



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC PETITION NO. 26 OF 2020

PETER MUSYOKA MUNYILU,

VINCENT WESONGA ASHIRA &

STELLA NYAWIRA WANG'OMBE,

(SUING ON THEIR OWN BEHALF

AND ON BEHALF OF GUIDELINES ON

DEVELOPMENT-BASED EVICTIONS AND

DISPLACEMENT.....PETITIONERS

=VERSUS=

THE DIRECTOR GENERAL, NAIROBI

METROPOLITAN SERVICES.....1ST RESPONDENT

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

THE ATTORNEY GENERAL.....3RD RESPONDENT

THE CABINET SECRETARY, MINISTRY OF INTERIOR

AND COORDINATION OF NATIONAL GOVERNMENT.....4TH RESPONDENT

JUDGMENT

INTRODUCTION

1. The Judgment herein is in respect of a Petition dated the 28th July 2020, filed by the Petitioners wherein same have sought for the following Reliefs:

i. A Declaration that the Respondents actions violates Articles 2,10,20,21,24,28,29,43,47,53 and 73 of the Constitution of Kenya,2010, thus null and void.

ii. A Declaration that the Respondents actions have violated Sections 3,4 and 5 of the Fair Administrative Actions Act, Section 152G of the Land Act and Urban Housing Renewal and Regeneration Policy 2018 of the 2nd Respondent and Part III to V of the United Nations Basic Principles and Guidelines on development-based evictions and displacement thus illegal.

iii. That a Permanent Injunction do issue restraining the Respondents, their servants, their agents from further development on land housing Gorofani estate phase 1.

iv. A Restorative injunction be issued to compel the Respondents, their servants, their agents to rebuild and/or reconstruct the houses demolished and cause the Petitioners to re-occupy the same.

v. An order that Pending the restoration of the premises, the Respondents do provide an alternative decanting shelters to the Petitioners.

vi. An order for General Damages for violation of the Petitioners' fundamental rights.

vii. An order that any future development of the land housing Gorofani estate will be carried out in accordance with the Constitution, the law and the Urban Housing Renewal and Regeneration Policy 2018 of the 2nd Respondent.

viii. Any other Relief that the Honorable Court may deem fit and just to grant.

2. The Petition herein is premised on the various grounds contained in the body thereon and same is further supported by the Affidavit of Peter Musyoka Munyilu, sworn on the 20th July 2020, and to which the deponent has attached a total of five (5) annexures, *albeit* containing volumes of Documents running from pages 208 to 374 respectively.

3. Upon being served with the Petition, the 1st, 3rd and 4th Respondents duly entered appearance and thereafter filed a Replying affidavit sworn on the 26th October 2020, which was sworn by one Mr. Kang'ethe Thuku, who avers that same is the Deputy Director General and by extension the Accounting Officer of Nairobi Metropolitan Services.

4. Consequently, the Deponent has further stated that same is conversant with and/ or knowledgeable of the facts of the Subject matter. At any rate, the Deponent has also stated that facts herein, are within his Knowledge.

5. Upon being served with the Replying affidavit by and/or on behalf of the 1st, 3rd and 4th Respondent, the Petitioners herein sought for and obtained Leave of the court to file a Further Affidavit and same was duly filed.

6. For clarity, the Further Affidavit, responded to the various albeit, new Issues that were captured and contained in the Replying Affidavit of Kangethe Thuku, sworn on the 26th October 2020.

EVIDENCE BY THE PARTIES

DEPOSITION BY THE PETITIONERS

7. Vide the Supporting Affidavit and Further Supporting Affidavit respectively, one Peter Musyoka Munyilu, has averred as follows;

8. The Petitioners herein and the persons on whose behalf the Petition has been filed, are said to have been tenants residing in the premises known as, Gorofani Phase One Estate, belonging to and owned by the 2nd Respondent.

9. It was further averred that during the period of occupancy in the premises, the Petitioners and the persons represented by the Petitioners, who were tenants of the 2nd Respondent, duly and continually paid rents to the 2nd Respondent.

10. Owing to the foregoing, it was further averred that the Petitioners and the persons represented by the petitioners, were therefore not in default in payments of Rents and neither were same in Rent arrears.

11. Nevertheless, it was further averred that even if there were instances of none payment of Rents, which was denied, the 2nd Respondent is knowledgeable of means and/or avenues for Recovery of Rent arrears.

12. It was further averred that on the 25th June 2020, the houses that were occupied by the Petitioners and the persons represented by the Petitioners, were torched and/or otherwise razed down by fire, which left the Petitioners and the other Co- tenants without shelter and/ or housing.

13. It was further averred that on the 26th June 2020, the 1st Respondent herein dispatched bulldozers to the houses of the petitioners herein and same demolished the remnants of the houses, which had been gutted and/ or burnt down by fire.

14. On the other hand, it was further averred that after the demolition of the remnants of the houses that had been gutted down by fire, the Respondents herein proceeded to and commenced to fence the portion of land, wherein the petitioners' houses, were previously located and as a result of the fencing, the Petitioners and the Co- tenants, were therefore forcibly evicted from their homes.

15. Further, the deponent of the affidavit contends that the demolition of the remnants of the houses that had been gutted down by fire and the consequential eviction of the Petitioners and Co- tenants, from the premises, were carried out and/ or undertaken, without consultation, approval and/or without any Notice at all.

16. Owing to the foregoing, the deponent to the Supporting affidavit has therefore averred that the Eviction of the Petitioners and the Co- tenants, which were carried out without Notice, were therefore in breach of the provisions of the law and in particular, the Provisions of **Section 152 G of the Land Act, 2012 (2016)**.

17. On the other hand, the deponent of the Affidavit has further averred that the forced eviction, which were carried out and/or undertaken *albeit* without Notice and which were similarly, undertaken during the peak of Covid -19 pandemic, therefore exposed the Petitioners and

Co- tenants, to the risk of contracting covid 19 disease.

18. It was further averred that the manner in which the eviction were carried out, also violates the Rights to privacy and also subjected the Petitioners and Co- tenants, to cruel and inhumane treatment, contrary to and in violation of the Provisions of **Article 28 of the Constitution 2010**.

19. Besides, the deponent has further averred that as a result of the manner in which same, namely, the Petitioners and the Co- tenants were evicted, same were therefore subjected to and have, thus suffered psychological and physical torture, at the instance of the uncaring Respondents.

20. Owing to the foregoing, the Petitioners herein and the Co- tenants, have therefore approached this court and are seeking the intervention of the court, to namely, sanction the Respondents and to protect their Rights to accessible and affordable Housing and also to compel the Respondents, to avail alternative accommodation during the restoration of the Premises.

21. On the other hand, the Petitioners and the Co- tenants have also sought for an order for payment for General Damages for violation of their Fundamental Freedoms and Rights as enshrined in the **Constitution, 2010**.

DEPOSITION BY 1ST, 3RD & 4TH RESPONDENT

22. Vide Replying Affidavit sworn on the 26th October 2020, one Kang'ethe Thuku, has responded to the allegations by the Petitioners and same has stated as hereunder;

23. First and foremost, the deponent has confirmed that the suit property on which the premises, known as *Gikomba Gorofani Estate*, was situate belonged to and/or is owned by Nairobi city County Government. In this regard, the deponent has underscored the fact that the suit property was therefore Public Land.

24. The deponent has further averred that the Petitioners herein and the persons represented by the petitioners, were indeed tenants in the suit premises belonging to Nairobi City County Government and same were therefore obliged to pay Rents to Nairobi City County Government, namely, the 2nd Respondent, herein.

25. Nevertheless, the deponent has further averred that despite being tenants of Nairobi City County Government, the Petitioners and the persons represented by them, had defaulted in Rent payments and were thus in Substantial Rent Arrears.

26. Be that as it may, the deponent has averred that on the 25th June 2020, the suit premises namely, *Gikomba Gorofani Estate, Phase 1*, were gutted down by fire and the entire premises were rendered inhabitable.

27. It is further averred by the deponent to the Replying Affidavit that upon the occurrence of the fire incidence, the 1st and 2nd Respondents herein, commenced investigations with a view to ascertaining and/ or authenticating the cause of the fire and it was found that the fire commenced and/or originated from the Fish mongers place.

28. However, the deponent has further averred that for purposes of complete and conclusive investigations, the incidence was referred to the Police, but up to and including the time of filing the Replying Affidavit, the Investigations had not been concluded.

29. Notwithstanding the foregoing, the deponent of the Replying Affidavit, has further averred that following the fire incidence, the 1st and 2nd Respondents, mobilized their bulldozers and thereby proceeded to the Site for purposes of the removal of the remnants of houses that have been destroyed by fire and the resultant Debris, which had remained littering the *Locus in Quo*, of the fire.

30. It is further averred by the deponent that during the exercise of the demolition of the remnants of the Houses, that had been gutted down by fire and the litters that had remained on the scene, the Petitioners and the persons represented by same, were involved and were in any event, each paid the sum of kes.10, 000/= only for the exercise.

31. It was further averred that after the demolition of remnants of the houses that have been gutted down by fire, it became necessary to fence the portion of land, where the burnt houses were standing, to protect and safe guard, the Land from encroachment and grabbing.

32. Be that as it may, the deponent has further averred that the fencing of the portion of land, wherein the houses previously, stood did not amount to forcible eviction of the Petitioners and the persons represented by the Petitioners, in the manner alleged in the Petition.

33. Suffice it to say, that the deponent has averred and maintained that by the time of fencing the scene of the fire incidence, the Petitioners and the persons represented by them, were no longer in occupation of the houses, insofar as same had been burnt down and completely, destroyed by the Fire.

34. Owing to the foregoing, it is therefore the deponent's position that it was not possible to issue and serve the Petitioners and the Persons represented by same with any Eviction Notices or at all.

35. Simply put, the said Respondents have averred that the Petitioners and the persons represented by same, were never Evicted from the premises, save for the misfortune of fire, that destroyed the premises and thus rendered the Petitioners and the Co-Tenants, homeless.

36. Finally, the deponent has also averred that the Petitioners herein do not have the *Locus Standi* (*Legal Capacity*) to commence, originate and/or maintain the subject Petition. In this regard the Respondents have implored the Court to strike out the Petition.

DEPOSITION BY THE 2ND RESPONDENT

37. The 2nd Respondent herein also entered appearance and filed a Replying Affidavit whereby same substantially repeated the averments by and/or on behalf of the 1st, 3rd and 4th Respondent herein.

38. Suffice it to say, that the 2nd Respondent averred that the Petitioners herein and the persons represented by same, were never Evicted from the suit property as alleged or at all.

39. To the contrary, it has been averred that the Petitioners and the persons represented by same, suffered the misfortune of fire that gutted and/ or razed down the houses, which were owned by the 2nd Respondent, albeit, rented to and in favor of the Petitioners and the persons represented by same.

40. In a nutshell, the 2nd Respondent as well as the 1st, 3rd and 4th Respondents, opposed the Petition and implored the Court to Dismiss the Petition.

SUBMISSIONS

41. On the 29th September 2020, the subject matter came up for mention before the court for purposes of Directions on the hearing and disposal of the Application dated 20th July 2020, whereupon counsel for the Petitioner informed the court that same was keen to withdraw the Application and thereafter proceed with the Petition.

42. Pursuant to and in line with the request by the counsel for the Petitioners, the Honourable court proceeded to and endorsed an order whereby the subject Application, namely, the Application dated the 20th July 2020, was *marked as withdrawn*.

43. On the other hand, the parties thereafter agreed to canvass the Petition, on the basis of Affidavit Evidence and to file and exchange written submissions, on the same.

44. Following the consent order, which was endorsed on the 29th September 2020, the Parties herein proceeded to and filed their respective Submissions as hereunder;

i. Petitioners submissions were filed 14th October 2020,

ii. 1st, 3rd and 4th filed written submission on the 5th January 2021.

iii. 2nd Respondent did not file written submissions.

45. It is important to point out that the Submissions filed by and/or on behalf of the Parties herein are on record and same have been duly considered and shall be applied appropriately towards Disposal of the subject Petition.

ISSUES FOR DETERMINATION

46. Having reviewed the Petition herein, the Affidavit and Further Affidavit in support thereof, as well as the Responses filed by and/or on behalf of the Respondents, and having similarly appraised the elaborate submissions filed by the Petitioners on one hand and the 1st and 3rd Respondents, on the other hand, *the issues that arise for determination are as hereunder:*

i. Whether the Petitioners herein have the requisite locus standi to commence, originate the subject Petition.

ii. Whether the petitioners were evicted from the suit premises and if so whether the Petitioners were issued and served with the requisite Notices.

iii. Whether the Petitioners' Fundamental Freedoms and Rights were violated

iv. Whether the Petitioners have established a basis for the grant of the Reliefs sought.

ISSUE NUMBER 1

Whether the Petitioners herein have the requisite Locus Standi to commence, originate and maintain the subject Petition.

47. The Respondents herein have contended that the Petitioners are not seized of the requisite locus standi to commence and/or maintain the subject Petition, on their own behalf and on behalf of the persons represented by same. In this regard, the Respondents have therefore sought to have the Petition struck out.

48. Nevertheless, it is common ground that the Petitioners and the persons represented by same, were indeed occupants of the premises, otherwise referred to as Gikomba Gorofani Phase 1, which were the premises that was gutted down by fire.

49. On the other hand, it has been conceded by the Respondents that indeed the Petitioners and the persons represented by same, were actually Tenants of the 2nd Respondent, though there is an issue as to whether same were paying Rents or had accumulated Rents arrears in favor of the 2nd Respondent.

50. Either way, the Petitioners herein have contended that same have duly and continually paid Rents to and in favor of the 2nd Respondent and in any event, if there was any Rent arrears, then there is an established avenue and mechanism for Recovery of same.

51. Nevertheless, despite the exchanges between the Parties herein as to whether Rents were duly and continually paid, or whether same were in arrears, I must point out that what is before me is not a claim for Levying of Distress on account of none payment of Rents under the provision of the **Distress for Rent Act, Chapter 296 Laws of Kenya**, or a claim for Recovery of vacant possession against a Defaulting Tenant.

52. Be that as it may, the critical point to determine, is whether or not the Petitioners, have Legal capacity to approach this honourable court by way of a constitutional Petition, on their behalf and on behalf of Co- tenants, in the premises that were gutted down by fire.

53. In my humble view, having been lawful Tenants in the Gikomba Gorofani Phace 1 premises, which were gutted down by fire, if there is a Fundamental Right(s), which have been violated, infringed upon and/or otherwise threatened with violation, then the Petitioners herein have Legal right to approach this honourable court in the manner they have done.

54. Similarly, it is important to note that the Petitioners can also be able to file and/or mount the subject Petition, not only on their own behalf, but also on behalf of the Co-Tenants, being persons, who also had, similar interests and/or rights over the said property.

55. In support of the foregoing position, one does not need to look far and/or into the horizon, but it suffices to invoke the Provisions of **Articles 22 and 258 of the Constitution 2010**, which provides as hereunder;

22. Enforcement of Bill of Rights

(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

(3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—

(a) the rights of standing provided for in clause (2) are fully facilitated;

(b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the

court shall, if necessary, entertain proceedings on the basis of informal documentation;

(c) no fee may be charged for commencing the proceedings;

(d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and

(e) an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court.

(4) The absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by a court.

258. Enforcement of this Constitution

(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

56. In any event, the issue as to whether a person or a cluster of persons possess the locus standi, to be able to bring forth and/or otherwise commence a constitutional Petition, has received judicial pronouncements, and the scope thereof is now well beaten, nay, delineated.

57. In support of the foregoing observation, I adopt and restate the position of the Law as enunciated in the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR**, where a Five-judge bench of the Court of Appeal observed as hereunder;

(28) It still remains to reiterate that the landscape of Locus standi has been fundamentally transformed by the enactment of the Constitution in 2010 by the people themselves. In our view, the hitherto stringent locus standi requirements of consent of the Attorney General or demonstration of some special interest by a private citizen seeking to enforce a public right have been buried in the annals of history. Today, by dint of Articles 22 and 258 of the Constitution, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest. Pursuant to Article 22 (3) aforesaid, the Chief Justice has made rules contained in Legal Notice No. 117 of 28th June 2013 – The Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013—which, in view of its long title, we take the liberty to baptize, the “Mutunga Rules”, to inter alia, facilitate the application of the right of standing. Like Article 48, the overriding objective of those rules is to facilitate access to justice for all persons. The rules also reiterate that any person other than a person whose right or fundamental freedom under the Constitution is allegedly denied, violated or infringed or threatened has a right of standing and can institute proceedings as envisaged under Articles 22 (2) and 258 of the Constitution.

(29) It may therefore now be taken as well established that where a legal wrong or injury is caused or threatened to a person or to a determinate class of persons by reason of violation of any constitutional or legal right, or any burden is imposed in contravention of any constitutional or legal provision, or without authority of law, and such person or determinate class of persons is, by reason of poverty, helplessness, disability or socio-economic disadvantage, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Articles 22 and 258 of the Constitution.

(30) It is our consideration that in filing the petition the 1st respondent was acting not only on behalf of its members and in accordance with its stated mandate, but also in the public interest, in view of the nature of the matter at hand. The 1st respondent, its members and the general public were entitled to participate in the proceedings relating to the decision-making process culminating in the impugned decision.

(31) However, we must hasten to make it clear that the person who moves the court for judicial redress in cases of this kind must be acting bona fide with a view to vindicating the cause of justice. Where a person acts for personal gain or private profit or out of political motivation or other oblique consideration, the Court should not allow itself to be seized at the instance of such person and must reject their application at the threshold. The time is now propitious at this stage of our constitutional development where we can state as was stated by the Supreme Court of India in the case of S.P. Gupta v President of India & Others AIR [1982] SC 149 that:

58. The Petitioners herein and the persons represented by same, having been occupants, residents and by extension Tenants of the 2nd Respondent in the premises that were gutted down by fire, same therefore had a Common interest in the subject matter and were therefore at liberty to approach the court for the determination of any issue in dispute, either personally or through persons representing their interest.

59. In a nutshell, I find and hold that the Petitioners herein have and/ or are seized of the locus standi to commence and maintain the subject Petition herein.

ISSUE NUMBER 2

Whether the petitioners were Evicted from the suit premises and if so, whether the Petitioners were issued and served with the requisite Notices.

60. It is common ground that the premises, otherwise known as Gikomba Gorofani phase 1, which were previously being occupied by the Petitioners and the persons represented by the Petitioners, were gutted down by fire on the 25th June 2020.

61. It is also not in contest that the cause of the fire, which razed down the premises, has not been authenticated and/or established.

Nevertheless, suffice it to say that the cause of the fire, is still the subject to investigations by the Relevant Authorities, and the report thereto, has not been disseminated and/or disclosed.

62. Notwithstanding the foregoing, it is also agreed that upon the outbreak of the fire, whose cause had not been authenticated, the premises which were previously occupied by the petitioners and the persons represented by same, were completely destroyed and rendered inhabitable.

63. In the premises, it is a common fact that the Petitioners and the persons they represent, were therefore left without shelter and/or Housing. For clarity, the Petitioners would want all and sundry, to take it that they were left without homes.

64. Be that as it may, the point that cannot be the subject of debate is that by the 25th June 2020, the houses which were previously occupied by the Petitioners and the persons represented by same, were fully razed down by the fire and therefore nothing had remained, wherefrom the Petitioners and the persons they represent could be Evicted from.

65. In any event, on the 26th June 2020, when the Respondent brought bulldozers to the scene of the fire, what remained thereon were remnants of the houses, which had previously been occupied by the Petitioners and the persons whom they represent.

66. Certainly, the remnants could not be treated as houses from which Eviction could arise and/ or ensue.

67. On the other hand, it has also been contended by the Petitioners that after the demolition of the remnants that had been burnt down, as well as the Removal of the resultant Debris, the Respondents, fenced off the Site and in this regard, it is contended that the fencing off amounted and/ or constituted Forcible Eviction.

68. On their part, the Respondents have averred that the Fencing of the Site, after the demolition of the remnants of the Houses, was necessary to protect the Land from encroachment and/or land grabbing.

69. Certainly, the reason of the fencing of the Site cannot be overemphasized. It is well documented that there are a class of Kenyans, who will stop at nothing, in order to acquire and obtain title over any portion of land that is deemed undeveloped, whether it be private or public land.

70. In my humble view, the portion of land where Gikomba Gorofani Phase 1 premises, had been gutted down by fire, could not be allergic to land grabbing and generation of illegal titles, by a class of Kenyan's, who have insatiable thirst for land.

71. Consequently, I find and hold, that the reason offered for the Fencing of the portion of land, where the burnt down premises were located, is wholly convincing and was indeed, done to avert encroachment and land grabbing.

72. To the contrary, the Petitioners and the persons they represent stood removed from the suit premises by *Force majeure* and same therefore ceased to be in occupation over in respect of the suit premises.

73. In my humble view, the suit premises having been razed down and the Petitioners and the persons whom they Represent, having lost shelter (*read houses*), same could not therefore be Evicted from non-existent houses and/or premises.

74. In my humble view, the circumstances as pertains to the subject matter, are such that the provisions of **Section of 152 G of the Land Act, 2012 (2016)**, were therefore inapplicable, nay, irrelevant.

75. For the avoidance of doubt, the provisions of **Section 152 G of the Land Act 2012 (2016)** provides as hereunder;

152G. (1) Notwithstanding any provisions to the contrary in this Act or in any other written law, all evictions shall be carried out in strict accordance with the following procedures-

(a) be preceded by the proper identification of those taking part in the eviction or demolitions;

(b) be preceded by the presentation of the formal authorizations for the action;

(c) where groups of people are involved, government officials or their representatives to be present.

(d) be carried out in a manner that respects the dignity, right to life and security of those affected;

(e) include special measures to ensure effective protection to groups and people who are vulnerable such as women, children, the elderly, and persons with disabilities and include special measures to ensure that there is no arbitrary deprivation of property or possessions as a result of the eviction;

(g) include mechanisms to protect property and possessions left behind involuntarily from destruction;

(h) respect the principles of necessity and proportionality during the use of force; and

(i) give the affected persons the first priority to demolish and salvage their property.

(2) The Cabinet Secretary shall prescribe regulations to give effect to this section.

76. On the other hand, I wish to point out that circumstance obtaining in respect of the subject matter are also separate and distinct from the circumstance that were dealt with and addressed by the court in the case of **Moi Educational Centre Company Limited v William Musembi & 16 Others (2017) eKLR**, where the honourable court observed as hereunder;

“The preponderant view expressed by the High Court in those decisions, correctly in our view, is that notwithstanding that squatters may not have title over the property they occupy they are entitled to be treated with dignity. Lenaola, J (as he then was) articulated the argument by positing that “it does not matter that the petitioners do not hold title to the suit premises and even if they had been occupying shanties, the 1st respondent was duty bound to respect their right to adequate housing as well as their right to dignity.”

77. Similarly, the subject matter herein is also markedly different from the case in **Mitu-Bell Welfare Society v Attorney General & 2 others[2013] eKLR**, where the court observed as hereunder;

“ The court recognises that there may be instances when eviction of people may be necessary, and that considerations of national security may be one reason for such evictions. It is, however, recognised that even in such instances, there is a need to follow due process: that those to be affected should be given notice, and that there should be consultation and participation of those to be affected by the removal process”.

78. For the avoidance of doubt, in respect of the subject matter the premises which were previously occupied by the Petitioners and the persons they represent had been burnt down and same had thus been destroyed beyond redemption by *force majeure*.

79. In the premises, there would be no need to issue Notices to and engage the Petitioners that they were to be evicted, yet they had ceased to be in occupation of the suit premises and which Premises, had become *non-existent*.

ISSUE NUMBER 3

Whether the Petitioners fundamental rights were violated

80. The Petitioners herein have contended that their constitutional and fundamental rights have been violated, breached and/or infringed upon by the Respondents.

81. However, the Petitioners herein do not appear to have articulated what Rights, if any, has been violated and/or infringed upon. Certainly, after the premises had been gutted down and rendered non-existent by the offensive fire, the Petitioners and the Persons represented by same, ceased to be Tenants of the 2ND Respondent.

82. Be that as it may, I must point out that up to and including the time when the premises which were occupied by the Petitioners were burnt down, the Petitioners and the Co- tenants had Fundamental Rights, to occupy and reside in the premises, for as long as same were paying the Rents to the 2nd Respondent.

83. On the other hand, even if the Petitioners and the Co- tenants, were not paying Rents, which is not the issue before me, neither the 2nd Respondent nor the rest of the Respondents, could levy Eviction without compliance with the provisions of **Section 152 E & G of the Land Act**.

84. For clarity, during the subsistence of the premises, which were burnt down by the fire, the Petitioners and the Co- Tenants had a right to tenancy, accessible and adequate housing and shelter, which could not be disturbed, without Due regard to the law.

85. Nevertheless ,*ex- post* the fire, the Petitioners and the Co- Tenants Rights to occupy and/ or reside in the premises, ceased to exist and thus, it cannot be said that same had any Fundamental Rights to and in respect of the Destroyed premises.

86. In my humble view, unless the Petitioners and the Co- tenants are alleging that the Respondents were responsible for the fire, I do not see how the Respondents herein or any one of them, has breached and/or violated the Petitioners Rights under the Constitution, 2010.

87. At any rate, I have perused the entire Constitution, 2010, and I have not come across what Right of the Petitioners has been violated, and if so, by whom and in what manner. For clarity, this are issues that must be expressly pleaded, particularized and thereafter proved.

88. Unfortunately, the Petitioners herein have skirted round the issues and have failed to delineate, if any, what Rights same would be having in respect of the premises, once the landlord- tenancy relationship that underlined their occupancy of the premises, ceased to exist.

89. In support of the foregoing legal position, I can do no better than to invoke and rely in the Decision in the case **Moi Education Centre Co. Ltd v William Musembi & 16 others [2017] eKLR**, where the court observed as hereunder;

Under rule 10 of the Mutunga Rules, a petition should contain, among other things, the facts relied upon, the provisions violated, the nature of injury complained of and the reliefs sought.

ISSUE NUMBER 4

Whether the Petitioners have established a basis for the grant of the Reliefs sought.

90. The Petitioners herein have sought for various reliefs anchored at the foot of the Petition, including Declarations and orders for Injunction. Besides, the Petitioners have also sought for provision of alternative accommodation and/or shelters pending the restoration of the Premises.

91. As concerns the Declaratory orders sought, I have found and held that the burning of the suit premises, namely, *Gikomba Gorofani Phase 1*, wherein the petitioners were tenants, was no orchestrated by the Respondents and any one of them.

92. For clarity, the Petitioners have themselves conceded at paragraph 7 of the Supporting affidavit that the causation of the fire and the persons responsible, if any, has not been established or authenticated.

93. In the premises, the circumstances that brought to an end the Petitioners' occupation of the suit premises, wherein they were previously tenants, cannot be attributed to the Respondents. Consequently, the Declaratory orders sought are misconceived.

94. In respect of the prayer for Permanent Injunction to restraining the Respondents and/or their agents from undertaking developments and/or further developments on the land wherein the burnt down premises were located, I am afraid that no such order can issue and/or be granted.

95. Suffice it to say, that the land in question is public land and the Respondent and more particularly the 2nd Respondent, who holds the land on behalf of the residents of the City County of Nairobi, are mandated to develop the land in the interests of the general public and for the betterment and livelihood of the People of Nairobi, the Petitioners not *expected*.

96. At any rate, to the extent that the suit property is public land, that inheres in the name of the 2nd Respondent, same is therefore the Proprietor thereof. Consequently, same is obliged to undertake the necessary developments thereon.

97. In my humble view, an order for Permanent Injunction in the manner sought, cannot issue against owner and/or legitimate proprietor, unless there has been established and/ or proved an Exceptional and peculiar circumstance, which would necessitate the issuance of such an Order.

98. However, in respect of the subject matter no Exceptional and peculiar circumstance(s), has been pleaded, established and/or proven, whatsoever.

99. In support of the foregoing legal pronouncement, I rely in and restate the position propounded in the Decision in the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR**, where the Court of Appeal observed as hereunder;

“It must also be remembered that it is a serious thing to restrain a registered proprietor of a property over what is undeniably his unless there are justifiable grounds to do so”.

100. As concerns the claim for Provision of alternative accommodation and/ or what is called decanting shelters to and in favor of the Petitioners, it must not to be forgotten that the Petitioners were occupying the premises belonging to the 2nd Respondent, as tenants, for which they were paying Rents.

101. In the premises, the Relationship that existed between the Petitioners and the 2nd Respondent was one of the Landlord and tenant .For clarity, Same lasted for as long as the premises were in existence.

102. However, upon the fire outbreak, the premises were destroyed beyond redemption and thereby same ceased to exist. Consequently, the relationship between the Petitioners and the Respondent was extinguished.

103. I am not aware of any law where a Landlord, whose premises have been destroyed by *force majeure*, like in the instant case, is obliged to provide accommodation for the Tenants or better still, the previous Tenants of the destroyed premises.

104. In any event, no such law was pointed out to me and I harbor doubts, as to if any such laws exist, and whether the Respondents herein or any of them, has any Budgetary allocation to attend to a claim in the nature propagated by the Petitioners.

FINAL DISPOSITION

105. First and foremost, I must say that am alive to the transformative nature of the constitution 2010, but despite its unique and transformative position, Petitioners are still enjoined to prove their claims before the Honourable Court.

106. At any rate, the transformative constitution 2010, is Vineyard for all and sundry to walk in and pluck ripe Fruits ready to eat, without, any Sweat. Surely, One must lay a basis, for whatever claim that is being placed before the Court and thereafter, endeavor to prove same.

107. In my humble view, the Petition dated 20th July 2020, has not been proved.

108. Consequently, the order that endears itself to me is one for *Dismissal*.

109. In a nutshell, the Petition by the Petitioners be and is hereby Dismissed, *albeit* with no orders to costs.

110. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF DECEMBER 2021.

HON. JUSTICE OGUTTU MBOYA

JUDGE

ENVIROMENT AND LAND COURT.

MILIMANI.

In the Presence of;

June Nafula Court Assistant