



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC PETITION No. E003 OF 2020

DAVID GATHINJI KARIUKI

Suing on behalf of members of

Mbegi Muridate Community, Gilgil.....PETITIONER

VERSUS

KENYA DEFENCE FORCE.....1ST RESPONDENT

KDF KENYATTA BARRACKS GILGIL.....2ND RESPONDENT

THE OFFICE OF THE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. The petitioner herein moved the court on 30th November 2020 through petition dated 26th November 2020. He described himself in the petition as a citizen of the Republic of Kenya, a farmer and a resident of Mbegi Muridate Ward, Gilgil. He brought these proceedings on his own behalf and on behalf of members of the community of Mbegi Muridate Village, Gilgil.

2. The petitioner averred in the petition that the respondent infringed on their fundamental rights arbitrarily by ordering them to vacate a parcel of land measuring approximately 10 acres which belongs to Kenya National Highways Authority (KENHA) and Telkom located near GTI, Gilgil without giving them a written reason for the action. He added that the action goes against their fundamental rights guaranteed under Articles 26 and 47(2) of the Constitution and will adversely affect their right to farm and sell maize which they have been drying on the property after harvest.

3. It was further averred in the petition that land is the main sustenance of life and any action by 1st and 2nd respondents to order the petitioner and the community to vacate infringes on their right to life.

4. The petitioner therefore prayed for the following orders:

a) Make a declaration that the 1st and 2nd respondents violated Article 47(2) of the Constitution by not giving the petitioner and the community members of Mbegi Muridate village, Gilgil a written reason for their action to order them to vacate and stop using the land that belongs to KENHA and Telecom to dry their maize harvest.

b) Make a declaration that the action by the 1st and 2nd respondents to displace, evict and interfere with the operations of the applicant and other farmers (Mbegi Muridate community members) threatens and violates the right to life under Article 26 of the Constitution of Kenya.

c) Make a declaration that the 1st and the 2nd respondents have acted ultra vires in their act to displace, evict, intrude and interfere with the property that do not belong to them.

d) Make a declaration that the action of the action of the 1st and 2nd respondents to displace, remove, evict and interfere with operations of the applicants and community members of Mbegi Muridate ward, Gilgil is attempt (sic) to stifle their right to earn a living.

5. The petition was supported by an affidavit sworn by the petitioner. He deposed that member of Mbegi Muridate community earn a living by farming of grains such as maize and beans. That KENHA and Telkom gave the community consent to use the suit property for drying of

their maize and other grains and that they had been doing so for 15 years until the 1st and 2nd respondents issued a notice requiring them to stop doing so on the ground that their operations were attracting birds which leave their droppings on the 1st and 2nd respondents' camp. He added that the community was not given any prior hearing and that the land does not belong to the 1st and 2nd respondents.

6. The respondents opposed the petition through an affidavit sworn by Lieutenant Colonel Victor Mburu, the General Manager Kenya Ordnance Factories Corporation - Food Processing Factory in Gilgil. He deposed that the petitioners have no rights to the suit property or consent to use it and that their use of it had attracted and facilitated the multiplication of numerous birds which perch on the respondents' food processing factory which is adjacent to the property and leave their droppings strewn all over the factory roof and drainage system used for harvesting rain water for use in the factory. That the droppings render the water unsanitary and unfit for use in food processing.

7. He further deposed that the respondents made a report to the local administration about the nuisance arising from the petitioners' activities and had taken the appropriate legal action by making an official report and that a meeting was held between the area's Deputy County Commissioner, the Area Chief, the petitioners and the respondent at which a resolution was passed to the effect that the petitioners should vacate the suit property by 30th November, 2020. He added that the Public Health Officer Gilgil Sub-County issued to the petitioners a notice to vacate on 3rd December 2020 and annexed a copy of minutes dated 8th November 2020 and a notice dated 3rd December 2020.

8. The petition was canvassed through written submissions. The petitioners did not file any submissions despite being given numerous opportunities to do so.

9. In their submissions, the respondents argued that the petitioners lack the necessary locus standi to institute these proceedings as they do not have any tenable legal interest in the suit property. They cited the case of **Khelef Khalifa El-Busaidy v Commissioner of Lands & 2 others [2002] eKLR.**

10. The respondents further argued that the petitioners are mere trespassers seeking to abuse the processes of the court in asserting illegal rights to continue trespassing into the suit property and utilize the same without being granted the authority to do so to the detriment of the respondents. Relying on **Section 115** of the **Public Health Act**, they submitted that the petitioners are a nuisance which renders the respondents' operations ineffective due to the lack of potable water for use in their food processing factory. The respondents finally submitted that the petitioners conceded to neither owning nor residing within the suit property and urged the court to dismiss the petitioner's case with costs.

11. I have considered the petition, the affidavits and the submissions. I note that the petitioners neither filed any affidavit in response to the respondents' affidavit nor any submissions. Three issues arise for determination: whether the petitioners lack *locus standi*, whether the respondents have violated the petitioner's rights under **Articles 47 (2)** and **26** of the **Constitution** and whether the petitioner is entitled to the reliefs sought.

12. The first issue for determination has a ready answer at **Article 22** of the **Constitution** which accords every person the right to institute proceedings in court claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. Such proceedings may be brought by a person acting in their own interest, by a person acting as a member of or in the interest of a group or by a person acting in the public interest. There is no dispute that the petitioners have been drying maize on the suit property and that they have been ordered to vacate. They do not need to have any ownership claim over the property so as to have a foundation to approach the court seeking to enforce a right or fundamental freedom in the Bill of Rights. **Article 22** gives them a right to access the court provided that they allege in their petition that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or is threatened. I harbour no doubt that the petitioners herein have *locus standi*.

13. The petitioners claim that the respondents have violated their rights under **Articles 26** and **47 (2)** of the **Constitution** by requiring them to vacate the suit property. **Article 26** provides in part:

(1) Every person has the right to life.

(2) The life of a person begins at conception.

(3) A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law.

...

14. On the other hand, **Article 47 (1)** and **(2)** provide:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

15. The petitioners concede that they do not own the suit property and that they do not have any other property interest over it. In fact, it is their case that the suit property belongs to KENHA and Telkom who they claim gave them authority to use it for drying of their maize and other grains. They have not exhibited anything to demonstrate such authority. He who alleges must prove. The petitioners have failed that cardinal test. It may very well be that the petitioners' presence on the suit property and their activities thereon are contrary to the law.

16. The petitioners claim that the respondents did not accord them a hearing or fair administrative action prior to requiring them to vacate. The respondents have placed before the court material showing that they made a complaint to the local administration about the petitioners' conduct and that arising from the complaint a meeting was held between the area's Deputy County Commissioner, the Area Chief, the

petitioners and the respondents whereat a resolution was passed that the petitioners should vacate the suit property by 30th November 2020.

17. The respondents have exhibited copy of minutes dated 8th November 2020 and a notice to vacate dated 3rd December 2020 issued to the petitioners by the Public Health Officer Gilgil Sub-County. A reading of the minutes shows that the parties met on 7th November 2020 and that they had previously met on 15th October 2020. The petitioners offered no evidence to challenge these aspects of the respondents' case. In the circumstances, the petitioners have failed to establish their claims that the respondents violated their rights under **Articles 26 and 47 (2) of the Constitution**. It follows therefore that the petitioners are not entitled to the reliefs sought.

18. In the result, I dismiss the petitioners' case with costs to the respondents.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 16TH DAY OF SEPTEMBER 2021.

D. O. OHUNGO

JUDGE

Delivered through Microsoft Teams video link in the presence of:

No appearance for the petitioner

No appearance for the respondents

Court Assistant: E. Juma