



REPUBLIC OF KENYA



Mbugua (Rev) Displaced Citizen & another v Attorney General & 5 others (Petition 447 of 2013) [2024] KEHC 15528 (KLR) (Constitutional and Human Rights) (6 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15528 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION 447 OF 2013

LN MUGAMBI, J

DECEMBER 6, 2024

BETWEEN

JOHN MBUGUA (REV) DISPLACED CITIZEN 1ST PETITIONER

WILSON NGANGA KABIRIA 2ND PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

**CHIEF JUSTICE AND PRESIDENT OF THE SUPREME
COURT 2ND RESPONDENT**

DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT

INSPECTOR GENERAL OF POLICE 4TH RESPONDENT

EVANS KIDERO, GOVERNOR NAIROBI 5TH RESPONDENT

NAIROBI CITY COUNCIL 6TH RESPONDENT

JUDGMENT

Introduction

1. It is worth noting that the Record shows that the National Construction Authority who was the 7th Respondent herein, was removed from these proceedings by consent of parties on 31st August 2016.
2. Further, although the Petitioners had applied to join a number of Interested Parties to this suit, the record is silent on whether they were granted leave to join the said parties to the instant suit.



The Petition

3. The instant Petition is undated. It is supported by the Petitioners' affidavits sworn on 10th September 2013 and further affidavits reacting to the Respondents' responses. Additionally, the Petition is also supported by supplementary affidavits and testimonies of 15 families which lost their family members during the 1993 and 2007 - 2008 post-election violence.
4. The gist of this Petition is that the Petitioners alongside victims of post-election violence that occurred following various general elections have never been compensated for the loss of their family members' lives, their property and homes. As a consequence, the Petitioners on their behalf and these persons bring this Petition against the Respondents on the premise that these actions have infringed on their constitutional rights.
5. Subsequently, the Petitioners seek the following reliefs:
 - i. A declaration that the internally displaced Petitioners, their families and their agents be given state protection including decent housing and allowances and facilitation to be able to prosecute this case without fear or intimidation since its touching the high and mighty in the government and society.
 - ii. An order be issued for the release of the list of names in the Waki Report given to Kofi Annan before this Court.
 - iii. An order be issued compelling the government to compensate all the displaced persons as recommended in the Parliamentary Report and the Internally Displaced Persons Act.
 - iv. An order be issued compelling Prof. Githu Muigai to produce and make available all data from the Special Programmes, Treasury, Kenya National Bureau of Statistics, Red Cross of all the displaced citizens (IDPs), the compensation and other information available. This includes the TJRC Report, details of the Mau Mau victims, the Kiluku Report and all relating to IDPs. This so as to help the Petitioners prepare a more detailed Petition.
 - v. An order be issued compelling the 1st Respondent to facilitate the Petitioners with Visas to the UK and the Hague on both the Mau Mau and IDPs matters not only as victims but as witnesses.
 - vi. A declaration be issued that IDPs of all categories are a vulnerable group in Kenya and that their rights under Articles 26, 27, 28, 29, 31, 36, 38, 40, 43, 53, 57 and 70 of *the Constitution* have been infringed upon.
 - vii. An order be issued compelling the Ministry of Treasury to withdraw the VAT Bills and together with the Ministries of devolution, land and housing produce details of all the names, money paid and land bought for the IDPs.
 - viii. An order be issued to the 5th Respondent to ensure that all buildings are compliant with the disability guidelines in view of provision of ramps, lifts and facilities. Equally, that the 5th Respondent produce the Report of the 3000 ghost workers and ISO's certification report. Furthermore, that the 5th Respondent be ordered not to collect rates in Umoja Embakasi as the collected monies will be utilized by ghost workers.
 - ix. An order be issued compelling the 5th Respondent to produce the details of the Eastland fire station, Kariobangi market, titles for the Umoja residents and the RIM maps numbers.



- x. A declaration that environmental and forest destruction, pollution and Post-Election Violence 2007 was caused by Mwai Kibaki (the Late), Raila Odinga, Kalonzo Musyoka. Further that the late Daniel Toroitich arap Moi committed crimes in the 1982-1986; 1990-1993; 1997 and 2002 general elections.
- xi. An order be issued compelling the Respondents herein to compensate the Petitioners and their families for the 20 wasted years and their retirement benefits scheme be consolidated to pay the damages.
- xii. That the payments be calculated as the salary of one current MP as were displaced during voting. Particularly Kshs. 1,000,000 per month for 1 year. This is to be multiplied by 31 years and thus in total, an award of Ksh.396, 000, 000.
- xiii. This Court be pleased to order the formation of a local tribunal so that the responsible Respondents can be charged in a criminal court of law.
- xiv. This Court be pleased to grant such orders as it may deem fit under Articles 26, 40 and 70 of *the Constitution*.
- xv. The costs of this Petition be provided for.

Petitioners' Case

1st Petitioner's Case

6. The 1st Petitioner informs that he was continuously displaced from his home during the KANU regime. This was during the 1982 - 1986 forest evictions; 1990-1993; 1997; 2002 tribal clashes and 2007 – 2008 post-election violence.
7. He also states that he is a third generation Mau Mau who was never compensated. In this regard, he avers that their effort to have this matter addressed by the 1st Respondent was futile. He notes however that only the then British High Commissioner responded to their correspondence on this issue.
8. He asserts that during 30th December 2007 to 3rd January 2008, one Chege Githu Njuguna and James Kariuki among other 1500 others were killed during the post - election. He avers that instead of protecting them, security forces displaced persons from their homes and took them to show grounds in Eldoret, Nakuru and Kirathimo. He is aggrieved that during this period, Kalenjin warriors reigned terror and committed atrocities such as killing people among others.
9. He is as well grieved that Prof. Githu Muigai, failed to recognize these warriors as a vicious gang in view of the atrocities that they had committed. Further that he failed to advise the government against spending Ksh.84, 000, 000 to prosecute H.E. Dr. Samuel Ruto and Mr. Sang's trial at The Hague, whilst the victims languished in poverty and sought justice.
10. The 1st Petitioner asserts that on 26th April 2008, he was injured by armed riot police officers at Kirathimo where they had camped for 3 days as IDPs. He adds that he became disabled and has not been able to secure a job since.
11. He is further aggrieved that Kenya on 5th September 2013 withdrew from the International Criminal Court (ICC) yet there is no local tribunal to try persons who commit crimes against humanity.
12. He also asserts that the government failed to undertake a re-vetting exercise to ascertain who the genuine IDPs so as to resettle them. Further that the government failed to recognized the various groups in the IDPs category such as persons with disability. The 1st Petitioner thus submitted that the



- Kenya National Bureau of Statistics should produce the data of the integrated IDPs so that the same can be scrutinized.
13. He equally avers that the government failed to resettle the 663,000 IDPs in their records, compensate the families of the 1500 persons who were killed and the forest evictees. It is stressed that this compensation ought to include persons who became disabled in the process and lost their businesses.
 14. In like manner, that the government failed to accelerate payment of the IDPs ex-gratia of Ksh.10, 000 – Ksh.25, 000 but instead opted to issue blanket cheques of Ksh.400, 000. It is further stated that the government failed to complete construction of IDPs shelter as recommended in the Select Committee’s Report on Resettlement of Internally Displaced Persons, 2017.
 15. The government is also faulted for failing to provide sufficient food for the IDPs and psychological support owing to the traumatic experience they underwent. Similarly, its failure to set up a special bursary fund for IDPs children and operationalize the Department of Mitigation and Resettlement in the Ministry of Special Programmes.
 16. Additionally, the 1st Petitioner avers that the government failed to implement and enforce the Internally Displaced Persons Act, 2012; the UN guiding principles; Kampala Protocol on IDPs and the Great Lakes Protocol on Protection and Assistance of IDPs. In the same manner, that the Ministry of Devolution in line with Article 35 of *the Constitution* has failed to update the public on the status of the IDPs and resolutions arrived at in that regard.
 17. The 1st Petitioner avers that this Court ought to compel the 2nd Respondent, the then Dr. Willy Mutunga, to establish a local tribunal to try persons who commit crimes against humanity. Further that the 3rd and 4th Respondents ought to prosecute the persons who deported the 2nd Petitioner at gun point from the office of the Prime Minister and Deputy President. It is noted in this regard that there exists file No. ODP/CAM/013/7/4/280 at the 3rd Respondent’s office and a police report made at Gilgil Police Station vide OB No.49/2013.
 18. Equally, it is argued that the 5th Respondent, ought to issue the names of the 3000 ghost workers who may also be the ones displacing disabled workers.
 19. The Petitioner was also concerned that the outerring road expansion near the Kariobangi market would displace thousands of traders.
 20. The Petitioner further decried the lack of facilities for displaced persons at the 6th Respondent’s City Hall annex.
 21. In his oral testimony, the 1st Petitioner informed that the displacement of the forest dwellers between 1985 and 1986 dislodged his parents who had been staying at Kaptagat/Penon forest, Elgeyo Marakwet County. He states that they were there due to the 1952 war and that they were never compensated as a result of the same.
 22. He stated that his parents later on bought land in Eldoret, Yia Mumbi Farm in 1992. Their stay there was however short lived as in 1993 following the general elections, their houses were burnt down, cattle taken and a number of people killed. It is alleged that these attackers had government protection and that their loot was loaded into government trucks. For this reason, they were forced to move to the local PECA and catholic churches while others moved to the Eldoret NCCK grounds.
 23. He claimed that the then President Moi was punishing them for voting against him and travelled around the camps instructing them to ‘lie low like an envelope.’



24. He asserted that this continued with every ensuing election being 1997, 2002 and 2007. He noted that between 2007 – 2008 a number of people were killed as a result of the election violence. He went on to list the names of the persons he knew and their cause of death.
25. Following this, a number of commissions were formed with the view of resettling the IDPs which was also part of Agenda IV. He asserted however that the resettlement plans failed as the government refused to compensate for losses that did not include land. Since he had land, he emphasizes that he wanted compensation not land. He avers that in addition to his averments in his affidavit the government has never issued any compensation to date including to the other persons who were also displaced from Yia mbubi.
26. He as such seeks to have the government compensate him and these persons in line with the IDP Act. He added that he did not have evidence of quantum of damages as the same was destroyed during the attacks.

2nd Petitioner's Case

27. He in like manner, asserts that he was displaced during the politically instigated chaos and settled at Gilgil IDP camp which was later on destroyed by police officers.
28. He avers later in his submissions that the Director of Mitigation and Resettlement came to their camp and informed him that their intended resettlement was Gitwamba/Mohotetu/Block 2/1123 at Laikipia West Sub-County. This was affirmed in letters addressed to him dated 12th May 2012 and 2nd July 2012. He however claims that this resettlement did not materialize as it was never done. It is alleged that the 1st Respondent fraudulently processed IDPs resettlement. His report of the matter to the 4th Respondent is said to have been futile.
29. As a result, the 2nd Petitioner depones that he moved to Nairobi in 2012 with his family. They were hosted in Kiamaiko Shilo United Church at Mathare Estate. He soon after went to the Prime Minister's office where he camped for a week without any food and water, hoping to get assistance.
30. He avers that on 26th February 2013, himself alongside the others with him were taken at gun point by officers in a GK Prado A484G back to Gilgil. He informs that when they arrived there, they recorded their statements at Gilgil Police Station and reported the matter vide OB 49/2/2013.
31. He avers that thereafter he returned to Nairobi and yet again went and camped at the Deputy President's office. In the same manner, he together with his family were taken back to Gilgil on 27th May 2013 to the Gilgil County Commissioner's compound where they stayed.
32. The 2nd Petitioner noted that the then Cabinet Secretary announced on 5th September 2013 that IDPs would get Ksh.400000 compensation however he did not receive the same as he suspects he was not in the list. This is despite having lived in the DCs compound as IDPs.

Respondents' Case

33. The 2nd, 4th, 5th and 6th Respondents' responses and submissions to the Petition are not in the Court file or Court Online platform (CTS).



1st Respondent's Case

34. In rejoinder, the 1st Respondents filed grounds of opposition dated 14th October 2013 on the premise that:
- i. The Petition is incompetent and frivolous and a gross abuse of the court process.
 - ii. No cause of action has been disclosed by the Petitioner.
 - iii. There is no violation of *the Constitution* or constitutional rights of the Petitioner disclosed, hence no justifiable cause.
 - iv. There is no constitutional issue for the court determination.
 - v. The Petition herein is defective as some of the people he claims to have infringed their rights have not been enjoined as parties in the suit.
 - vi. The Petition is nuanced by mere hearsay without any colour of evidence.

3rd Respondent's Case

35. In like manner, the 3rd Respondent filed grounds of opposition dated 30th October 2013 on the basis that:
- i. The Petitioners are purporting to be litigating on their own behalf and behalf of the other disabled persons who are unnamed, neither do the Petitioners issue any authorization to act on behalf of these persons. As such the Petitioner lacks locus standi.
 - ii. The Petitioners have brought an omnibus application alleging infringement of their rights yet they are not being specific as to which particular rights were infringed, who infringed them, against who and how. Thus the Petition fails to be specific.
 - iii. The 3rd Respondent's mandate is prosecution and the Petitioners have failed to demonstrate how the 3rd Respondent has infringed upon their rights while performing its constitutional mandate.
 - iv. The Petitioner's in their Petition require the 3rd and 4th Respondents to arrest and prosecute personalities who are not named. Further the Petitioners fail to show whether the alleged incident at Paragraph 51 of the Petition was reported to the police if at all.
 - v. The Petition as it is, is incompetent for it fails to meet the threshold laid down for petitions or any pleadings in that it fails to disclose material particulars such as:
 - a. Identifying of the members of the other groups the Petitioner is claiming to act on behalf.
 - b. The specific articles of *the Constitution* or the rights alleged to have been infringed, how they have been infringed, when they were infringed and who infringed them.
36. Furthermore, the 3rd Respondent filed a Replying Affidavit by Katherine Kithiki sworn on 18th March 2014.
37. She reiterates that the Petitioners in light of the 3rd Respondent's mandate did not demonstrate how the 3rd Respondent failed to fulfill its constitutional mandate.



38. Contrary to the Petitioners assertions that the 3rd Respondent had failed to prosecute the high-profile personalities who deported the 2nd Respondent and the persons named in the cited reports, it was stated that the 3rd Respondent can only instigate criminal prosecution once a complaint is lodged with the police. It is stated that no such report was adduced as evidence by the Petitioners.
39. Additionally, it is argued that the mere fact that a commission of inquiry makes a report does not necessarily mean that prosecution has to take place. Especially, where there is no sufficient evidence to sustain the charge. For these reasons, it was maintained that the Petition lacks specificity and does not disclose a cause of action and so should be dismissed with costs.

Parties Submissions

1st Petitioner's Submissions

40. The 1st Petitioner's submissions are not in the Court file or Court Online platform (CTS).

2nd Petitioner's Submissions

41. Ombati and Ombati Company Advocates for the 2nd Petitioner filed submissions dated 24th May 2024. The single issue for determination was whether the 2nd Petitioner's constitutional rights had been violated.
42. Counsel submitted that indeed the 2nd Petitioner's constitutional rights had been violated. Particularly, he noted that the 2nd Petitioner and his family had been forcefully evicted from their home in an inhuman way in violation of Article 31 of *the Constitution* that guarantees them privacy to their affairs. He added that the 1st Petitioner's attempt to get assistance from the relevant authorities was met with shame and discrimination contrary to Articles 27 of *the Constitution*.
43. Equally that despite the 2nd Petitioner being allocated land as an IDP, the same was forcefully taken away in violation of his right to property under Article 40 of *the Constitution*. Undoubtedly it was argued that the 2nd Petitioner's economic and social right under Article 43 of *the Constitution* was also violated.
44. Counsel as well stressed that the Respondents' failure to hear the grievances and grant them justice, was contrary to Article 48 and 50 of *the Constitution*. In like manner, that the 2nd Petitioner's children's rights under Article 53 of *the Constitution* were violated. Additionally, including the 2nd Petitioner's right as a senior citizen contrary to Article 57 of *the Constitution*. It was further stated that the 1st Respondent erroneously asserted that the 2nd Petitioner was compensated however no evidence of this was adduced.
45. Owing to these reasons, Counsel argued that the 2nd Petitioner was entitled to Ksh.6, 500, 000 compensation and the land he had been already been allocated.

1st Respondent's submissions

46. On 15th October 2024, State Counsel, Ruth Wamuyu filed submissions in support of the 1st Respondent's case.
47. On the onset, Counsel noted that the Petition concerns a number of issues including the 2007 post-election violence, the Waki envelope, the Hague cases among others. In Counsel's view, the sole issue for discussion was whether the Petition had met the threshold of constitutional petitions.



48. Counsel submitted that the Petitioners had not enjoined in this suit the relevant government ministries, agencies and departments that deal with issues of IDPs. Moreover, that the Petitioners although attached correspondence between them and some of these bodies in their Petition, failed to sue these bodies and persons in light of the cited allegations. Counsel stressed that this was offensive to the principle of natural justice that requires both parties should be heard.
49. Counsel pointed out furthermore that no government official had clarified the issues asserted in the Petition, more so concerning the compensation of IDPs which is one of the key issues. Counsel also pointed out that the 2nd Petitioner said he had been allocated land however was not able to settle down, yet the responsible persons who curtailed this process were not enjoined in this suit. Counsel in view of this argued that as it stands the Petition is undefended.
50. Counsel further submitted that the Petition fails to disclose the issues set out under Rule 10(2) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. That is a Petition must disclose, the facts relied upon; the constitutional provision violated; the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community and the relief sought by the petitioner. It is reasoned thus that the Petition does not meet this threshold.
51. Reliance was placed in *Anarita Karimi Njeru v Republic* [1979] KLR where it was held that:
- “if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”
52. Like dependence was placed in *Muema v OCS, Langata Police Station & 4 others* [2022] KEHC 13194 (KLR) and *Mumo Matemu Vs Trusted Society of Human Rights Alliances & 5 Others* (2014) eKLR.
53. Counsel further argued that the 1st Respondent and 4th Respondent whose mandate is stipulated under Article 254 of *the Constitution* are not the appropriate parties and neither can they adequately respond to the subject matter of this Petition except to the extend of their mandates. As such, it was stated that it cannot be determined whether the 2nd Petitioner is indeed an IDP who was resettled and whether there was any form of compensation granted. Counsel also questioned whether, if the orders were to be granted who then would they be issued to. For this reason, Counsel stressed that the Petition lacks merit.

3rd Respondent’s Submissions

54. This party’s submissions are not in the Court file or Court Online Platform (CTS).

Issues for Determination

55. The issues that arise for determination in my view are as follows:
- i. Whether the instant Petition satisfies the constitutional threshold.
 - ii. Whether the Respondents’ violated the Petitioners’ constitutional rights.
 - iii. Whether the Petitioners’ are entitled to the relief sought.



Whether the Petition meets the constitutional threshold

56. A constitutional petition must be pleaded with reasonable precision pointing out those rights that were violated and the manner the violations were carried out or executed. That was the holding in the celebrated case of Anarita Karimi Njeru (supra) which the Supreme Court affirmed in the Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (2014) eKLR as follows:

“(349) ... Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement...”

57. Equally, the Court of Appeal in Mumo Matemu (supra) acknowledged that:

“...The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to defined issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19,20 and 73 of *the Constitution* in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown *the Constitution*, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of *the Constitution* and the rule of law, without any particulars.

58. The Court went further to state that:

“We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (Supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High



Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting,” without requiring remedy by the 1st respondent...”

“If a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

59. Furthermore, in *Kenya Medical Practitioners, Pharmacists and Dentists’ Union v University of Nairobi & Universities Funding Board* [2021] KEHC 13442 (KLR) the Court reiterating these authorities noted as follows:

“86. The above case is hailed for establishing the following precedent in respect of constitutional Petitions: -

... if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed...

87. The foregoing finding received endorsement from the Court of Appeal in *Nairobi Civil Appeal No. 290 of 2012, Mumo Matemu v Trusted Society of Human Rights Alliance* when the Learned Judges remarked on the importance of compliance with procedure under Article 159 of *the Constitution*, the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* and need for precision in framing issues in constitutional Petitions. It was observed thus: -

(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.

88. The Learned Judges further bolstered the foregoing finding by making reference to the decision of Jessel, M.R in *Thorp v Holdsworth* (1876) 3 Ch. D. 637 at 639 where he made the following findings: -

... The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense



and delay, especially as regards the amount of testimony required on either side at the hearing....”

60. In like manner, the Court in *Kenya Pharmaceutical Association & another v Nairobi City County and the 46 other County Governments & another* [2017]eKLR stressed as follows:

“ 33. The core issue here is to understand the function of and purpose of good pleadings. In this regard, I recall the words of the Australian Court where Vickery J said this of the principles of good pleading:-

“In a mathematical proof, elegance is the minimum number of steps to achieve the solution with greatest clarity. In dance or the martial arts, elegance is minimum motion with maximum effect. In filmmaking, elegance is a simple message with complex meaning. The most challenging games have the fewest rules, as do the most dynamic societies and organizations. An elegant solution is quite often a single tiny idea that changes everything.

... Elegance is the simplicity found on the far side of complexity.

While elegance in a pleading is not a precondition to its legitimacy, it is an aspiration which, if achieved, can only but advance the interests of justice. A poorly drawn pleading, on the other hand, which does not tell a coherent story in a well-ordered structure, will fail to achieve the central purpose of the exercise, namely communication of the essence of case which is sought to be advanced.

Pleading should not be dismissed as a lost art. It has an important part to play in civil litigation conducted within the adversarial system. Crafting a good pleading calls for precision in drafting, diligence in the identification of the material facts marshalled in support of each allegation, an understanding of the legal principles which are necessary to formulate complete causes of action and the judgment and courage to shed what is unnecessary.

Although a primary function of a pleading is to tell the defending party what claim it has to meet, an equally important function is to inform the court or tribunal of fact precisely what issues are before it for determination.

34. The function of a pleading in civil proceedings is to alert the other party to the case they need to meet (and hence satisfy basic requirements of procedural fairness) and further, to define the precise issues for determination so that the court may conduct a fair trial; The cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of action (or defence). The expression “material facts” is not synonymous with providing all the circumstances. Material facts are only those relied on to establish the essential elements of the cause of action; a pleading should not be so prolix that the opposite party is unable to ascertain with precision the causes of action and the material facts that are alleged against it.”

61. Over and above proper drafting, the allegations made in the Petition must also be proved by presentation of evidence that meets the requirements of the *Evidence Act*. The Petitioners must thus support claims of infringement of their rights with evidence to prove any allegations made.



62. In this regard, the Court in *Evans Otieno Nyakwana vs Cleophas Bwana Ongaro* (2015) eKLR held that:

“ 15. ... As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107(1) of the *Evidence Act* (Chapter 80 of the Laws of Kenya)...

16. Furthermore, the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

17. The Court of Appeal in *Jennifer Nyambura Kamau Humphrey Mbaka Nandi* [2013]eKLR considered the applicability of these provisions as follows;

We have considered the rival submissions on this point and state that section 107 and 109 of the *Evidence Act* places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the *Evidence Act* provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side.”

63. Moreover, in *Edward Akong'o Oyugi & 2 others v Attorney General* [2019] eKLR the Court held thus:

“73. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in *Britestone Pte Ltd vs Smith & Associates Far East Ltd*[38] :-

“The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”

74. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Court decisions cannot be made in a factual vacuum. To attempt to do so would trivialize *the Constitution* and inevitably result in improper use of judicial authority and discretion. It will be a recipe for ill-considered opinions. The



presentation of clear evidence in support of such prejudice is a prerequisite to a favourable determination on the issue under consideration. Court decisions cannot be based upon the unsupported hypotheses.”

64. It is thus necessary to interrogate the Petition and determine if it meets the requisite threshold of a Constitutional Petition considering the manner in which it is pleaded.
65. I have studied the Petition carefully and what is evidently clear to me is that the Petition raises varied and diverse issues that are presented in an uncoordinated version. To demonstrate, I will sample a few paragraphs verbatim to display the hotch-potch nature of this Petition that complicates a proper understanding of the real grievances that the Petitioners want this Court to resolve.

Para 4 of the Petition: That the Petitioners are applying under above to seek the orders to be protected from any attacks, threats or any intimidation and from violation of peaceful environment by respondent number one who is Attorney General of the Republic of Kenya who shocked the whole country and the entire legal fraternity on 13th August at Riara University when he declared the dubious universities are producing shoddy lawyers who are doing shoddy legal work. And as such the poor never get justice as a result of having dubious universities and lawyers doing very shoddy legal work. That this confirmed our fears why we the displaced beginning with the Mau Mau Veterans will never get justice if our education systems is dubious and doing shoddy legal work. That our efforts to get help from this office are futile and it is only the British High Commissioner Dr. Christian Turner who cunningly bothered to respond to our letters on the Mau Mau matter, Marked JM001.

Para 5: That his words were confirmed by Prof. Kaimenyi who declared that he will shut down all dubious universities on top of bars. He fell short of shutting down the bars. We will end up having all the students moving into the bars and becoming drunkards.

Para 6: That it is a great shame that Prof. Githu Muigai the Hon. Attorney General of the Republic has failed to advise the Government and Parliament against spending over 84 million Kenya Shillings to go to the Hague for Hon. Ruto and Sang’s trial while victims of crime committed are still languishing in poverty and crying for justice.

Para 7: That the amounts set of 400,000 by government is a mockery of justice and that they are following the then footsteps of British Government payments of MAU MAU veterans. You cannot lose all your property including animals and your paid amount after over 20 years in the cold and then the VAT bill comes top tax you.

Para 8: That it is shocking today September 5th at 18.00 hours the Parliament have adopted a Bill to withdraw Kenya from ICC and yet we don’t have local tribunal to try criminals that have committed crimes against humanity. Only the elites have their way.

Para 16: That based on the words of Prof. Githu Muigai the Hon. Attorney General of the Republic of Kenya, we feel indeed our human dignity is disgraced, humiliated and violated when we enter the Temple Courts of Justice and bow to the Court (sic) of arms which is composed of two Lions, holding spears, cockerel which still reminds us the KANU reign of RED TERROR under Presidents Jomo Kenyatta (late) Daniel Arap Moi KANU, Mwai Kibaki former KANU-DP-NARC-PNU and current President who is former KANU Chairman but who is protected by Article 143 of *the Constitution* from prosecution, but King James Version of 1611 of the Bible prohibits us from bowing to any idol or image nor have any other god apart from the Living Maker himself.



66. It is unclear what complaint the Petitioner wants resolved through this Petition. Is the issue the statement allegedly made by the Honourable Attorney General Githu Muigai at Riara University about falling educational standards in our universities which statement was allegedly subsequently reinforced by the then Cabinet Secretary for Education? Is it because the Cabinet Secretary promised to close the bars but failed thereby exposing the students to drinking beer? or is it because there was Kshs.84 million allegedly spent on travelling to the Hague for the ICC cases? Is the complaint about a proposal to pay Kshs.400,000/- compensation to persons displaced or Mau Mau veterans? Or are Petitioners opposed to bowing to the Coat of arms of which they consider to be relics of KANU regime and also allege is against biblical to bowing to it as is done in Court by equating it to idol worship. This Petition is a confused mixed grill of issues that makes vague and embarrassing to the extent that it does not disclose any definite cause of action. It is multidimensional, verbose making it completely nebulous.
67. The equivocality that characterizes the instant Petition does not even spare the reliefs sought. It is replicated through combination of disparate reliefs that the Petitioners seek starting with one that seeks:

“environmentally displaced petitioners (whose identities are not provided), their families and their agents to be given special witness protection (SWP) to be able to execute this case without fear or intimidation since its touching the high and the mighty; that an order be made to the Attorney General to facilitate us to get Visa to UK and Hague on both Mau Mau and IDPs as witness and victim of what happened; That this Honourable Court be pleased to order the Ministry of Treasury to withdraw the VAT Bills and together with Ministries of Devolution, land and housing produce details of all names, money paid and land bought for IDPs; the declaration be made to Nairobi City County Governor Dr. Kidero and City Hall to make sure all buildings are Disability compliant 2003 compliant with ramps, lifts and facilities for disabled. Further the Governor produce report of 3000 ghost workers and the report of ISO certification and further be ordered not to collect rates in Umoja Embakasi since the money collected could be going to the pockets of ghost workers. That further the Governor be compelled to produce details of the Eastland Fire Station, Karobangi market, titles for Umoja Residents and RIM maps numbers; IN THE ALTERNATIVE; it be declared environment and forest destruction, pollution and post-election violence 2007 was caused or instigated by respondents Hon. Mwai Kibaki, Raila, Odinga, Kalonzo Musyoka. That Moi and his agents committed crimes in 1982-86 and sufferings including the injuries, death, rape and loss of property and displacement thereof. THAT THE FURTHER ALTERNATIVE, This Honourable Court order all the respondents who have directly violated the rights of the Petitioners be compelled to bear the costs of compensating the petitioners and their families and all those they represent for all the 20 years wasted and that their retirement benefits scheme be consolidated to pay the damages; this Honourable Court be pleased to order the formation of a local tribunal as soon as possible so that responsible respondents be charged in a criminal court of law; That this Honourable Court may be pleased to grant such orders as it may deem fit under Articles 26, 40 and 70 of the Constitution; the Cost of the Petition be provided for.”

68. Explaining the purpose of pleadings, the Court in *Isaiah Ondiba Bitange & 3 others v Institute of Engineers of Kenya* (2017) eKLR stated as follows:

“The purpose of pleadings is to enable the defendant to know the case he had to meet so that he could properly plead his defence with the result that the issues would be sufficiently



defined to facilitate the appropriate questions for decision to be resolved. This purpose cannot be achieved unless the words are pleaded with sufficient particularity. Pleadings do not only define the issues between the parties for the final decision of the court at the trial; they manifest and exert their importance throughout the whole process of the litigation. They contain the particulars or the allegations of which further and better particulars may be requested or ordered, which help still further to narrow the issues or reveal more clearly what case each party is making. They act as a measure for comparing the evidence of a party with which he has pleaded. They determine the range of admissible evidence which the parties should be prepared to adduce at the trial...”

69. Apart from impreciseness in the pleading, there was the question of the pleading not being consistent with the claim that the 2nd Petitioner is presently pursuing. The 2nd Petitioner claims he is an internally displaced person. That is a proposition that he was required to prove to the required standard. The preamble to the Prevention, Protection and Assistance of Internally Displaced Persons and Affected Communities Act states as follows :

‘An Act of Parliament to make provision for the prevention, protection and provision of assistance to internally displaced persons and affected communities and give effect to the Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons, and the United Nations Guiding Principles on Internal Displacement and for connected purposes.’

70. Under the Act an IDP is defined under Section 2 of the Act as:

‘a person or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, large scale development projects, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border’.

71. Under Section 11(5) of the Act, the Government bears the primary duty and responsibility to:

- a. designate, where necessary, official areas for the settlement of internally displaced persons in the Republic;
- b. facilitate the administration of settlement areas for internally displaced persons;
- c. ensure adequate provision of basic social and health services in areas inhabited by internally displaced persons;
- d. ensure, where necessary, the maintenance of public order, public security, and public health in areas inhabited by internally displaced persons;
- e. safeguard and maintain the civilian and humanitarian character of settlements; and
- f. ensure adequate provision of the social economic rights specified in Article 43 - of *the Constitution*.

72. Further, Section 12(1) establishes the National Consultative Coordination Committee on Internally Displaced Persons and assigns it various functions under Section 13, which include:

- (d) ensure the registration of all internally displaced persons in order to maintain a national database of such persons which registration shall—
 - i. commence and conclude within thirty days of the occurrence of internal displacement;
 - (ii) be declared by the Cabinet Secretary through the issuance of a Gazette notice;



- (iii) be only for reasons of ascertaining the identification, profile, conditions, and numbers of internally displaced persons for the sole purpose of protection and assistance in accordance with Article 3(4) of the Protocol.

73. Additionally, the Act at Section 15 (1) establishes a Fund whose key purpose is as follows:

The Fund shall be used for meeting the capital and recurrent expenditure relating to—

- a) the protection and assistance to internally displaced persons and the provision of a durable solution to them as provided for in sections 9 and 10 of this Act including—
 - (i) their former homes or alternative settlement sites;
 - (ii) the replacement of their basic household effects;
 - (iii) enabling them to re-start their basic livelihood;
 - (iv) the reconstruction of destroyed basic housing and rehabilitation of community utilities and institutions;
- b) the prevention of internal displacement through preventive measures, including—
 - (i) the establishment of the preventive mechanism as provided for in section 5(4) of this Act;
 - (ii) public awareness campaigns, sensitization, training and education on the causes, impact and consequences of internal displacement as provided for in sections 6(3) and 18 - 21 of this Act;
- c. assisting in the operations of the Committee and non-State actors' programmes in accordance with subsection (3);
- d. any other matter incidental to the matters stated in paragraphs (a), (b) and (c).

74. To fall within the category of an internally displaced person, it was incumbent upon the 2nd Petitioner to provide proof of registration by the National Consultative Committee on Internally Displaced Persons as an IDP to be able to access assistance or benefits under the Act. The Petitioner has not provided evidence of registration or recognition as an IDP by the Committee or given any evidence that proves that he has sought that registration and the results of such application.

75. Discussing a similar matter in *Joseph Kibiwot Melly, Betty Jerotich Bargoiyet, Sammy Limo, Joseph Kipkoceh Kirui, Elias Kiptoo Ruto, Susan Njeri Kathege, Susan Waithera, Lydia Moraa, Peter Mpgendi Maranga, James Oyagi Ouro, Hellen Bochaberi, Samuel Kirwa, Andrew Karemi Kingori, Edward Kamau Karanja & Florence Wangoi Kiarie vs Ministry of Interior and Coordination of National Government, Attorney General, County Commissioner Nandi County, County Coordinator, Nandi County Integrated IDPS Programme & Equity Bank, Kapsabet Branch* [2018] KEHC 2382 (KLR), the Court observed as follows:

“I have gone through the supporting affidavit of Joseph Kibiwott Melly and save for stating that he is one of the representative of internally displaced persons from Nandi County, he does not bring the petitioners within the legal definition of who an internally displaced



person is. The petitioners may have been affected by the 2007-2008 post-election violence, but the question is, did they flee or leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effect of armed conflict? It is easy for anyone to regard himself as an IDP but whoever does so has an obligation to bring himself within the legal definition of it in order to make a legal claim as such. In this application, the petitioners have not done so.

Section 12 establishes National Consultative Coordination Committee on internally Displaced persons. Under Section 13, the functions of the committee include:-

(d)ensure the registration of all internally displaced persons in order to maintain a national data-base of such persons which registration shall commence and conclude within thirty days of the occurrence of internal displacement.

Part (iii) shows the said register is only for reasons of ascertaining the identification, profile, conditions and numbers of internally displaced persons for the sole purpose of protection and assistance in accordance with Article 3(4) of the protocol;

The petitioners’ problems if they are genuine IDPs arises out of failure to register them as such. They themselves are not mandated by law or by anyone to declare who is a genuine IDP and who is not. Their problem cannot be cured by stopping payment and assistance of the already identified IDPs, but by their inclusion in the register.

The committee mandated with such function is National Consultative Co-ordination Committee on Internally Displaced Persons. The petitioners herein lost it when they sued every government body or organization which had something to do with IDPs. They even overstretched by seeking leave to issue third party notice to an organization like Equity Bank. They should simply have brought the petition against the committee, seeking their recognition and registration as IDPs.”

76. Additionally, the 2nd Petitioner claimed in his submissions that he was allocated land as an IDP but the same was forcefully taken away in violation of his right to property under Article 40 of *the Constitution*. It was argued that the 2nd Petitioner’s economic and social right under Article 43 of *the Constitution* was thus violated.
77. That particular allegation is not pleaded anywhere in the Petition, and only came out by way of submissions. Submissions in themselves are not evidence. Further, there was no evidence of allocation of any particular piece of land that he now claims is being dispossessed of.
78. In view of the foregoing considerations, I do find that this Petition lacks merit and is hereby dismissed.
79. It is however my considered view that each party shall bears its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 6TH DAY OF DECEMBER, 2024.

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L N MUGAMBI
JUDGE

