



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC PETITION CASE NO. E004 OF 2021

IN THE MATTER OF ARTICLES 2 (6), 22 (2) (a), (3) (d), 23 (1), 162 (2) (b) & 165 (3) (a), (b), (d) (i), (ii), OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 26 (1), (3), 27 (1), (2), 28, 29 (c), (d), (f), 35 (1), (2), 40 (1) (a), (b), (3), (4), 43 (1) (b), (c), (f), 45 (1), 47 (1), (2), 50 (1), 53 (1) (b), (c), (d), (2) & 57 (b), (c) (d) OF THE CONSTITUTION OF KENYA 2010.

IN THE MATTER OF SECTIONS 152B, C, D, E, F, G OF THE LAND ACT 2012

AND

IN THE MATTER OF REG. 63 (1) (2), 66-69 OF THE LAND REGULATIONS, 2017

AND

IN THE MATTER OF SECTIONS 2, 3, 4, 5, 6, 7, 10, 11 & 12 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015.

AND

IN THE MATTER OF INTERNATIONAL LAW INSTRUMENTS:

UNIVERSAL DECLARATION OF HUMAN RIGHTS INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR)

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS MAASTRICHT GUIDELINES ON VIOLATIONS OF ECONOMIC SOCIAL AND CULTURAL RIGHTS.

UN BASIC PRINCIPLES AND GUIDELINES ON DEVELOPMENT BASED EVICTION AND DISPLACEMENT (2007)

AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS (AFRICAN CHARTER)

AND

IN THE MATTER OF THE RESETTLEMENT OF PROJECT AFFECTED PERSONS IN KIBOS WITHIN KISUMU BY KENYA RAILWAYS CORPORATION

BETWEEN

FATUMA KHAMIS BILAL.....1ST PETITIONER

RASHID SADI KEMIS.....2ND PETITIONER

KADMALA AHMED.....3RD PETITIONER

RUKIA KHAMIS.....4TH PETITIONER

NOOR RAJAB.....5TH PETITIONER

MICHAEL ODHIAMBO.....6TH PETITIONER

(Suing in the public interest on their own behalf and on behalf of 3,500 co-petitioners being residents of Kibos settlement located in Kisumu facing evictions)

VERSUS

THE KENYA RAILWAYS CORPORATION.....1ST RESPONDENT

THE CABINET SECRETARY FOR TRANSPORT, INFRASTRUCTURE,

HOUSING AND URBAN DEVELOPMENT.....2ND RESPONDENT

CABINET SECRETARY FOR LANDS.....3RD RESPONDENT

CABINET SECRETARY, MINISTRY OF INTERIOR AND

COORDINATION OF NATIOANL GOVERNMENT.....4TH RESPONDENT

THE NATIONAL LAND COMMISSION.....5TH RESPONDENT

KISUMU COUNTY GOVERNMENT.....6TH RESPONDENT

THE HON. ATTORNEY GENERAL.....7TH RESPONDENT

JUDGEMENT

The Petitions

Before this court are two Petitions that were consolidated into one because the parties and the issues are the same. These are petitions number 1 of 2020 and Petition number E004 of 2021. The petitioners allege in the consolidated petition that **Sometime in 1937, the Nubian Community was moved by colonial government to the suit block of land from the present area occupied by the Kisumu Airport, since then, the Nubian Community has known no other home.**

According to the petitioners, the Nubian Community have remained in possession and occupation of the said land since 1937 without any interruptions or eviction threats until 9th March 2020 when the Kenya Railways Corporation wrote an eviction notice to the Kibos Community giving them 7 (seven) days' notice to vacate.

Pursuant to the said allocation of land, the Government of Kenya under the Physical Planning Act (CAP 286) the Ministry of Lands in 2012 formally recognized the Kibos Township and prepared Development Plans for the area.

The Ministry of Lands on the 23rd October 2012, issued a notice for completion of the Development Plans under the Physical Planning Act (CAP 286). The Ministry of Lands invited all interested persons to submit any objections to the Development Plans within 60 (sixty days) from the 23rd October 2012. The Kenya Railways Corporation did not submit any objection of the Development Plans of Kibos Township.

During the development of the Development Plans the Ministry of Lands and the Kisumu County had no objection for the Nubian Community to be allocated that parcel of land.

On February 13th 2015 through a notice in the Nation Newspaper the Director of Physical Planning put a notice on formalization of Kibos Informal Settlement Upgrading Scheme.

Through the formalization process of Kibos settlement through the development Plans the Kibos settlement was to get letters of allotment awaiting a community Land Title Deed.

On or about the 9th March 2020, officials working for Kenya Railways Corporation informed them that their structures would be demolished and they would be evicted within 7 days on 16th March 2020.

The Petitioners and other residents of Kibos informal Settlement were partially evicted by the 1st Respondent from their settlements contrary to the Land Laws Amendment Act of 2016 that mandates a 90-day eviction period and there should be measures for resettlement so as not to render the petitioners homeless. Among other Statutory procedures that the 1st Respondent is bound to follow in an eviction process, neither has the 1st Respondent addressed the Petitioners herein and other residents on the Relocation

Action Plan (RAP) and made the same public. There is also no involvement of the National Land Commission and the Board of Trustees of the Settlement fund.

The Petitioners and residents of Kibos Settlement were thus put in danger of cruel and degrading actions arising from an illegal, irregular and un-procedural eviction notice. Their children faced the imminent danger of being stranded in the cold for days with no access to reasonable shelter, food and other basic amenities. The children's school program was also interrupted as they attend schools within the area, and the children who have registered for their final examinations in centres within the area, which centres were also set for demolition among many other structures, were plunged into miasma. The damage to other social amenities such as health centres, toilets and water storage facilities was catastrophic.

Consequently, children were stranded in the cold for days with no access to reasonable shelter, food and other basic amenities. The children's school program was interrupted as they attend schools within the area, and the children who had registered for their final examinations in centres within the area, which centres were demolished among many other structures.

The petitioners contend that it is in the interest of justice and the public that the relief sought herein are granted as prayed to avert the possible infringement of the Petitioners unlimited right to freedom from torture and cruel, inhuman or degrading treatment or punishment, and their right to housing, access to information and fair administrative action.

The Petitioners pray for a **declaration that any forcible, violent and brutal eviction through demolition of homes of the Petitioners and any other residents of the Kibos Informal Settlement without according them alternative shelter and/or accommodation leaving them to live in the open exposed them to the elements and vagaries of nature is a violation of their fundamental right to life guaranteed by article 26 (1) and (3) of the Constitution of Kenya, 2020.**

Moreover, a declaration that any forcible, violent and brutal eviction through demolition of homes of the Petitioners and other residents of the Kibos Informal Settlement, without according them alternative shelter and/or accommodation leaving them to live in the open exposed to the elements and vagaries of nature by the Respondents is unconstitutional contravening the national values and principals of governance that include human dignity, equity, social justice and need to protect the marginalized as enshrined in Article 10 (2) of the constitution of Kenya, 2010.

Furthermore, declaration that any forcible, violent and brutal eviction through demolition of homes of the Petitioners and other residents of the Kibos Informal Settlement, without any warning, Court Orders, any or reasonable notice in writing or availing them information regarding the evictions and without according them alternative shelter and/or accommodation and leaving them to live in the open exposed to the elements and vagaries of nature is a violation of their fundamental rights to inherent human dignity and the security of the person guaranteed by article s 28 and 29 (c) , (d) and (f) of the Constitution of Kenya, 2010.

The petitioners pray for a declaration that any forcible, violent and brutal eviction through demolition of homes of the Petitioners and other residents of the Kibos Informal Settlement, without warning, any or reasonable notice in writing or availing them information regarding the evictions is a violation of their fundamental right of access to information guaranteed by article 35 (1) of the Constitution of Kenya 2010 and that any forcible, violent and brutal eviction through demolition of homes of the Petitioners and other residents of the Kibos Informal Settlement, and the destruction of the building materials and their household goods in the process, without Court order/s and without according them an opportunity to salvage any of their belongings is a violation of their fundamental right to protection of property guaranteed by article 40 (1), (3) and (4) as read with article 21 (3) of the Constitution of Kenya.

That any forcible, violent and brutal eviction through demolition of homes of the Petitioners and other residents of the Kibois Informal Settlement, without according them alternative shelter and or accommodation and leaving them to live in the open exposed to the elements and vagaries of nature is a violation of their fundamental rights to accessible and adequate housing, reasonable standards of sanitation, health care services, freedom from hunger and the right to clean and safe water in adequate quantities guaranteed by article 43 (1) read with articles 20 (5) and 21 (1), (2) and (3) of the Constitution of Kenya 2010 and that any violent and brutal eviction through demolition of homes of the Petitioners and other residents of the Kibos Informal Settlement, without any Court order/s, warning, any or reasonable notice in writing or availing them information and reasons regarding the demolitions and evictions is a violation of their fundamental right to fair administrative action guaranteed by article 47 of the Constitution of Kenya 2010.

Most importantly, the petitioners pray for a declaration that any forcible, violent and brutal eviction through demolition of homes of the Petitioners and other residents of the Kibos Informal Settlement without according them alternative shelter and/or accommodation and leaving to live in the open exposed to the elements and vagaries of nature is a violation of their fundamental rights to physical and mental health, and the fundamental right to physical and moral health of the family under articles 16 and 18 of the ACHPR read with article 2 (16) of the Constitution of Kenya 2010 and a declaration that any forcible, violent and brutal eviction through demolition of homes of the Petitioners without according their children alternative shelter and/or accommodation and leaving the children to live in the open exposed to the elements and vagaries of nature is a violation of the fundamental rights of children to basic nutrition, shelter and healthcare and protection from abuse, neglect and all forms of violence and inhuman treatment and to basic education guaranteed by article 53 (1) (b), (c), (d) and (2) read together with article 21 (3) of the Constitution of Kenya 2010 and article 28 of the ACHPR read with article 2 (6) of the Constitution of Kenya 2010.

They also seek a declaration that any forcible, violent and brutal eviction through demolition of homes of the elderly persons among the Petitioners without according them alternative shelter and/or accommodation rendering them to live in the open exposed to the elements and vagaries of nature is a violation of the fundamental rights of the elderly persons to the pursuit or personal development, to live in dignity, respect and freedom from abuse and to receive reasonable care and assistance from the state guaranteed by article 57 (b) (c) and (d) as read with article 21 (3) of the Constitution of Kenya 2010.

Lastly, the petitioners pray for an order that the 1st to 6th Respondents bear the Petitioner's costs of this litigation while the Interested Parties each bear their own costs;

The petitioners ultimately pray for a structural interdict or continuing mandamus under Article 23 of the Constitution of Kenya 2010, directing the 1st to 6th Respondents to file affidavits in court, within a period determined by the court, indicating their status of compliance with the orders issued in this petition.

Answer to the petition

In answer to the Petition for and on behalf of the 1st Respondent, the Kenya Railway Corporation states that the suit land is surveyed and reserved as Kenya Railways land vide vesting order 1986 contained in legal notice number 24 of 1986 which replaced and revoked vesting of land regulation 1963 (L/N440/1963) which created an inclusive property interest thereon in favour of East African Railway Corporation the predecessor to the 1st respondent.

From the drawing, maps and plans both from the survey of Kenya and records held by first respondent, the subject land is clearly demarcated, surveyed and alienated as the Kibos Railways station reserve. All this can be seen in the following maps/drawings:-

- a) Map N. 2206 also marked as X.386 clearly showing the area marked as a Railway Reserve and marked in blue.
- b) A drawing No. 2206/1 showing the same are designated as the Kibos Railway Station Reserve.
- c) Deed plan No. 424626 dated the 22nd August 1918 showing the extend and boundaries for the said Kibos Railway Station Reserve.
- d) R.I.M under reference S.A 36/E161 for Kibos Township showing the area reserved for Kibos Railway Station which is parcel No. L.R. 31937 and which clearly shows the beacons and coordinates marking the boundaries.
- e) Two aerial satellite imageries of the parcel of land showing the areas, demarcated, alienated and reserved for the Kibos Railways Station.

The subject land parcel Number L.R 31937 as shown by the above stated maps has never been surrendered to the Government of Kenya for allocation to any party including the petitioners. Again, the said lands since they have always been designated and reserved for the Kibos Railways Station are not un alienated land as per the Government Land Act so there is no way the same could have been alienated in favour for Petitioners.

The said land being clearly marked as reserved for the Kibos Railway Station, there is no way the Petitioners and now respondents in the cross petition could claim ownership thereof or acquire any proprietary rights capable of protection by the law.

The petitioners have not demonstrated that all the procedures in survey, alienation, transfer and registration were duly followed to enable a procedural transition of proprietorship of the suit land from the first Respondent and or cross-petitioner to the respondents in the cross petition.

The first Respondents were never supplied with the annextures to the affidavits and even so if the petitioners hold any ownership documents, then the same must have been obtained either fraudulently or illegally.

The first Respondents reiterate that they were not involved in the transfer of the suit land to neither the Petitioners herein nor any other unnamed persons; the alleged allocation and or ownership by the petitioners' is not only illegal, fraudulent, null and void but is also irregular.

The 1st respondent has set down the particulars of fraud, illegality and/or nullity on the part of the Petitioners, their servants and or agents as fraudulently and illegally acquiring the first Respondents land without due regard to the law and due process. Purporting to acquire the suit land and occupy the same through illegal means. Using corrupt and unorthodox means to purport to acquire the defendants land and without consideration. Undertaking fraudulent transfers. Getting allotted the suit land without the consent and or knowledge of the Respondent.

The first Respondent states that if indeed the petitioners were allocated the suit land by the Government of Kenya, different from a long term lease granted by the first Respondents then that would mean that such a title and or allocation were irregularly and illegally acquired and the Respondents reserve the right to cross-petition this court for the revocation of the said titles.

According to the 1st respondent, the petitioners have themselves admitted that notices were issued to them and apparently it took them almost a year to react to the said notices and have only come to court after the illegal structures were removed in February 2021. The Petitioners are therefore guilty of laches and as such cannot be entitled to the equitable remedies of injunctions they are seeking.

The first Respondent states that the demolitions complained of were undertaken by a Government of Kenya Multi-agency operation team composed of National Government, Administrative Officers, Presidential Delivery Unit, National Police Service and Kenya Railways Officers after sufficient notices were duly served.

The first Respondents deny being responsible for the actions complained of and add that the petitioners and any other encroachers and trespassers on Railway Lands and reserves had been given sufficient notices to vacate and/or remove any illegal structures. The first notice

was a Public Notice in the Government Publication on 20/03/18, another in the Daily Newspapers on the 27th September 2019 and again on the 30th of September 2019. The petitioners were also served with another public notice on the 9/8/2020.

The first Respondents further state that the Petitioners in both their petition and evidence, have not exhibited any evidence to show that it is actually the first Respondents' servants and/r agents who were involved in the acts complained of and therefore short of any evidence, the Petitioners complaints against the first Respondents remain mere allegations.

The Respondents in view of the foregoing state that the Petitioners are not entitled to any of the prayers sought in the Petition either in the form of declarations, conservatory orders and/or mandatory injunctions for compensation as they are encroachers on railway reserve with right whatsoever on the said reserve, due process was followed in the demolition and eviction if any. The 1st Respondent prays that the petition should be dismissed with costs.

In the Cross- petition, the 1st respondent states that vide deed plan No. 424626, survey plan No. 612/125, railway reserve layout-drawing No. 2206/1 and Aerial imagery overlaid by the station boundary from the director of survey, the suit property falls within the Kenya Railways operational land in Kibos Railway station.

The aforementioned plan No. 424626, survey plan No. 612/125, railway reserve layout-drawing No. 2206/1 and Aerial imagery overlaid by the station boundary clearly show the location and extend or the Kibos Railway Station Operational area.

The cross petitioners have never alienated, disposed of, or transferred ownership of the suit land or any part of their operational land in Kibos to the Respondents in the cross Petition or any other person. The cross – Petitioners' have also never surrendered the suit land or any part of their Kibos Railway land to the Government or any other authority for allocation to any entity including the Respondents' in the cross-petition.

In circumstances undertaken in blatant breach of the cross-petitioners right to property, the Respondents' were allocated the suit land from the portion vested in the cross-petitioner. Therefore the allocation and titles (if any) by the Respondents' in the cross-petition over the suit land are creatures of fraud, void and of no legal effect.

In the cross petition the petitioner prays for an order for dismissal and or striking out of the main petition with costs to the 1st Respondent. A declaration that the cross- petitioners are rightful owners of all the suit land within Kibos Railway station and or reserve. A declaration that the acquisition of the cross Petitioner's land within Kibos is illegal, null and void. An order compelling the 5th Respondents in the main petition to cancel the certificate of lease and or ownership documents if any held by the 1st to 6th Respondents in the cross petition and a further order directing the 5th Respondent in the main petition, to rectify the register accordingly and thereafter register the cross-petitioner in the cross petition as the proprietor. A declaration that the occupation of the suit land within Kibos railway reserve by the 1st to 6th Respondents in the cross-petition is illegal and an order of eviction against the said Respondents. A permanent injunction to restrain the Respondents in the cross-petition, their agents and/or servants from interfering in any way with the Cross-petitioners use and occupation of the suit land, transferring, selling, encumbering and/or any other way dealing with the land within Kibos railway station and/or reserve. Costs of the cross petition.

In the supporting affidavit Geoffrey Wekesa a senior cartographer states that the suit has always been surveyed and reserved as the First Respondents' (Kenya Railways) land for the Kibos Railway Station, there can be no legal justification for the Petitioners and now respondents in the cross-petition to claim proprietorship rights over the same. The suit land is part of all of land reserved for Kibos Railways station and vested on the cross-petitioner by the operation of the Kenya railways (vesting land) Order 1986 contained in legal Notice No. 24 of 1986 which replaced and revoked vesting of land regulations 1963 (L/N440/1993) which created an inclusive proprietary interest thereon in favour of east African Railways Corporation, predecessor to the 1st Respondent.

There is no way the Government would make the plans stated therein in respect of lands reserved for the Kibos Railway Station and if any such plans were ever made, the same ought to have been over the lands reserved for Kibos Township without encroachment to the land specifically designate and reserved for the Kibos Railway Station.

The subject land parcel Number L.R. 31937 as shown by the above stated maps has never been surrendered to the government of Kenya for allocation to any party including the petitioners in the main petition. Again, the said lands since they have always been designated and reserved for the Kibos Railways Station are not un alienated land as per the Government Land Act so there is no way the same could have been alienated in favour of Petitioner.

The said land being clearly marked as reserved for the Kibos Railway station, there is no way the Petitioners and now respondents in the cross petition could claim ownership thereof or acquire any proprietary rights capable of protection by the law.

According to the Kenya Railways Corporation, the petitioners and now respondents in the cross petition have not demonstrated that all the procedures in survey, alienation, transfer and registration were duly followed to enable a procedural transition of proprietorship of the suit land from the first Respondent and or cross-petitioner to the respondents in the cross petition.

The cross petitioners contend that they were never supplied with the annexures to the affidavits and even so if the petitioners hold any ownership documents, then the same must have been obtained either fraudulently or illegally. The respondents in the cross-petition and all other encroachers or trespassers into and grabbers of Kenya Railways land, reserves and level crossings had been given sufficient notices to vacate and/or remove all illegal structures on such lands. The first notice was a public notice on "My Government" publication on 20/03/2018, another in the Daily Newspapers on the 27th September 2019 and against on 30/09/2019. A further General Notice was served on the said encroachers; including the petitioners on the 10th March 2020 and still the Petitioners did not heed to the said notices.

The petitioners and now respondents in the cross petition have themselves admitted that notices were issued to them on the 16th March 2020 and apparently it took them almost a year to react to the said notices and have only come to court after the illegal structures were removed in February 2021. The Petitioners in the main petition are therefore guilty of laches and as such cannot be entitled to the equitable remedies of injunctions they are seeking.

The petitioners in the main petition together with all other encroachers on Kenya railways Land had been warned by National Government Administrative officers of the impending demolition country wide. After that the operation was carried out by a Multi-Agency operation team composed by National Government administrative officers, presidential delivery unit, national police service and Kenya Railways officers.

The Petitioners in the main petition are not entitled to the orders sought including the orders of injunction as the structure have already been removed so they have been overtaken by events, the petitioners in the main petition have come to court with unclean hands and after undue delay, the balance of convenience does not tilt in their favour as the projects being undertaken and what is complained of is for the benefit of the general public, and they have also not demonstrated whether an award of damages would not be an adequate compensation.

The 2nd respondents Response.

The 2nd Respondent filed a replying affidavit stating that pursuant to Executive Order No. 5 of 2020 the framework for Management, co-ordination and integration of Public Port, Rail and Pipeline Services was placed under the Cabinet Secretary, National Treasury and Planning.

That as part of the implementation of the Big Four agenda under the Manufacturing Pillar, the Government identified rail transport as one of the major projects to be undertaken. This project is critical in light of the executive Order No. 1 of 2019.

The suit parcel of land is part of all that parcel of land reserved for Kibos Railway Station and vested on the 1st Respondent by operation of the Kenya railways (vesting land) Order 1986 contained in legal Notice No. 24 of 1986 which replaced and revoked vesting of Land Regulations 1963 (L/N440/1993) which created an inclusive proprietary interest thereon, in favour of East African railways Corporation, predecessor of the 1st Respondent herein.

That from the records at Survey of Kenya and records held by the 1st Respondent that the subject land is clearly demarcated, surveyed and alienated as the Kibos Railway Station reserve. Being public land and clearly demarcated as reserved for Kibos Railway station, the Petitioners cannot lay claim to it unless they can present proof of legal ownership of suit property.

The 1st Respondent has never surrendered the suit land for allocation to the Petitioners hence the Petitioners are simply trespassers and encroachers to that land.

In realization of the need to revive, rehabilitate and re-establish rail transport in Kenya, the National Government has resolved to reclaim all land owned by Kenya Railways Corporation.

The sufficient notice was given to members of the public to vacate and remove illegal structures on all land belonging to the 1st Respondent.

The Government has invested Public Funds towards the revival and rehabilitation of the metre gauge railway line running service from Nakuru to Kisumu and that there will be huge financial loss to the public if the project is stopped by this Honourable court: public interest outweighs the private interests of the Petitioners.

The Petitioners herein have filed this suit in an attempt to advance personal interests and not public interest as they would want this Honourable Court to believe.

The petition is totally devoid of any merit and does not meet the threshold under the Constitution and statute law for this court to grant the orders sought.

Response to the Cross Petition

In response to the cross – petition, the petitioners state that on 30th of November 1938, the then Lands Officer, acting under Section 51 of the 1915 Crown Land Ordinance and before the District Commissioner of Kisumu-Londiani, signed an agreement granting license to the Nubian households within Kibos Township in the District of Kisumu as free rental for the duration of their lives and the lives of their wives, and in perpetuity for their heirs on subsequent payment of rents by their heirs upon them obtaining taxable age. The conditions of this agreement did not only allow the Nubian Community of Kibos to settle in Kibos Township, but also gave them the right to cultivate the land within Kibos trading Centre.

On the basis of this allocation of the Crown Land L.R. No. 655 in Kibos Township to the Nubian Community and its recognition as being different from the Railway Reserve, being crown land earmarked for Kenya-Uganda Railways; the same would not have vested in Kenya Railways Corporation as the successor of the east African Railways by virtue of Vesting Order No. 24, the 1st Interested Party Affidavit reveals that the east African railway Corporation had no ownership rights even on the railway reserve, ownership being held by the crown.

Railway reserves are clearly demarcated 30 metres on either side of the railway line using railway sleepers, which is the case in Kibos and which physical sleeper demarcation marks the boundary between the Kenya railways reserve and the land belonging to the Nubian Community, which is a good 150 metres distance from the Kenya railway Sleeper. The purported vesting orders of 1963, and 1986 would,

therefore, not have vested any part of the parcel of land upon which the Nubian Community were relocated in Kibos on the 30th November 1938, an allocation that was authoritatively done by the Crown, who had complete and unfettered mandate to alienate and allocate land in Kenya.

The suit land not being the property of Kenya Railways Corporation as the successors of the East African Railway Corporation, the Cross-Petitioners here have failed to indicate any other way that the suit property vested in them either through the production of a title deed to the land or even a gazette Notice that indicates the transfer of the land from the Government of Kenya to themselves. On this basis, the Cross-Petitioners will be put to a strict proof of the vesting of the suit property to them by the Government.

The suit land not having vested in Kenya Railways Corporation in any way known to law, the Corporation had no authority to undertake any activities/operations in the land as per section 13 of the Kenya railways act denotes the power of the Corporation to either sell or dispose of land, or to construct or execute works on land, as this section only empowers the Corporation to so deal with land that is vested in it or that has been placed at its disposal by the Government. The Cross-Petitioners are thus put to a strict proof of authority or mandate to deal with the suit property as per the provisions of section 13 of the Act.

The Kenya Railways Act in section 14, which has been relied on by the Cross-petitioners, provides for procedures for acquisition of land needed by Kenya Railways for its operations- which procedure involves a) Negotiation and agreement with registered owners if the land is not public land; b) Notification to the Minister/Cabinet Secretary of Lands of the need for the acquisition of the land if the land is public land or negotiations are not successful in relation to private land. This in essence brings into effect the provisions of the constitution in Articles 40 (3) which deals with compulsory acquisition of land and 40 (4) that requires compensation to occupants of compulsorily acquired land even if they do not hold title to the land. The suit land not being the property of Kenya railways Corporation, the law in the Constitution and in the Kenya railways Act as well as other relevant legal provisions provide them with a clear path of acquisition of land for their operations, and not through unlawful land grabbing as they attempted with the demolitions of 5th February 2021 or this mischievous Cross-Petition through which they seek to acquire land that has not vested in them in any manner known to law. It thus the prayers of the Respondents to this cross-petition that the court sees this cross-petition for what it is an attempt to unlawfully and illegally grab the land belonging to the respondents without following the laid down legal procedures – and thus dismiss and strike out the Cross-petition with costs to the Cross- Petitioners.

The alleged fraud and the particulars of fraud as detailed in paragraph 7 of the cross-petition are unknown to the Respondents to the Cross-Petition as the land in question never vested in the Cross-Petitioners as is exemplified by the fact that the cross-petitioners have failed to table any document of title or any gazetted vesting order which vested the suit property to the corporation or indeed its predecessor the east African railways. The Respondents thus put the cross-petitioners to the strictest proof of the alleged fraud and all the particulars of fraud detailed in the Cross-petition.

The Respondents to the cross-petition state that it is the cross-petitioners who are in reality trying to grab land belonging to the Respondents, and which the respondents have known as home for over 83 years. This can clearly be seen in the documents relied on by the Cross-Petitioners in this cross-petition- Deed Plan No. 424626, Survey plan No. 612/125, railway Reserve Layout Drawing No. 2206/1/ and Aerial Imageries- that are not in themselves proof of ownership of property and are also lacking in authenticity as they indicate no dates, sources not certification as true copies of the original.

Illegally and without any colour of legal authority, the Cross-Petitioners- having no ownership rights to the suit property exemplified by a genuine title document or gazetted vesting order; and knowing that petition No. 1 of 2020 had been filed to determine the contested ownership of the suit property in this Honourable court, and knowing that a Conservatory Order had been issued by this Honourable Court on the 13th of March 2020 stopping any planned demolition by the cross-petitioners until that petition was heard and determined- proceeded to undertake demolitions of the settlement of the Nubian Community in Kibos on the night of the 5th of February 2021.

According to the petitioners, this demolition was done without adequate notice and without following the procedural protections required under section 152B, C and g of the Land Act as amended that requires evictions to be undertaken as per the act with the National Land Commission giving at least 3-months' notice and that evictions must be carried out during the day with those undertaking the evictions properly identifying themselves.

Other mandatory requirements for procedural evictions under the section 152G of the Land act require evictions to:

- a) Be preceded by the presentation of the formal authorizations for the action;
- b) Where groups of people are involved, government officials or their representatives to be present during an eviction;
- c) Be carried out in a manner that respects the dignity, right to life and security of those affected;
- d) Include special measures to ensure effective protection to groups and people who are vulnerable such as women, children, the elderly, and persons with disabilities;
- e) Include special measures to ensure that there is no arbitrary deprivation of property or possessions as a result of the eviction;
- f) Include mechanisms to protect property and possessions left behind involuntarily from destruction;
- g) Respect the principles of necessity and proportionality during the use of force; and
- h) Give the affected persons the first priority to demolish and salvage their property.

In undertaking the evictions of 5th February 2021 without proper authority, without following the mandatory provisions of national and international law and without allowing people to salvage their property or providing compensations and alternative land as required by law in the processes of compulsory acquisition of land, the Cross-Petitioners have violated a myriad of rights of the Respondents, which include the right to human dignity, the right to property, the right to equality and non-discrimination, the right to participation, the right to bodily integrity, the right to religion, the right to housing, the right to livelihoods and the right to fair administrative practices as detailed in the consolidated petition 1 of 2020 and petition 4 of 2021.

The said demolitions and attempted evictions have placed the Respondents to this Cross-petition and their Community in dire straits of homelessness and destitution, with the community losing their means of livelihoods and being exposed to extreme weather events as well as disease vectors due to limited shelter and lack of access to proper drainage and good sanitation. The community has been further exposed to the COVID-19 disease as the demolition was undertaken during a pandemic and despite a Presidential Moratorium by the President of Kenya who stopped all demolitions and evictions until after the pandemic due to the inability of evicted people to observe the public health requirements of staying at home, social distancing and washing of hand, among others.

The Respondents and their community are thus seeking compensations for the violation of their rights as detailed above and in the Consolidated Petitions 1 of 2020 and 4 of 2021 resulting from the demolition of their settlement by the Cross-Petitioners and their resultant exposure to homelessness and destitution as a result of the compensation.

Sixth Respondents Case

The 6th Respondent filed a replying affidavit whose import is that the colonial Government settled the Nubians Community at what was then referred to as the old Kisumu the area presently occupied by the Kisumu International Airport before or just at the turn of the 20th century. That sometimes in 1937 after protracted negotiations between the Colonial Government and the representatives of the Nubian Community. The Colonial government through His excellency the Governor who had Plenipotentiary powers and authority to alienate land defined under the Crown Ordinance of 1915, alienated part of the Kibos Township Area which was excluded from the Native Land Ordinance and settled approximately 66 Nubian families whose dwelling had been demolished in the "Old Kisumu" Nubian Village.

That pursuant to the Authority delegated to the Governor, further to the Governor's plenipotentiary powers and authority to alienate land as he deems fit under section 5 of the Lands Ordinance 1915, that the Land Officer for the colony and Protectorate of Kenya, pursuant to his own powers granted and Section 51 of the same Ordinance, on or about 30.11.198 before the District Commissioner, signed agreements granting Licences to 53 Nubian household heads within Kibos Trading Centre in the District of Kisumu - Londian granting residence free of rental during the Licensee' lifetime, provided that in the even to the licensee's demise the heirs become liable for payment of tax upon attaining the taxable age.

That the Kibos Township referred to hereinbefore was an expansive 109Ha, registered as Crown Land, L.R. 655 (a subdivision from the original L.R. No. 654/38 Riyee.1) within which provision was clearly made for the railway lien reserve of 30 meters on either side and for Railway station within the Township, the boundaries of both which were clearly outlined in the map and marked on the ground using Railway sleepers.

That the Nubian Community licensees to the Crown Land L.R. 655 their families and heirs have remained in possession and active occupation in continuity, in publicity while maintaining the set boundaries for over 84 years on all that parcel of land when the Kenya railway Corporation without colour of right issued the Nubian Community a seven (7) day Eviction Notice to vacate the aforesaid land.

That pursuant to the illegal notice issued by the Kenya Railway Corporation, the Government of Kenya under the Physical Planning Act (CAP 286) the Ministry of Lands in 2012 formally recognized the Kibos Township and prepared Development Plans for the Area. The Ministry of Lands on the 23rd October, 2012, issued a Notice for completion of the Development Plans under the Physical Planning Act (CAP 286) and invited all interested parties and/or persons to submit any objections to the Development Plans within a period of Sixty (60) days.

That at the lapse of the stipulated Sixty (60) days period no government agency including the 1st Respondent raised any objection to the allocation of that parcel of land to the Nubian Community.

That on 13th February, 2015 through a Notice in the Nation Newspaper the Director of Physical Planning put a Notice on the formalization of Kibos Informal settlement Upgrading Scheme. The formalization process of the settlement through the Development Plans, the Kibos Settlement was to get allotment awaiting a community Land title Deed.

That despite the above assertions and the fact that neither the 1st Respondent or its predecessors had ever raised any claim over the Land or utilized any legal mechanisms to claim the alleged land, on the 05.03.2021, without notice and in total disregard of the law and constitutional rights of the family members and heirs of the original licensees to the portion of Kibos Township Crown Land L.R. 655 that has grown to be popularly known as Kibos Nubian Settlement demolished the structures rendering the residents homeless.

That the demolition exercise carried out by the purported multi-agency team created pursuant to a presidential directive in November 2015, was a violation of the obligation of the state to refrain from, and protect against forced evictions from homes and land as prescribed under the provisions of the Constitution, Land Act 2016 and several International legal instruments enacted to protect the human rights.

That illegal demolition and subsequent eviction of the Nubian Community violated their right to housing as guaranteed under article 43 (1) of the Constitution which prayer we ask the court to find in favour of the Petitioners, further we seek the Honourable court to find that the state, which presided over the illegal demolitions has and still has the obligation to protect such informal dwelling and that the residents are entitled to live peacefully therein even as the state provides for progressive realization better and adequate housing to the residents.

That the 6th Respondent prays that the Honorable Court invokes its powers under Article 20 of the Constitution to apply the Bill of Rights as enshrined in the Constitution and in particular the right to housing for the current homeless Nubians who formerly occupied all that parcel of Land known as Kibos Township Crown Land. L. R. No. 655.

1st Interested Party's Case

The 1st interested party filed a supporting affidavit sworn by Dr Annette Mbogoh whose gist is that the colonial government in the first instance settled the Nubian community at what was referred to as the Old Kisumu where the international airport stands now. This was just before or at the turn of the 20th Century. The Nubian soldiers who retired from the Kings African Rifles were allocated plots at the Old Kisumu to put up dwelling houses for a period of the retired soldier's individual lives and terminated at the demise of the allottee and the surviving family members were to apply for temporary occupation licence.

On the 11th of March 1936, the colonial government promulgated the scheme for the removal of the Nubian Settlement from the village in Old Kisumu land that was part of the crown land and providing them with accommodation elsewhere probably between the Kaloleni areas and the Kasagam areas of Kisumu. That after lengthy negotiations with the government some of the Nubians moved to the new villages created for them in Kaloleni and Kasagam but those who did not move had their houses demolished.

The Nubians through their advocate mooted a solution that they be allowed to build their houses in land to be allocated at Kibos township. On the 25th to 26th January 1938, Sir Robert Brooke Pophan the then governor of Kenya visited Kisumu and told the small group of Nubians who had refused to go to the new village that they were free to go to Kibos if they wished to and that were to build their own houses but would be compensated for their demolished houses. The Nubians lost their demolished houses in the Old Kisumu and surrendered the new houses in Kaloleni and Shaurimoyo that had been built for them in exchange of the land in Kibos and some form of compensation.

On the 30th November, 1938, the land officer as represented by the assistant lands officer for the colony and protectorate of Kenya pursuant to his powers under section 51 of the land ordinance 1915, before the district, signed agreements granting licenses to 53 Nubian household's heads within Kibos Trading center in the district of Kisumu Londiani by measurement of of 50 feet by 50 feet for purposes of residence free of rental during licensees lifetime.

According to the deponent, the Kibos township is the expansive 109HA of land registered as Crown Land LR NO 655 a subdivision of the original LR NO 654/ 38Riyec within which provision was clearly made for railway line reserve of 30meters on either side of the line marked on the ground by the railway sleepers. The Nubian community were settled on the south-Eastern end of the Kibos Township before the Kibos River in 1937 and have resided on the land todate.

In the year 2012, the ministry of land and settlement prepared the Kibos settlement scheme advisory plan no N9/2012.08 and the Kenya Railways corporation never complained. The Kenya railways corporation has admitted giving a 7 days' notice to the petitioners and thereafter destroying their structures.

This court made a site visit and established that the petitioners have been in occupation of the disputed area for a very long period of time going by the buildings, infrastructure and the amenities, the court was shown the railway station the 30-meter reserve and the Kibos Township.

ANALYSIS AND DETERMINATION

I have considered the consolidated petitions, cross petition and the reply to the cross petition and supporting affidavits together with the replying affidavits and the detailed and well researched submissions of all parties and do find the indisputable facts of this matter being that the colonial government in the first instance settled the Nubian community at what was referred to as the Old Kisumu where the international airport stands now. This was just before or at the turn of the 20th Century. The Nubian soldiers who retired from the Kings African Rifles were allocated plots at the Old Kisumu to put up dwelling houses for a period of the retired soldier's individual lives and terminated at the demise of the allottee and the surviving family members were to apply for temporary occupation licence.

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On the 30th November, 1938, the land officer as represented by the assistant lands officer for the colony and protectorate of Kenya pursuant to his powers under section 51 of the land ordinance 1915, before the district, signed agreements granting licenses to 53 Nubian household's heads within Kibos Trading center in the district of Kisumu Londiani by measurement of of 50 feet by 50 feet for purposes of residence free of rental during licensee's lifetime.

In the year 2012, the ministry of land and settlement prepared the Kibos settlement scheme advisory plan no N9/2012.08 and the Kenya Railways corporation never complained. The Kenya railways corporation has admitted giving a 7 days' notice to the petitioners and

thereafter destroying their structures.

The petitioners have established that they still maintain a licence in respect of the disputed land and therefore have rights capable of being protected by the court. The colonial government gave them property that can be described as long term licence during their lifetimes and therefore the same cannot be taken away. The act of Kenya Railways evicting the petitioners from the property in dispute is a violation of Article 40 of the constitution of Kenya as it amounts to deprivation of property of a description and a deprivation of an interest in property that was given to the forefathers of the petitioners in the year 1937 when the land tenure at that time was very informal and not as formal as it is today. The petitioners cannot be said to be in an illegal occupation of the land as they have a long term licence comprising a period of their lifetime.

Section 40 of the constitution of Kenya 2010 provides: -

- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property--
 - (a) of any description; and
 - (b) in any part of Kenya.
- (2) Parliament shall not enact a law that permits the State or any person--
 - (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
 - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).
- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation--
 - (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
 - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that--
 - (i) requires prompt payment in full, of just compensation to the person; and
 - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
- (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
- (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.
- (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

This court further finds that the disputed land was crown land that was alienated by the governor in 1937 to the Nubian Community and therefore the Legal Notice no 440 of 1963 issued under the Kenya (Vesting of Land) Regulations of 1963 for the administration and control of railway and harbour services did not apply to the same because it only applied to un-alienated land. I do agree with the petitioners and the interested parties that the land occupied by the petitioners and all family members and heirs to the original licencees to the portion of Kibos Township Crown Land LR NO655, a subdivision of the original LR NO 654/38Riyec.1 never became part of the land vested in the Kenya Railways Corporation as the same had been alienated in 1937 and therefore the eviction, destruction and demolitions of the petitioner's property was an affront to the petitioner's rights to property.

It is an admission by the 1st respondent that the demolition of the petitioner's structures was carried out by government agencies including the 1st respondent which structures included hospitals, mosques and schools. Houses, water facilities.

The Bill of Rights guaranteed economic and social rights and outlawed all forms of violation of these rights. **Vision 2030** was the main framework for achieving economic, social and cultural rights. The justiciability of those rights in Kenyan courts was assured in terms of specific constitutional provisions including Article 43 of the Constitution of Kenya 2010 that provides for the socio economic and cultural rights thus:-

- (1) Every person has the right--
 - (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;
 - (b) to accessible and adequate housing, and to reasonable standards of sanitation;
 - (c) to be free from hunger, and to have adequate food of acceptable quality;
 - (d) to clean and safe water in adequate quantities;
 - (e) to social security; and
 - (f) to education.
- (2) A person shall not be denied emergency medical treatment.
- (3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants.

By destroying the petitioner's houses, hospitals and Mosques, the 1st and 4th respondents denied the petitioners their socio economic and cultural Rights under Article 43 of the constitution of Kenya 2010. I do agree with the petitioners, 6th respondent and the interested parties that the state has a duty to refrain from interfering directly or indirectly with the petitioners' enjoyment of their socio economic and should instead step in and help them as its citizens. It is a duty of every state organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the bill of rights and not to infringe on the same as was done by the 1st and 4th respondents.

The petitioner's contention that the evictions are irregular, illegal and unprocedural finds favour with this court as there was a court order stopping the eviction and that the evictions were conducted contrary to the provisions of section 152b of the land Act 2012 that provides evictions should be conducted in accordance with the Act thus any unlawful occupant of private, community or public land shall be evicted in accordance with the Act. Section 152 c provides for the eviction of an unlawful occupier of public land thus the National Land Commission shall cause a decision relating to an eviction from public land to be notified to all affected persons, in writing, by notice in the Gazette Notice in one newspaper with circulation nationwide and by radio announcement, in a local language where appropriate at least three months before eviction. The 1st and 4th respondents never followed the above stated procedure. This also demonstrates that the respondents violated the petitioners' rights to a fair administrative action contrary to Article 47 of the constitution.

In conclusion this court has a duty to protect every individual against the state from the violation of their fundamental rights and guard against state brutality on its citizens and to ensure that each state organ and its officers practice the national values as enshrined in chapter 10 of the constitution of Kenya. I do find that the petitioners are entitled to the following orders and I do grant the same thus: -

1. A declaration that any forcible, violent and brutal eviction through demolition of homes of the Petitioners and any other residents of the Kibos Informal Settlement without according them alternative shelter and/or accommodation leaving them to live in the open exposed to the elements and vagaries of nature is a violation of their fundamental right to life guaranteed by article 26 (1) and (3) of the Constitution of Kenya, 2020.

2. Moreover, a declaration that any forcible, violent and brutal eviction through demolition of homes of the Petitioners and other residents of the Kibos Informal Settlement, without according them alternative shelter and/or accommodation leaving them to live in the open exposed to the elements and vagaries of nature by the Respondents is unconstitutional contravening the national values and principals of governance that include human dignity, equity, social justice and need to protect the marginalized as enshrined in Article 10 (2) of the constitution of Kenya, 2010.

3. Furthermore, I do grant a declaration that any forcible, violent and brutal eviction through demolition of homes of the Petitioners and other residents of the Kibos Informal Settlement, without any warning, Court Orders, any or reasonable notice in writing or availing them information regarding the evictions and without according them alternative shelter and/or accommodation and leaving them to live in the open exposed to the elements and vagaries of nature is a violation of their fundamental rights to inherent human dignity and the security of the person guaranteed by article s 28 and 29 (c) , (d) and (f) of the Constitution of Kenya, 2010.

4. A declaration that any forcible, violent and brutal eviction through demolition of homes of the Petitioners and other residents of the Kibos Informal Settlement, without warning, any or reasonable notice in writing or availing them information regarding the evictions is a violation of their fundamental right of access to information guaranteed by article 35 (1) of the Constitution of Kenya 2010 and that any forcible, violent and brutal eviction through demolition of homes of the Petitioners and other residents of the Kibos Informal Settlement, and the destruction of the building materials and their household goods in the process, without Court order/s and without according them an opportunity to salvage any of their belongings is a violation of their fundamental right to protection of property guaranteed by article 40 (1), (3) and (4) as read with article 21 (3) of the Constitution of Kenya.

5. That any forcible, violent and brutal eviction through demolition of homes of the Petitioners and other residents of the Kibos Informal Settlement, without according them alternative shelter and or accommodation and leaving them to live in the open exposed to the elements and vagaries of nature is a violation of their fundamental rights to accessible and adequate housing, reasonable standards of sanitation, health care services, freedom from hunger and the right to clean and safe water in adequate quantities guaranteed by article 43 (1) read with articles 20 (5) and 21 (1), (2) and (3) of the Constitution of Kenya 2010 and that any violent and brutal eviction through demolition of homes of the Petitioners and other residents of the Kibos Informal Settlement, without any Court order/s, warning, any or reasonable notice in writing or availing them information and reasons regarding the demolitions and evictions is a violation of their fundamental right to fair administrative action guaranteed by article 47 of the Constitution of Kenya 2010.

6. A declaration that any forcible, violent and brutal eviction through demolition of homes of the Petitioners and other residents of the Kibos Informal Settlement without according them alternative shelter and/or accommodation and leaving to live in the open exposed to the elements and vagaries of nature is a violation of their fundamental rights to physical and mental health, and the fundamental right to physical and moral health of the family.

7. A declaration that any forcible, violent and brutal eviction through demolition of homes of the Petitioners without according their children alternative shelter and/or accommodation and leaving the children to live in the open exposed to the elements and vagaries of nature is a violation of the fundamental rights of children to basic nutrition, shelter and healthcare and protection from abuse, neglect and all forms of violence and inhuman treatment and to basic education guaranteed by article 53 (1) (b), (c) , (d) and (2) read together with article 21 (3) of the Constitution of Kenya 2010 .

8. The court further grants a declaration that any forcible, violent and brutal eviction through demolition of homes of the elderly persons among the Petitioners without according them alternative shelter and/or accommodation rendering them to live in the open exposed to the elements and vagaries of nature is a violation of the fundamental rights of the elderly persons to the pursuit or personal development, to live in dignity, respect and freedom from abuse and to receive

reasonable are and assistance from the state guaranteed by article 57 (b) (c) and (d) as read with article 21 (3) of the Constitution of Kenya 2010.

9. That any forceful eviction and or demolition without relocation is illegal and violates the rights of the petitioners to property and that the petitioners are entitled to the property or compensation before relocation.

10. This court orders that the petitioners are entitled to the full protection from discrimination which right was violated by the 1st and 4th respondents and therefore the petitioners are entitled to full compensation for the loss suffered during and after the illegal demolition of their structures. However, the petitioners ought to file a separate civil suit for compensation as the damages incurred cannot be ascertained in such petition as the one before me.

11. The petitioners are entitled to the Costs of the petition to be borne by the 1st and 4th respondents who have been found to have violated the petitioners' rights.

12. The interested parties to bear own costs.

DATED, SIGNED AND DELIVERED THIS 27TH DAY OF AUGUST, 2021 AT KISUMU

ANTONY OMBWAYO

JUDGE

This Judgement has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE