COUNTY LAND REGISTRAR, KWALE 4TH RESPONDENT

**DIRECTOR OF SURVEY, MINISTRY OF LANDS HOUSING AND
DEVELOPMENT 5TH RESPONDENT**

ADJUDICATION OFFICER, KWALE 6TH RESPONDENT

SETTLEMENT FUNDS TRUSTEES 7TH RESPONDENT

THE ATTORNEY GENERAL 8TH RESPONDENT



JUDGMENT

The Petition

1. This petition was filed on April 9, 2019 against the 8 respondents. The 1st respondent is the National Land Commission sued by virtue of its mandate of managing public land on behalf of the national and country governments. The 2nd respondent is the Ministry of Lands Housing and Urban Developments and is custodian of all land records. The 6th respondent is employed by the 2nd respondent and is the principal officer in charge of approvals relating to subdivision of parcels of land among other duties. The 7th defendant is the land adjudication officer for Kwale area appointed under the [Land Adjudication Act](#) chapter 284 of the laws of Kenya.
2. The petitioner states that it is the registered proprietor of plot number 1041 in west of Mombasa measuring 93 acres (the suit property) with a title dated November 10, 1964. That at all material time the petitioner has been the freehold proprietor of the suit property which is confirmed by various certificates of postal searches.
3. It is the petitioner's case that in 2018 while in the process of disposing the suit property, the proposed purchaser discovered in their due diligence that the suit property was being subdivided as part of the Tsunza settlement scheme. That upon further investigation the petitioner's surveyor confirmed the allegations to be true. The petitioner contends that the inclusion of the suit property in the scheme was without the petitioner's consent and knowledge. It is stated that the suit property cannot be included in the scheme since it is private and not public land. That efforts to obtain further information from the respondents and assurance that the suit property should not be interfered with being private property were unanswered pointing to lack of integrity, bonafides and mal intent on the part of the respondents. The petition is supported by the affidavit of Huzefa Karachiwalla a director of the petitioner.
4. The petitioner pleads infringement of its rights to the suit property, arbitrary deprivation and dispossession as provided in articles 40 and 10 of the [Constitution](#) of Kenya 2010.
5. Together with the petition was filed a notice of motion application dated April 9, 2019 for conservatory orders prohibiting the respondents from inter alia engaging or treating the suit property as if it were public land, carrying out subdivision and issuance of title deeds. The court allowed the application in the interim which was later compromised by the parties on November 9, 2021 in favor of progressing with the main petition. The petitioner also filed a witness statement and a list of documents on February 22, 2022 as part of the evidence in support of the claim which I will refer to later.
6. The petitioner seeks the following orders; -
 - a) A declaration that the petitioner is the registered proprietor of the suit property and is entitled to all the right prescribed by law and attendant thereto including, inter alia, the right to use, occupy, develop and quiet and peaceful enjoyment thereof without any interference or hindrance thereof;
 - b) A declaration that the respondents have no right to dispose or deal with or interfere in any way whatsoever with the suit property of part thereof;
 - c) A declaration that any adjudication, subdivision or issuance of any titles with respect to the suit property or any part thereof to any third party or parties in breach of any part thereof



to any third party or parties in breach of the petitioner's proprietary rights carried out by the respondents, or anyone or more of them, is null and void *ab initio*.

- d) An order directing the respondent, or any one or more of them, to exclude the suit property from the Tsunza settlement scheme.
- e) A permanent order prohibiting the respondents from engaging in any conduct or taking any steps which is or are inconsistent with the petitioner's proprietary rights and interest and/or treating the suit property belonging to the petitioners as though it were public and available for allocation.
- f) A permanent order prohibiting the respondents, or any one or more of them, from carrying out any adjudication of the suit property and further prohibiting them from carrying out any subdivision of the suit property or part thereof and further prohibiting them from issuing any title deeds to any third parties in breach of the petitioner's proprietary rights over the suit property or part thereof.
- g) Compensation by way of damages for unlawful interference with the petitioners' proprietary rights and development of the suit property and/or use and occupation thereof;
- h) The costs of and consequent upon this petition be paid and borne by the respondents;

Responses To The Petition

1st Respondents response

- 7. The 1st respondent filed memorandum of appearance and grounds in opposition to the petition both dated May 9, 2019 and filed on May 15, 2019. They did not file a replying affidavit to the petition. The main ground of opposition was that the petition did not state the alleged constitutional provisions violated by the 1st respondent and the acts complained of with reasonable precision based on the court's pronouncement in *Anarita Karimi Njeru v The Republic* (1976 – 1980) KLR 1272. That the 1st respondent had no role over land adjudication and establishment of settlement schemes. Further that the petitioner had not proved that the suit property had been included in the Tsunza settlement scheme.

The 2nd – 8th Respondents Response

- 8. According to the file record the respondents were served with the petition and application on April 29, 2019 as deponed in the affidavit of service sworn by Emmanuel Mulindi filed on May 2, 2019. Also see affidavit of service by Isaac Muriuki Kinyua sworn on April 25, 2019. Subsequently there are several affidavits of service filed in respect of the 1st respondent and the Attorney General on various dates when the matter was fixed for mention. On October 4, 2021 Mr Makuto attended court holding the brief of Mr Wachira for the 2nd respondent who informed the court that they had filed grounds of opposition though they were not on record and undertook to have them filed. On November 9, 2021 Mrs Waswa state counsel attended and informed the court they were appearing for the 2nd to the 9th respondents but had not filed any papers except a memorandum of appearance. Mr Mbuthia appeared for the 1st respondent and this court granted the respondents 30 days to file all their replies and the petitioner corresponding 14 days to respond further to the same. This court fixed the matter for mention on November 30, 2021. On November 30, 2021 Mr Mbuthia for the 1st respondent did not attend though Mr Ondengo for the petitioners informed the court there were discussions with the 1st respondent that were likely to affect the trajectory of the petition. Mrs Njau state council sought



for 30 days to regularize her clients record. I fixed the matter for mention on February 2, 2022. On February 2, 2022 Mr Mbuthia and Mr Mwandeje state counsel attended for the respondents. The court was informed that nothing was forthcoming from the discussions. This court yet again granted but a last chance to the respondents 21 days to file responses to the petition and fixed the matter for mention on February 23, 2022. On February 23, 2022 counsels for the respondents did not appear, Mr Ondego confirmed he had not been served with anything from the respondents and urged that the matter proceeds by way of written submissions. Noting my previous orders, I still gave another 14 days to the respondents to file responses to the petition and directed the petitioner to file written submissions within 21 days of failure by the petitioners to comply with the said orders. In the event the respondents complied the petitioner was granted corresponding leave to respond further and the respondents were to file their submissions within 14 days. The court fixed the matter for mention on June 20, 2022 to confirm compliance with the orders when on the said date counsel for the respondents did not appear and Mr Ondego confirmed he had not been served with anything from the respondents. I thus gave a date for judgement for June 20, 2022 which I later deferred to July 1, 2022 as the same was not ready on account of exigency of duty.

9. Vide a letter dated June 20, 2022 addressed to the deputy registrar and M/s A.B Patel advocates for the petitioner Winnie Namahya Waswa litigation counsel sought the indulgence for their grounds of opposition dated February 14, 2022 to be placed on record before the scheduled judgement for a fair determination. The reason cited was that while they were served with the petitioners' submissions on April 25, 2022 the same were not brought to her attention as they were erroneously filed away at their office registry. That she was also not aware of the date for judgement (June 20, 2022) for want of service though she subsequently saw the same on the cause list prompting her to write the letter. The letter states that the submissions point that the 2nd to 9th respondents have not opposed the petition. She admitted that while they had not filed a replying affidavit to the petition they had filed grounds of opposition on April 14, 2022 but were not placed in the court file neither were they served on the petitioners.
10. The grounds of opposition are dated February 14, 2022 and there is no explanation as to why they were not filed since then because what is said to have been erroneously filed away at the Attorney Generals registry are the grounds of opposition which were filed later on April 22, 2022. From the record Mr Mwandeje state counsel attended court on February 2, 2022 when this court fixed the matter for mention on February 23, 2022 and on the said February 23, 2022 there was no representation from the Attorney General's office. It appears that no follow up was made on what may have transpired in court on that date. The record will bear this court witness that this court gave enough indulgence to the respondents and I'm not persuaded the said grounds should be considered having been filed in April 2022. No response was received from the firm of AB Patel Advocates in respect to the letter. In any event looking at the nature of the request made it ought to have been done through a formal application.
11. I will therefore proceed on the basis that this petition is not opposed in respect of the 2-9th respondents.

Submissions

12. The petitioner filed submissions dated April 22, 2022. Counsel for the petitioner submitted that in the absence of a replying affidavit the grounds of opposition cannot constitute a response to the petition by dint of rule 15 (1) of *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* legal notice No 117. That though the said grounds of opposition raised issues of law it did not respond to issues of fact raised in the petitioners supporting affidavit herein. Consequently, this court was invited to treat the issues of fact as unconverted and the petition as



unopposed by the 1st respondent and the rest of the respondents who had failed to file any document in response to the petition. To buttress this point the decision in the case of High Court civil appeal No 242 of 2018 *Mustano Rocco v Aniello Stereli* where the court relied on the case of *Kennedy Atieno Odiyo & 12 others v Kenya Electricity Generating Company Ltd* (2010) eKLR was cited. Also see *Kipyator Nicholas Biwott v George Mbuguss and Kalamka Limited* civil case No 2143 of 1999. Counsel reiterated the averments in the petitioners supporting affidavit and the petition and relying on the documents presented as proof of ownership as well as the inclusion of the petitioner's land in the Tsunza settlement scheme.

13. Relying on ELC case No 61 of 217 *Jobab Omoyoma v Bonface Oure & 2 others* (2021) eKLR it was submitted that the petitioners title enjoyed supremacy as it was undisputed proof of ownership as stipulated in section 24(a) and 26(1) of the *Land Registration Act*, except where it is proved the same was obtained through fraud or misrepresentation with participation of the holder. It was urged that it was clear that the illegal attempt to include the suit property in the Tsunza scheme will deprive the petitioner of its suit property to which it was the lawful owner.
14. This courts attention was drawn to articles 10, 20, 21, 22, 27, 40, 47, 48 50 and 159 of the *Constitution* which were enumerated as having been breached together with statutory provisions governing the enforcement of payment of rates by the respondents. In conclusion it was submitted that the petition raised matters of material concern touching on the fundamental rights and freedoms of the petitioner and that it was clear that the petitioner was threatened with unlawful and arbitrary deprivation and dispossession of the property. The court was urged to allow the petition with costs to the petitioner.

Analysis and Determination

15. I have considered the petition, supporting affidavit, submissions as well as the list of documents filed in support of the petition. In this courts view the following issues commend for determination
 - 1) Whether the petition is bad in law for want of precision.
 - 2) Whether the 1st respondent grounds of opposition should be considered in the absence of a replying affidavit.
 - 3) Whether there is a cause of action against the 1st respondent.
 - 4) Whether the petitioner is entitled to the reliefs sought.

Whether the petition is bad in law for want of precision.

16. I have read the petition. The petitioner cites articles 40 and 47 as having been infringed for the reason the suit property which they are the registered owners has been included in Tsunza settlement scheme without the petitioner's notification and consent. At paragraph 24 of the petition the petitioners name articles 20, 21, 27, 48, 159 which relate directly to the actions complained of by the petitioner. This court observes that while there has been no specific action attached to each of the respondents the complaint is very clear, the inclusion of the suit property into the Tsunza settlement scheme for alienation under the scheme without its knowledge and consent. I will proceed to fully determine the petition so that its full judicial effects are known.



Whether the 1st respondent grounds of opposition should be considered in the absence of a replying affidavit.

17. This point is based on rule 15 (1) of *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* legal notice No 117 which states; -

‘The Attorney General or any other state organ shall within 14 days of service of a petition respond by way of replying affidavit and if any document is relied upon, it shall be annexed to the replying affidavit’

It is urged that by dint of the foregoing the grounds of opposition filed by the 1st respondent cannot constitute a response. My reading of this rule does not suggest that only a replying affidavit can constitute a response to a petition. To me the rule envisages responses to the facts raised in a petition accompanied by such documents as are intended by the state organ to support their response which serves as its evidence as these cannot be attached to let's say grounds of opposition. In my view grounds of opposition still remain a response as long as the grounds raise valid points of law.

Whether there is a cause of action against the 1st respondent.

18. Article 67 of the *Constitution* of Kenya establishes the National Land Commission and set out the functions of the commissions as follows; -

National Land Commission

(1)

(2) The function of the National Land Commission are –

- a) To manage public land on behalf of the national and county governments.
- b) To recommend a national land policy to the national land policy to the national government;
- c) To advise the national government on a comprehensive programme for the registration of titles in land through Kenya.
- d) To conduct research related to land and the use of natural resources and make recommendations to appropriate authorities.
- e) To initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;
- f) to encourage the application of traditional dispute resolution mechanism in land conflicts.
- g) To assess tax on land and premiums on immovable property in any area designated by law; and
- h) To monitor and have oversight responsibilities over land use planning throughout the country.

(3) The National Land Commission may perform any other functions prescribed by national legislation.

The above function are reiterated in section 5 of the *National Land Commission Act* No 5 of 2012. The other function given by the Act pursuant to article 67 (3) are state in section 5(2) of the act thus; -

In addition to the functions set out in subsection (1), the commission shall, in accordance with article 67 (3) of the *Constitution*-



- a) On behalf of, and with the consent of the national and county government, alienate public land.
 - b) Monitor the registration of all rights and interests in land.
 - c) Ensure that public land under the management of the designated state agencies is sustainably managed for the intended purpose;
19. Clearly from the above provisions I have not identified any of the commissions functions that can support the petitioner's claim that the commission has included the suit property as part of the Tsunza settlement scheme. First of all, the land is private land as evidenced by the indenture of title dated November 10, 1964 and the various postal searches issued resting with the one of January 25, 2022. It is trite the commissions mandate is over public land and it may only have come into play if the land was being compulsorily acquired for a public purpose. The petitioner has not produced any evidence of the commissions involvement in this regard. It cannot even be said the petitioner was not sure of which party to sue as anticipated by the rules, through counsel they ought to have known which party to sue even where they were denied information about the scheme. The process of land adjudication is well enumerated under the [Land Adjudication Act](#) and the players are clearly set out. This court respectfully agrees that the 1st respondent has no role in the process of land adjudication and ought not to have been sued in this petition. Consequently, this court hereby invokes rule 5(d) (1) of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules, 2013](#) legal notice No 117 to strike out the 1st respondent for having been improperly joined in the petition. It is not a necessary party to this petition.
20. Assuming this court is wrong on the above, the burden of proof would still rest on the petitioner to prove the acts committed by the commission which infringed upon the rights of the petitioner. There are no such specific allegations as to the role played by the 1st respondent in the entire petition. I have indeed perused the documents filed with the petitioners list of documents dated February 22, 2022. The report of Mashariki Geo Survey Limited dated July 9, 2020 mentions the key players as the director of survey, the district surveyor kinango and the land adjudication and settlement officer Kinango. The other documents were the searches issued on July 15, 1997, March 9, 2018, January 9, 2019 and January 21, 2021 and demand letter dated January 16, 2019 with enclosures which make no reference at all to the 1st respondent. The claim against the 1st respondent would not have been proved either way.

Whether the petitioner is entitled to the reliefs sought.

21. The onus is with the petitioner to prove breach and violation of the rights they have alleged. The fact that the factual evidence is not challenged does not mean the claim is proved.
22. In my view to arrive at the determination as to whether the petitioner is entitled to the reliefs sought one must first address if the land belongs to the petitioner, and if it has actually been included as part of the Tsunza settlement scheme. I have already observed that the petitioners placed before this court the indenture of title dated November 10, 1964, the various postal searches issued resting with the one of January 25, 2022 as evidence that they are the registered proprietors of the suit property. This has not been controverted either by evidence on the part of the respondents to show the petitioners title was obtained by fraud or misrepresentation to which they were a party or through a corrupt scheme. This court finds that the suit property belongs to the petitioner. It is imperative to however note this is not enough.



23. The next step would then be for this court to consider if there is proof that the suit property was indeed included in the Tsunza settlement scheme and this is the crux of this claim. In the alternative I pose the question, would an intention or an attempt to include it as such suffice? I have introduced the issue of intention because the claim seems to be also hinged upon an action which has not crystallized. Firstly, the latest postal search is the one as at January 25, 2022 by the registrar of coast land titles. It reveals that the registered freehold owner of the suit property is still the petitioner G.E Karachiwalla (Properties) Limited. The rest of the earlier searches echo the results of this search except the court order which was registered later. The petitioner has heavily relied on the report by Mashariki Geo Survey Limited dated July 9, 2020 which I have keenly read and it is evident most of their work was based on a desk top survey. According to the report the gazette notice declaring Tsunza squatter scheme could not be obtained which suggested there was controversy surrounding the scheme. This is a very critical piece of evidence. It is the very substratum of and sets the entire process of adjudication into motion. Without it an intention to create a scheme cannot be said to exist neither can an adjudication process be said to have been undertaken. From the pleadings and evidence placed before this court, it is clear that this entire petition is about the inclusion of the suit property as part of the alleged Tsunza settlement scheme. Crucial documents with regard to the establishment of a settlement scheme and the process envisaged under part iv of the Land Adjudication Act chapter 284 of the Laws of Kenya has not been availed yet the records at the lands registry confirm that the petitioner is still registered as the owner of the freehold interest in the suit property. While it is pleaded that the information was not forthcoming due to some alleged interest and controversy surrounding the scheme, the petitioner ought to have sought the requisite orders of mandamus to compel production of such information to enable it prosecute its claim. My hands are tied and this court cannot act on speculations.
24. The report concludes at paragraph 4 thus; -
- That to the best of our knowledge information and belief there are squatters or persons in illegal occupation of the property and that there are several illegal structures, both identifiable on the google Earth Imagery and during our physical site verification exercise with hand held global positioning system (GPS) of the property. Most of the property is currently being used as a ‘shamba’ as well as with having some settlements’.
25. The foregoing conclusion does not in my view confirm that the squatters or persons therein are beneficiary allottees of the Tsunza settlement scheme or that they occupy the suit property by virtue of their allocation under the alleged Tsunza scheme neither does it confirm the legal existence of the said scheme. In any event if the suit property is invaded by squatters the petitioners must know the appropriate remedy or forum for removing them from the suit property. It cannot be under this petition. I make a finding that the intention to or even the legal existence of the Tsunza settlement scheme has not been proved on a balance of probabilities. The orders cannot therefore issue.
25. The upshot of the foregoing is that this petition is dismissed. There shall be no orders as to costs.

DELIVERED AND DATED AT KWALE THIS 1ST DAY OF JULY, 2022.

A.E. DENA

JUDGE

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Ms Mutune holding brief for Mr. Anjarwall for the petitioner

Ms. Waswa for the 2nd – 8th respondents



No appearance for the 1st respondent.

Mr. Denis Mwakina- Court Assistant.

