



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC PETITION NO. 55 OF 2018

MATER CENTRAL MARIAKANI

RESIDENTS ASSOCIATION.....PETITIONER

VERSUS

THE CABINET SECRETARY, MINISTRY OF

TRANSPORT, INFRASTRUCTURE, LANDS,

HOUSING & URBAN DEVELOPMENT.....1ST RESPONDENT

THE CITY COUNTY OF NAIROBI.....2ND RESPONDENT

THE NATIONAL HOUSING

CORPORATION.....3RD RESPONDENT

NATIONAL LAND COMMISSION.....4TH RESPONDENT

JUDGEMENT

1. The Petitioner is an association of residents of Mater Central Mariakani Slum, within the City of Nairobi. The petition was brought on behalf of members of the association together with the other occupants of Mariguini slums who have been resident in the area known as Mariguini in the vicinity of Mater Hospital in South B in Nairobi since 1962.

2. The 1st Respondent is the Cabinet Secretary, Ministry of Transport, Infrastructure, Lands, Housing and Urban Development vested with the authority of implementing the National Land Policy. The 2nd Respondent, the County Government of Nairobi is established under Article 176 (1) of the Constitution and holds in trust public land within its boundaries which is vested in it pursuant to Article 62 (2) of the Constitution for the people resident in Nairobi. Such land is administered by the 4th Respondent.

3. The 3rd Respondent is a public corporation established by the Government of Kenya to develop, manage or sell residential houses to the public at affordable prices. The 4th Respondent is a commission established under Article 67 of the Constitution whose duties include managing public land, recommending a national land policy and initiating investigations into land injustices.

4. The Petitioner contended that the land in dispute, which is better known as Mariguini slum, was unalienated public land which was originally used as a stone quarry and later became a dumpsite from which the Petitioner's members and other residents of Mariguini slum eked out a living rummaging through the trash dumped on the suit land. That the dumpsite gradually became habitable and grew into Mariguini slum.

5. The Petitioner contended that in 1983 or thereabouts, a director of planning of the 2nd Respondent irregularly and wrongfully procured issuance of a letter of allotment by the 2nd Respondent to himself for a substantial portion if not all of Mariguini slum, which by then was occupied by members of the Petitioner as their residential area. The Petitioner contended that the parcel of land on which Mariguini slum stood was unalienated public land within the meaning of Article 62 (1) (a) of the Constitution and that the 2nd Respondent had no authority to manage or alienate that land in the manner it did in 1983. That acting on that letter of allotment, the 2nd Respondent issued a lease over Mariguini slum to the 3rd Respondent pursuant to which the 4th Respondent issued grant number 40250 for land reference number 209/10354 to the 3rd Respondent.

6. The Petitioner relied on Sections 12 and 14 of the Land Act and the procedure that was to be followed in issuing public land to targeted

groups of persons. The Petitioner contended that the Respondents should have known that the Petitioner and other occupants totalling about 8,000 resided on the public land in Mariguini slum when the land was alienated to Charles Icharia without any notice being given to the Petitioner of the proposed alienation of the public land.

7. The Petitioner contended that the alienation of the suit land to Charles Icharia by the 2nd to 4th Respondents was not properly conducted and was calculated to cause eviction and displacement of a targeted group of members of the Petitioner and other occupants of Mariguini slum to aggravate their disadvantaged position in contravention of Sections 12 (1) (b) and 14 of the Land Act.

8. They contended that the alienation of the public land to Charles Icharia was illegal. Further, that since 1962 and after the suit land was alienated by the 2nd and 4th Respondents to Charles Icharia as the registered proprietor of grant number IR 40250 L.R. No. 209/10354, members of the Petitioner and other occupants of Mariguini settlement had remained in continuous occupation and possession of the suit land and the remainder of the adjoining land. They claimed that they had peaceably and openly exercised all the rights of an owner over the suit land and the remainder of the Mariguini slum public land.

9. The Petitioner asserted that the 3rd Respondent who purchased the suit land from Charles Icharia on or about 1985 was never given vacant possession and that it therefore holds the title over L.R. No. 209/10354 in trust for members of the Petitioner and other occupants of Mariguini slum pursuant to Section 7 of the Limitation of Actions Act.

10. The Petitioner averred that through the administrative agencies of Kenya including the County Commissioner, Chiefs and Sub-chiefs, the 1st, 2nd and 3rd Respondents verbally informed members of the Petitioner and other occupants of Mariguini slum settlement to voluntarily move out of the suit land to pave way for a slum upgrading project to be undertaken by the Government of Kenya otherwise they will face hellfire worse than the conflagration that razed down Mariguini slum in 2004.

11. The Petitioner contended that the 1st to 3rd Respondents purported to identify and compile a list of the occupants of Mariguini slum whose houses are targeted for demolition with the promise of resettlement in the upgraded development. However, it contended that that exercise was not undertaken with accountable transparency disclosed for verification by owners of the targeted developments the list of residents identified to benefit from the upgraded project.

12. Members of the Petitioner were therefore apprehensive that the undisclosed list which it claimed was secretly compiled by the 1st to 3rd Respondents for resettlement in the upgraded development would most likely comprise persons who were not in occupation of any portion of Mariguini slum and that they would purport to resettle in the ultimate upgraded development to the exclusion of members of the Petitioner and other current residents of Mariguini slum.

13. The Petitioner feared that the Respondents were planning to violently demolish the properties of its members and those of other residents of Mariguini slum settlement for the benefit of the 3rd Respondent and that of a private developer disguised as Kenya Slum Upgrading Programme (KENSUP). It argued that they had failed to speak truthfully, show equity, equality, and humanity and had failed to follow due process and the eviction and resettlement guidelines developed by the Ministry of Lands and Settlement.

14. The Petitioner claimed that it had been advised that some of the requirements under the guidelines included identification of persons to be relocated; holding consultative meetings with the relevant stakeholders for a common understanding; sensitising target groups in order to bring trust and ownership of the process; issuance of vacation notices and allocation of housing units at a decanting site; removal of structures by the owners and signing of a memorandum of understanding; signing tenancy agreements indicating the house allocated, rent payable and the conditions of temporary allocation before the new houses were completed as well as facilitation of movement of the families involved by the 1st to 3rd Respondents.

15. The Petitioner contended that its members and other occupants of Mariguini slum settlement had not been given any formal notice of eviction nor had they been offered a phased out evacuation plan. Further, that they had not been identified nor shown the place to move or offered any compensation for their property. They contended that the lack of action by the Respondents threatened them with unfair, unprocedural, wrongful and undignified forced eviction without resettlement and loss of property without compensation unless the court intervened to prohibit the looming forced eviction.

16. The Petitioner relied on Article 20 of the Constitution which declares that the bill of rights applies to all persons and binds all State organs and requires courts, when applying a provision of a bill of rights, to develop the law where it does not give effect to a right or fundamental freedom and to adopt an interpretation that most favours the enforcement of a right or fundamental freedom. The court is also enjoined to promote values that underlie an open and democratic society based on human dignity, equality, equity and freedom as well as the spirit and object of the bill of right.

17. It further contended that the suit land was public land which according to Article 62 (4) of the Constitution could only be disposed of in terms of an Act of Parliament specifying the nature and terms of that disposal. The Petitioner contended that in all the prevailing circumstances and events the Respondents had not treated its members with transparency, equity, equality or accountability and that the proposed slum upgrading would not benefit its members and the immediate occupants of Mariguini slum settlement but would instead benefit the 3rd Respondent who needs vacant possession of the land so that it can sell it to a private property developer.

18. The Petitioner averred that Article 43 (1) of the Constitution guaranteed its members and other occupants of Mariguini slum settlement the highest attainable standards of health including the right to healthcare services and reproductive health; accessible and adequate housing and reasonable standards of sanitation. It urged that Article 47 guaranteed them the right to fair administrative action and to be given written reasons for administrative action which would likely adversely affect their fundamental rights.

19. Further, they urged that the threats by the Respondents to demolish their houses ahead of the short rains without any demonstration of an

urgent need for the development of the land by the Government and without evidence of verifiable resettlement or compensation strategies would unleash terror on the members of the Petitioner and other occupants of Mariguini with their families without justifiable cause and would subject them to anxiety, distress, suffering and render them homeless.

20. The Petitioner contended that the Government of the Republic of Kenya was a signatory to the Universal Declaration of Human Rights and the International Covenant on Economic Social and Cultural Rights. Further, that Article 2 (5) and (6) of the Constitution mandated the Government to uphold the provisions of Article 11 (1) of the International Covenant and Economic Social and Cultural Rights which guaranteed members of the Petitioner the rights to housing and protection by the Respondents as agencies of Government from unlawful arbitrary evictions.

21. The Petitioner contended that the Respondents' were in breach of or threatened to breach Article 11 of the International Covenant on Economic Social and Cultural Rights by forced eviction of its members who at the best of times were extremely disadvantaged economically and were also in breach of the Petitioner's members covenant to ownership of their property and quiet enjoyment of their premises and would violate their right to protection from forced eviction through the Respondents' failure or refusal to;

(a) afford the Petitioner any opportunity for genuine consultation or to involve or inform its members of the decision to demolish and plans to redevelop and approval by the regulatory authorities and funding for the developments;

(b) afford the Petitioner and their families' adequate and reasonable notice to make timely preparations and by their failure to find adequate and reasonable alternative accommodation for members of the Petitioner within easy reach of their employment and accessible to schools attended by their children or to find suitable schools;

(c) divulge to Petitioner's members the list of targeted families or information or documents or planning approvals backing the proposed change of user of the premises, the demolition and its development and timing and implementation and want of a phased demolition and resettlement;

(d) disclose to the Petitioner and other occupants of Mariguini the name of the private developer and the source of funds to be used by the developer to develop a massive housing scheme for disadvantaged people least able and secure a profitable return on his investment.

22. The Petitioner contended that its members and other occupants of Mariguini slum had not freely consented to the proposed eviction and they reasonably expected security of tenure and security of their properties as well as protection from eviction by the Government. They added that as the agents of the government, the Respondents had failed to ensure to the Petitioner and their families protection and threatened to render them homeless without making any offer of reasonable resettlement or compensation to the members of the Petitioner and other occupants of Mariguini slum and their families for infringement of their fundamental rights.

23. The Petitioner contended that prior to the informal verbal communication complained of, the 1st, 2nd and 3rd Respondents by themselves or through their agents and the apparent beneficiaries of the irregular alienation of the public had on several occasions made menacing and unauthorised forays into Mariguini slum thereby breaching the covenant of quiet possession and enjoyment of premises by members of the Petitioner and other occupants besides causing them fear, anxiety and intimidation.

24. Members of the Petitioner contended that they were entitled to protection by the Government from forced eviction by dint of Article 2 of the Constitution. Further, that members of the Petitioner and other residents of Mariguini slum with their families had suffered anxiety, fear, intimidation, humiliation, loss of enjoyment of their premises and injury to their feelings and dignity.

25. The Petitioner sought a declaration on behalf of its members and the occupants of Mariguini slum that L.R. No. 209/10354 was unprocedurally issued by the 2nd and 4th Respondents and sold by the allottee to the 3rd Respondent and that the 3rd Respondent held the title in trust for members of the Petitioner and other occupants of Mariguini slum settlement.

26. They sought an order for rectification of the land register by the 4th Respondent by cancellation of the title held by the 3rd Respondent over the suit land and issuance of a title in the names of members of the Petitioner and the immediate neighbours residing on the land as a group, association or society. The Petitioner also sought an order of injunction to restrain the Respondents from demolishing the houses in Mariguini slum or evicting members of the Petitioner and other occupants of Mariguini slum together with an order stopping the 3rd Respondent from selling, transferring, leasing or charging the suit land while the petition was pending.

27. In the petition dated 21/9/2018, the Petitioner sought judgement against the Respondents jointly and severally for a finding that the fundamental rights and freedoms of the Petitioner's members and those of other occupants or residents of Mariguini slum to protection from forced eviction and protection of the law had been or were under threat of violation by the Respondents.

28. They sought an order to give effect to such judgement restraining the Respondents or their agents from evicting members of the Petitioner or interfering with their right to quiet possession and enjoyment of the suit land. In addition, they sought damages for violation of the Petitioner's covenant of quiet enjoyment of the suit premises with interest on the said damages at court rates from the date of judgement until payment in full. They urged the court to make any further orders for the ends of justice and sought the costs of the petition.

29. The petition was supported by the affidavit of Mary Mwimbi, who deponed that she was a resident of Mariguini slum and that she was the Deputy Chairlady of the Petitioner. She produced copies of the Petitioner's certificate of registration issued on 6/7/2018, its constitution, minutes of the meeting held on 7/7/2018, the list of members of the Petitioner, letter dated 5/8/2018 from the Petitioner to the Director of Slum Upgrading and the letter dated 27/7/2018 addressed to Hon. Johnstone Sakaja, Senator for Nairobi County. She also attached copies of letters dated 27/7/2018 addressed to the National Land Commission, Ministry of Housing and Infrastructure, the Ethics and Anti-Corruption Commission, the Director of Public Prosecutions and the Director of Criminal Investigations. Further, she annexed copies of letters dated

19/7/2018 addressed to the Director of Public Prosecutions and Director of Criminal Investigations.

30. The Petitioner wrote to the Permanent Secretary, Internal Security and County Administration on 20/7/2018 complaining that the County Commissioner, the Starehe Assistant County Commissioner, Chief and Assistant Chief had colluded with a certain Somali man to grab their slum and that those officers had been given money to evict the Petitioner by either setting the slum on fire or using caterpillars to bulldoze and evict the residents. She annexed copies of other correspondence written by the Petitioner to various entities.

31. Ms. Mary Mwimbi also annexed proof of enumeration issued by the Ministry of Lands to various persons on 13/12/2011. She produced a copy of the notice issued by the Ministry of Transport, Infrastructure Housing and Urban Development notifying the public that the enumeration of persons in Mariguini would resume on 25/9/2018 between 9 a.m. and 4 p.m. An earlier enumeration had been held from 3rd to 7th September, 2018.

32. She produced a copy of the letter dated 2/7/2008 which NHC wrote to the Petitioner informing it that the sale opportunity that had been given to Mariguini Muungano Multipurpose Cooperative Society Limited expired on 30/6/2008 and that the land had been sold by the corporation to the new owner. The letter required the society to vacate the land while pointing out that they had been squatting on the land for a long time.

33. She attached a copy of NLC's letter dated 11/4/2018 addressed to the managing director of NHC regarding a complaint NLC had received from residents of Mariguini in South B who claimed that they had always occupied the disputed land. NLC wrote to the Chairman of Mariguini slum on 20/4/2018 notifying it that NHC had formerly responded to its letter and confirmed that the suit land belonged to NHC. Ms. Mwimbi also attached the eviction and resettlement guidelines issued by Ministry of Lands in March 2011.

34. The 2nd Respondent filed a notice of preliminary objection on 5/10/2018 contending that the petition did not raise any cause of action against the 2nd Respondent and that the entire suit was incompetent and bad in law. It also contended that the Petitioner had not demonstrated that its rights were under threat of violation or were being violated by the 2nd Respondent to warrant its standing to lodge the petition against the 2nd Respondent. Further, that the Respondent had not demonstrated that it was entitled to any relief or remedy from the 2nd Respondent.

35. Charles Mwangi Hinga, the Principal Secretary in the State Department of Housing and Urban Development swore an affidavit on 18/4/2019 in opposition to the petition. He deponed that Mariguini settlement was located on land owned and registered in the name of NHC, the 3rd Respondent. He clarified that NHC was domiciled in the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works sued as the 1st Respondent in this petition.

36. He averred that he was aware that the 3rd Respondent had made several attempts in the past to take vacant possession of the suit land without success. That at some point, NHC offered to sell the land to the Petitioner but that was not possible because the residents could not raise the purchase price. He deponed that out of fear of being evicted from the suit land, the Mariguini residents approached the 1st Respondent to undertake an upgrading initiative of the settlement.

37. He deponed that the Government embarked on the "big four agenda" whose objective was to generate 100,000 home owners within slums and informal settlements in the country which when complete would have housing units with the associated infrastructure. That Mariguini settlement was identified as one of the informal settlements that was to benefit from the pilot project which was expected to produce approximately 11,000 housing units. He stated that a Social – Economic Survey of the slum was conducted and the report prepared in January 2019, a copy of which he produced.

38. He averred that the 1st Respondent conducted public participation with the residents of Mariguini on 26/1/2018 through a public *baraza* on the relocation of the beneficiaries of the housing project. He produced a copy of the report prepared by the Ministry of Transport Infrastructure, Housing, Urban Development and Public Works, Slum Upgrading Department following the meeting which was held on 26/1/2018.

39. Mr. Hinga emphasised that during the *baraza*, residents were assured that there would be no forced evictions and that the residents together with various government agencies would develop a relocation plan to vacate the project area. He clarified that residents of Mariguini would be required to vacate the land to pave way for construction of the houses. He added that those to be affected by the project had already been identified and that the *bona fide* Mariguini residents would be issued unique identity cards for future allocation of houses.

40. Mr. Hinga pointed out that Mary Mwimbi who swore the affidavit in support of the petition together with Esther W. Maina, John Mugo Maina and Mercy Wambui Mwaura whose details are given in the petition participated in the Mariguini slum Upgrading process and were enumerated in 2011 and that these persons updated their details during the enumeration exercise in July 2018. He produced a copy of the list of the enumerated people. The court notes that their names appear at numbers 695,720 and 724 of the list titled Slum Upgrading Department.

41. He averred that the main aim of the Kenya Slum Upgrading Program under the Ministry of Transport, Infrastructure, Housing and Urban Development was to improve the lives and livelihoods of people living and working in slums and informal settlements as envisaged in the Constitution and the National Slum Upgrading and Prevention Policy, a copy of which he produced.

42. Mr. Hinga gave the main objectives of the slum upgrading program as to:

(i) recognise and integrate slums into urban fabric which guarantees access to adequate housing;

(ii) provide a regulatory and institutional framework to guide coordinated and accountable implementation of slum upgrading and prevention at the National and County levels;

- (iii) encourage, facilitate and secure community and stakeholder participation, transparency and accountability in slum upgrading, rehabilitation, redevelopment and slum improvement programs;
- (iv) provide for direct Government intervention in provision of social housing for the urban poor;
- (v) provide urban land for private sector led development in low cost housing, slum rehabilitation and improvement; and
- (vi) promote national and county integrated financial planning, budgeting and advocate for the creation of amalgamated fund for slum upgrading and prevention.

43. He averred that the program was intended for public good and would ensure equity both for tenants and the structure owners. He pointed out that the Petitioner was registered on 5/7/2018 while the Mariguini Slum Upgrading Initiative began in 2009 and posited that the motive for its registration might be to derail the process which was at an advanced stage and which was supported by a majority of the residents. He produced a copy of the National Slum Upgrading and Prevention Policy, Sessional Paper Number 2 of March 2016.

44. Mr. W.K.B. Keitany, the 3rd Respondent's Chief Legal Officer swore the affidavit in opposition to the petition. He averred that NHC was a state corporation hence a public body established under Section 3 of the Housing Act with its functions being to lend or grant money to county governments, companies or individual persons to enable them acquire land and construct on it approved dwellings or carry out approved schemes for promoting the development of housing. NHC is also mandated to construct dwellings and to carry out approved schemes. It also manages the housing funds established under that Act. NHC was mandated to acquire land or buildings.

45. He averred that the suit land was granted by the President of the Republic of Kenya to NHC for a term of 99 years from 1/11/1982 for use in connection with its legal mandate. He maintained that the suit land had never been subdivided and was not available for alienation or occupation by third parties including members of the Petitioner. He urged that being public land, the suit land was protected against illegal alienation, grabbing or adverse possession by the Petitioner or any third party under the Limitation of Actions Act.

46. Mr. Keitany averred that in **HCCC No. 2842 of 1996** which was a suit between the 3rd Respondent and the illegal squatters the court pronounced itself through the decree dated 15/5/1997 and declared the occupation of the suit land by invaders or third parties as illegal and unlawful and issued orders of eviction. He argued that if this court were to grant the orders sought in the instant petition it could amount to determining an appeal against the decision of the High Court which had conclusively determined the issues at hand. He attached a copy of the decree in that case.

47. He deponed that the Petitioner had not proved its legal ownership over the suit land and that it had admitted in the past and in the petition that the suit land was owned by NHC hence its members had no lawful claim or justification to entitle them to the suit land. He urged that the Petitioner was estopped from alleging or claiming proprietary rights over the 3rd Respondent's land. He contended that the Petitioner had not proved or substantiated the alleged violation of the rights of its members by the 3rd Respondent to warrant the grant of the orders sought and urged the court to dismiss the petition while contending that the Petitioner was an amorphous group lacking standing to institute this petition.

48. The 2nd Respondent opposed the petition through the replying affidavit sworn by its Chief Valuer, Nyoike N.I. on 19/8/2019. Mr. Nyoike averred that the records in the 2nd Respondent's custody relating to the suit land show that the land is registered and owned by the 3rd Respondent. That the land was transferred to the 3rd Respondent by the government of Kenya on 23/10/1985 under a lease for 99 years. He averred that the Petitioner had not adduced any evidence to prove the allegations that the suit land had been allocated to anyone pursuant to the Land Act. He maintained that until the suit land was transferred to the 3rd Respondent, it was public property and was not available for private or communal use.

49. Mr. Nyoike deponed that no evidence had been adduced to show that the Petitioner invoked the procedure provided in Section 12 of the Land Act and submitted a request to the 4th Respondent for consideration for allocation of the land. It therefore urged that the petition was premature and largely based on misinformation, conjecture and half-truths.

50. He added that being public land the suit land could not be adversely possessed pursuant to the Limitation of Actions Act. Further, that the court was not the proper forum to ventilate the Petitioner's grievances after the establishment of NLC which was clothed with the legal mandate to handle disputes of this nature. He pointed out that the Petitioner had conceded the fact that the suit land belonged to the 3rd Respondent and at some point even considered purchasing the land from the 3rd Respondent and that it was therefore an abuse of the court process for the Petitioner to turn around and claim title to the suit land which it had acknowledged was not its land. He contended that the Petitioner had not demonstrated any sufficient title to the suit land which is public land and was therefore unavailable for alienation. He urged the court to dismiss the petition.

51. The 3rd Respondent filed grounds of opposition on 19/2/2020 and contended that the Petitioner had no reasonable cause of action against it. Further, that it had neither demonstrated nor substantiated the allegation that the rights of its members had been violated or were likely to be violated by the 3rd Respondent to warrant the grant of orders sought. It added that no satisfactory or plausible reason had been advanced by the Petitioner for the grant of orders sought and more particularly that it had not demonstrated any imminent threat from the 3rd Respondent to support the allegations by its members.

52. Parties filed written submissions which the court considered. The Petitioner submitted that it had *locus standi* to file the petition because it comprises members of a group that represents the community resident in Mariakani, thus they fell in the category of Petitioners contemplated by Article 258(c) of the Constitution. It contended that the suit land was previously a quarry or waste land and was therefore public land when members of the Petitioner settled there. It contended that the allotment and alienation of the suit land to the 3rd Respondent was done in contravention of Article 62 of the Constitution.

53. The Petitioner complained about the 1st Respondent's actions and decisions relating to the development of the suit land ostensibly for the benefit of the residents of Mariguini settlement and argued that if not restrained the actions would lead to the demolition of properties, developments and houses of residents of Mariguini slum and their violent eviction rendering them homeless in contravention of Articles 10, 27, 40, 43 and 53 of the Constitution and Article 25 of the United Nations Universal Declaration of Human Rights as well as Article 11 of the International Covenant on Economic, Social and Cultural Rights, the African Charter on Human Rights. It cited paragraph 1.1 chapter 5 of the National Slum Upgrading and Prevention Policy Sessional Paper no. 2 of March 2016.

54. It also submitted that once it challenged title to the suit land, it was not enough for the 3rd Respondent to dangle its title over the suit land for it had the burden of proof to rebut the Petitioner's testimony which it failed to discharge. The Petitioner submitted that its members had lived on the suit land openly and uninterrupted for more than 40 years therefore the 3rd Respondent's interest on the suit land was extinguished by Section 7 of the Limitation of Actions Act. The Petitioner sought the court's protection for restraint of the 1st to 3rd Respondents or their agents from evicting its members from L.R. No. 209/10354.

55. The 1st Respondent submitted that the 3rd Respondent's rights over the suit land were protected under Section 26 of the Land Registration Act. It urged that the Petitioner's allegation that the suit property was irregularly allocated by the 2nd Respondent was not demonstrated to the standards required by Sections 107 and 109 of the Evidence Act which provides that he who alleges must prove.

56. On the Petitioner's contention that it was entitled to the suit property by operation of law, the 1st and 2nd Respondents submitted that Section 41 of the Limitation of Actions Act exempted government land from being acquired through adverse possession. On the contention by the Petitioner that the suit land was allocated without complying with the Constitution of 2010 and the Land Act, No.6 of 2012, it was urged that the Petitioner was estopped from applying the law retrospectively since the suit land was allocated in 1988 way before the current Constitution came into effect in 2010 and the Land Act in 2012.

57. The 1st Respondent also submitted that the Government had good intentions to upgrade slums with the aim of improving the livelihoods of people living and working in the slums and informal settlements as envisaged in the Constitution of Kenya 2010 and the National Slum Upgrading and Prevention Policy. It pointed out that the upgrade could only be done after members of the Petitioner vacate the suit land.

58. The 2nd Respondent submitted that the Petitioner had failed to prove their right over the suit land and that Article 43 of the Constitution enjoined the Respondents to provide adequate and affordable housing to the residents of the city of Nairobi. It urged that this petition was intended to derail the realisation of that constitutional obligation. It also submitted that the legal framework empowered the 4th Respondent to hear and determine disputes of this nature as the arbiter in the first instance and argued that this court should down its tools until the dispute was determined by the 4th Respondent based on its mandate to review grants of public land.

59. The 3rd Respondent urged the court to find and hold that it is the legal owner of the suit land because it had furnished the court a grant over the suit land. Further, that being a state corporation, it was a public body and holds the suit land for the use and benefit of the Government and the public at large in accordance with Article 62(1) of the Constitution and that it enjoys protection under Article 40(3) (b) as well as Article 62(4) of the Constitution.

60. It added that having demonstrated ownership of the suit land, it was within its right to demand and require members of the Petitioner to vacate from the portion of its land where they had encroached to enable it use the land for the designated public use in line with its mandate. It submitted that the Petitioner had not demonstrated any proprietary interest over the land and that its claim for infringement under the Constitution and the UN Declaration had no basis at all.

61. The 3rd Respondent submitted that it had treated members of the Petitioner with dignity by giving them more than ample time to vacate its land and had gone further to hold meetings with members of the Petitioner with County administrators on various occasions to facilitate the peaceful exit of the Petitioner from its land and that the only option left was forceful removal.

62. On whether members of the Petitioner were entitled to the orders sought, it submitted that the Petitioner merely made allegations without any proof and as such, the court had no basis for making serious findings of constitutional violation of their rights. It urged the court to dismiss the suit with costs for lack of merit and for the Petitioner to be ordered to vacate the suit land within seven days failing which eviction would issue.

63. In response to the Respondents' submissions, the Petitioner submitted that the decree issued in respect of the suit land which the 3rd Respondent filed and relied on cannot be enforced because under Section 4 of The Limitation of Actions Act, enforcement of decrees had a timeline of 12 years. It argued that the decree should not distract the court from the issues manifest from the pleadings which has everything to do with fairness or due process in implementation of a noble Government programme to empower and dignify the socially and economically underprivileged.

64. The main issues for determination are firstly, whether the Petitioner has *locus standi* to file the petition; secondly whether this court has jurisdiction to entertain it; thirdly whether the Petitioner's rights have been contravened as it claims; and lastly, whether the Petitioner has made out a case for grant of the orders it seeks in the petition.

65. The 2nd and 3rd Respondents argued that the Petitioner lacked capacity to sue. The Petitioner is a registered association under the Societies Act and would have standing under Articles 22 and 258 and 260 of the Constitution to institute proceedings where it claims that a right or fundamental freedom has been contravened or is threatened.

66. The 2nd Respondent contended that the Petitioner's claim fell within the 4th Respondent's mandate to review grants of public land pursuant to Article 67(e), 68 (c) (v) of the Constitution and Section 14 of the National Land Commission Act No. 5 of 2012 read with the

National Land Commission (Review of grants and Dispositions of Public Land) Regulations of 2017 and that this court should down its tools. The court does not agree with this submission for Article 22 of the Constitution empowers every person to institute court proceedings claiming that a right or fundamental freedom has been denied, violated or is threatened. The Petitioner contended that the rights of its members and residents of Mariguini settlement to remain on the suit land are threatened by the Respondents.

67. The Petitioner bases its claim on the Constitution and adverse possession which fall outside the mandate of the 4th Respondent. Issues of violation of constitutional rights fall outside the scope of the National Land Commission. In any event, NLC's mandate to review grants of public land to establish their propriety lapsed on 2/5/2017 and has not been extended by Parliament. This court has jurisdiction to determine this dispute.

68. The court notes from the correspondence produced that vide the letter of 13/3/2007, NHC offered to sell L.R. No. 209/10354 South B to Fuma Multipurpose Cooperative Society Limited at Kshs. 100,000/=. The minutes of the meeting held on 13/7/2007 in NHC House by representatives of NHC and Mariguini Muungano Cooperative and Fuata Nyayo Multipurpose Cooperative Society. It is clear that members of the Petitioner and other residents of Mariguini slum attempted to purchase the suit property from the 3rd Respondent but could not raise the purchase price.

69. On whether a determination of this matter would amount to sitting on appeal against the decision of the High court in **Civil Suit No.2842 of 1996**, whose decree dated 15/05/1997 was filed by the 3rd Respondent, this court agrees with the Petitioner that the decree has already been caught up by time. The Court of Appeal stated in **M'Ikiara M'rinkanya & Another v Gilbert M'mbijiwe (2007) eKLR** that it was logical from the scheme of the Act that a judgment for possession of land should be enforced before the expiration of 12 years because Section 7 of the Limitation of Actions Act barred the bringing of actions for recovery of land after the end of 12 years from the date on which the right of action accrued. Section 4 (4) of the Limitation of Actions Act bars the bringing of an action upon a judgement after the end of twelve years from the date of that judgement.

70. The argument by the Petitioner that the decree alluded to by the 3rd Respondent is unenforceable regarding ownership of the suit land lacks merit because Section 41 of the Limitation of Actions Act stipulates that that Act does not enable a person to acquire any title to or easement over Government land or land otherwise enjoyed by the Government.

71. The Petitioner did not lead any evidence to show that the suit land was illegally allocated to Charles Icharia or that Charles Icharia irregularly transferred the suit land to the 3rd Respondent. The Land Act and the new Constitution which came into after 2010 could not have applied to the land transactions relating to the suit land which were carried out in 1983 or 1988 as the Petitioner contended in this petition.

72. At that time, allocation of public land was governed by the old Constitution and the Government Lands Act, which termed such land as unalienated government land and set out an elaborate procedure for the allocation of unalienated public land for specified public purposes and the sale of town plots from public land which was not required for public purposes.

73. Being a State corporation, the land which is registered in the 3rd Respondent's name is public land pursuant to Article 62 of the Constitution. Members of the Petitioner cannot therefore lay any adverse claim to it based on Section 41 of the Limitation of Actions Act. The prayer for adverse possession of the suit land must therefore fail.

74. Since the suit land is public land, the Petitioners have a protectable right to housing over the land that they occupy. In **Mitu-Bell Welfare Society v Kenya Airports Authority; Initiative for Strategic Litigation in Africa (ISLA) [2019] eKLR**, the Supreme Court of Kenya stated that where the landless occupy public land and establish homes on public land, they do not acquire title to the land but a protectable right to housing because the 2010 Constitution had radically transformed land tenure in this country by creating a specific category of land known as public land and declaring that all land belonged to the people of Kenya collectively as a nation, communities and individuals. Therefore every individual as part of the collectivity of the Kenyan nation had an interest, however indescribable, however unrecognisable or however transient in public land.

75. The Petitioner does not deny that the 1st Respondent has commenced a slum upgrading project in Mariguini slum. The right to accessible and adequate housing guaranteed under Article 43 of the Constitution will in this court's view be attained with regard to members of the Petitioner if the Mariguini slum upgrading is allowed to proceed to its logical conclusion. The slum upgrading project cannot possibly be executed without members of the Petitioner vacating the suit land to pave way for the commencement of that project. It is not in dispute that enumeration of persons who are to benefit from the Mariguini slum upgrading project began in 2011 before the Petitioner was registered on 6/7/2018.

76. Members of the Petitioner contended that their constitutional rights to property and to housing were under threat based on the Respondents' informal notice of eviction. The Petitioner was apprehensive that the list compiled by the 1st to 3rd Respondents of persons to be resettled in the upgraded development would comprise persons who were not in occupation of any portion of Mariguini slum and that members of the Petition and current residents of Mariguini slum may be excluded from the proposed resettlement. The Petitioner did not lay any basis for this apprehension.

77. The court notes that the names of Mary Mwimbi who swore the affidavit in support of the petition, together with Esther W. Maina, John Mugo Maina and Mercy Wambui Mwaura whose details are given in the petition, participated in the Mariguini slum Upgrading process and were enumerated in 2011.

78. The Petitioner has not demonstrated any real threat of the constitutional rights of its members being contravened by the Respondents. The court is satisfied that members of the Petitioner and other residents of Mariguini slum have participated and have been involved in the preparations for the proposed upgrade of Mariguini slum. There is no evidence of the likelihood of there being forced evictions from the suit land.

79. The slum upgrading programme commenced under the Ministry of Transport, Infrastructure, Housing and Urban Development should be allowed to progress expeditiously with set timelines which the 1st Respondent must communicate to members of the Petitioner and other residents of Mariguini slum. The 3rd Respondent will not evict members of the Petitioner from the suit land for a period of 6 months from the date of this judgement.

80. The 1st Respondents is to avail the list of enumerated residents of Mariakani settlement scheme to the Petitioner and residents of Mariguini slum for transparency and accountability in line with Article 10 (c) of the Constitution.

81. Members of the Petitioner and other residents of Mariguini slum will hold follow up discussions with the 1st, 2nd and 3rd Respondents with a view to resolving the outstanding issues raised in the petition in baraza meetings. Members of the Petitioner must be allowed to fully participate in those meetings.

82. The 1st Respondent in consultation with the Petitioner and other residents of Mariguini slum, is to develop an evacuation plan which will include setting a date for the residents to vacate the suit land. Members of the Petitioner and other residents of Mariguini slum should be informed of the date in advance.

83. The date set for the evacuation must take into consideration the school calendar and prevailing weather conditions. During the evacuation, the privacy, dignity and security of members of the Petitioner and other residents of Mariguini slum should be observed and given due regard by the Respondents.

84. The evacuation exercise to be undertaken to pave way for the slum upgrading project to commence must be conducted in strict compliance with Sections 152, 152 A to 152 I of the Land Act.

85. Each party will bear its costs for the petition.

DELIVERED VIRTUALLY AT NAIROBI THIS 2ND DAY OF JUNE 2021.

K. BOR

JUDGE

In the presence of: -

Mr. F.N. Wamalwa for the Petitioner

Ms. Ruth Kerubo for the 1st Respondent

Mr. K. Gitonga holding brief for Mr. I. Kangatta for the 2nd Respondent

Mr. Simon Ngugi for the 3rd Respondent

Mr. V. Owuor- Court Assistant

No appearance for the 4th Respondent