



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KAKAMEGA
ELC PETITION CASE NO. 2 OF 2019

FREDRICK MANOAH EGUNZA

DOMINIZU ABASI CHETUNGA

AVEDI VUTITA

SHADRACK KADUKA

DR. ISSACC LIVUMBADZI

PATRICL LUMUMBA ONGUGU

MICHAEL EGUNZA

JOHNSTONE MUHAVI

SAIDI KIDAMBASI ALUSA

SHEM ANYONGE

WILSON OGADA KEA..... PETITIONERS

VERSUS

THE COUNTY GOVERNMENT OF VIHIGA

THE LAND REGISTRAR VIHIGA

THE NATIONAL LAND COMMISSION

THE COUNTY POLICE COMMANDER VIHIGA

THE COUNTY PRISON COMMANDER

THE COUNTY TEACHING AND REFERAL HOSPITAL VIHIGA

THE HON ATTORNEY GENERAL.....RESPONDENTS

JUDGEMENT

The petitioners aver that they are the registered and beneficial owners of free-hold title to land as per their annexed schedule which properties secured by sanctity of title, was home, ancestral home and thereon lived with the petitioner families since time immemorial, only to be atrocified out due to actions of the respondents. The petitioners further avers to have utilized the parcel of land as per the schedule attached for agricultural cultivation both commercial and subsistence and permanent homesteads for the petitioners families both nuclear and extended in accordance with Maragoli traditions and customs. The petitioners also aver that they created permanent homesteads on the

parcels of land, buried relatives, on the said parcels of land, thus attach sentimental, spiritual and ancestral values thereon. On diverse dates in the year 1985, in the absence and without written notice the 1st to the 7th respondents through their agents forcefully evicted the petitioners from the parcels of land to pave way for the creation and eventual creation of present day Vihiga County Headquarters, Vihiga County and Referral Hospital, Vihiga Main Prison, Mbale Police Station, Regional headquarters and amenities thereto purportedly created the said infrastructure on the petitioners parcels of land and pulled down all the petitioners homes, desecrated burial and graves sites, exhumed remains of dead relatives of the petitioners to the extreme detriment, loss and damage of the petitioners. Suffice to state that to date the respective titles to the parcels of land belonging to the petitioners have not been revoked, cancelled and/or declared invalid through any legal means and it is therefore imperative that the 1st to the 7th respondents' occupation, creation of County headquarters and amenities thereto has no legal basis consequently null and void ab initio. Notwithstanding the provision of repealed section 75 of the constitution of Kenya, Article 40 of the Constitution of Kenya 2010 provides thus;

40 (1). Subject to Article 65, every person has the right either individually or in association with others to acquire own property:-

(a) Of any description

(b) In any part of Kenya

(2) Parliament shall not enact a law that permits the state or any person:-

(a) to arbitrarily deprive a person of any property of any description or

any interest in or any property of any description, or

(b) To limit or in any way restrict the enjoyment of any rights under this article on the basis of any of the grounds specified or contemplated in Article 27 (4)

(3) The state shall not deprive a person of property of any description or of any interest in or right over property of any description, unless the deprivation.

The petitioners state that upon forceful eviction from the parcel of land, the petitioners were given pieces of paper with numbers thereon put into government lorries with the petitioner's movable earthly belonging and taken to the edge of the Kakamega Forest Reserve. The petitions further states that a forceful occupation exercise was conducted wherein the petitioners were allocated un-surveyed portions of the Kakamega Forest Reserve under the supervision of the then provincial administration, as per size of family with absolutely no regard for previously owned portions of land forcing each petitioners family to clear a specific section of the Kakamega Forest Reserve and where abandoned thereon. The petitioners also state that no compensation has been forthcoming from the 1st to the 7th respondents with regard to the due process as set out in the Constitution of the Republic of Kenya 2010 and the Land Act 2012 with emphasis to Part viii (Compulsory Acquisition of Interest in Land). The petitioners settled at what is now known as Musunji Village, Tiriki location which in essence is part of the Kakamega Forest Reserve. The petitioners are aggrieved that their right to property under Article 40 and 64 of the Constitution of Kenya 2010 has been infringed as no prior arrangements/consequently arrangements had been made by the 1st to 7th respondents. The petitioners humbly prays for:-

(a) A declaration that the respondents action on the petitioners parcels of land as per schedule annexed hereto are in contravention of Article 28, 40 and 47 (2) of the Constitution of Kenya and are therefore illegal hence null and void ab initio.

(b) A declaration that all the petitioners (1,500) ought to be compensated for the atrocities committed including trespass, destroyed homes at current market value.

(c) A declaration that settlement of the petitioners and families ought to be prioritized as per legal boundaries.

(d) Costs of this petition.

(e) Such other orders this honourable court shall deem fit to grant in the interest of justice.

The 2nd 4th 5th 6th and 7th respondents submitted that the petitioners brought this petition on behalf of themselves and other one thousand five hundred co-petitioners. In their petition they state that they are the bonafide owners of the suit parcels which was acquired by the government through compulsory acquisition in 1985. They petitioners allege that the process of compulsory acquisition did not follow the due process of the law. For the said reason, the petitioners were exposed to extreme cases of torture, discrimination, and untold suffering.

The petitioners allege that they are now squatters at Kakamega Forest Reserve as they have never been issued with title deeds. They further state that they have not been permitted to carry any form of subsistence or commercial farming by the Kenya Forest guards which has led to arbitrary arrest and criminal charges. That in their pleadings the petitioners state that their suit parcels where they lay claim are the present day Vihiga County Headquarters, Vihiga County and Referral Hospital, Vihiga Main Prison, Mbale Police Station, Regional headquarters and amenities. That the petitioners have not produced any certificates of title to prove ownership but have attached seven official searches which do not show the link between the petitioners, the title owners and the alleged violation by the respondents. That the petitioners were given alternative parcels of land and were relocated to Musunji village. That the petitioners' did not meet the threshold for filing constitutional petitions. That this application is an abuse of the court process as it has been filed 35years after he alleged violation took place.

This court has carefully considered the petition and the submissions therein. The petitioners came to this court under certificate of urgency where they filed a notice of motion application and the petition. The petitioners in their substantive petition sought for the following prayers;

1. A declaration that the respondents' action on the petitioner's parcels of land is in contravention of articles 28, 40 and 47 (2) of the Constitution and therefore illegal, null and void.
2. A declaration that all petitioners ought to be compensated for the atrocities committed including, trespass destroyed homes at the current market value.
3. A declaration that settlement of the petitioners and families ought to be prioritized as per legal boundaries.
4. Costs of the petition and any other orders that the court seems just and fit.

The petition proceeded by way of written submissions. Article 40 of the Constitution, reads in part as follows:

40. (1) *Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—*

(a) of any description; and

(b) in any part of Kenya.

(2) *Parliament shall not enact a law that permits the State or any person—*

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(3) *The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—*

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

The Land Acquisition Act (now repealed) provided for the procedure to be followed in the compulsory acquisition of property by the Government of Kenya. When the compulsory acquisition herein began, the Land Acquisition Act Cap 295 Laws of Kenya, Section 3 of the Land Acquisition Act provided as follows:-

"Whenever the Minister is satisfied that the need is likely to arise for the acquisition of some particular land under section 6, the Commissioner may cause notice thereof to be published in the Gazette, and shall deliver a copy of the notice to every person who appears to him to be interested in the land."

The Universal Declaration of Human Rights has the force of law in Kenya. In the case of *R vs Chief Immigration Officer* (1976) 3 AER 843 Lord Denning stated thus regarding the Universal Declaration of Human Rights;

"... Among the important rights which individuals traditionally have enjoyed is the right to own property. This right is recognised in the Universal Declaration of Human Rights (1948). Article 17(1) which states that everyone has the right own property and Article 17(2) guarantees that "no one shall be deprived of his property" The contention of the State counsel negates this right. An intention to provide for arbitrary infringement of human rights cannot be attributed to the legislature unless such intention is unequivocally manifest. When Parliament is enacting a statute, the court will assume that it had regard to the Universal Declaration of Human Rights and intended to make the enactment accord with the Declaration and will interpret it accordingly..."

And Justice G.V. Odunga in *Republic v Council of Legal Education Ex-parte Nyabira Oguta* (2016) eKLR, phrased it thus:

"Our Constitution embodies the values of the Kenyan Society, as well as the aspirations, dreams and fears of our nation as espoused in Article 10. It is not focused on presenting an organisation of Government, but rather is a value system itself hence not concerned only with defining human rights and duties of individuals and state organs, but goes further to find values and goals in

the Constitution and to transform them into reality”.

Be that as it may, the petitioners stated that on diverse dates in the year 1985, in the absence and without written notice the 1st to the 7th respondents through their agents forcefully evicted the petitioners from the parcels of land to pave way for the creation and eventual creation of present day Vihiga County Headquarters, Vihiga County and Referral Hospital, Vihiga Main Prison, Mbale Police Station, Regional headquarters and amenities thereto purportedly created the said infrastructure on the petitioners parcels of land and pulled down all the petitioners homes, desecrated burial and graves sites, exhumed remains of dead relatives of the petitioners to the extreme detriment, loss and damage of the petitioners. I have perused the annexed schedule to the petition and I concur with the respondents submissions that, the petitioners have not disclosed the citation of the land under dispute, it is therefore unclear they are seeking relief in respect of what parcel of land. Several search certificates have been annexed which do not show the nexus between the land and 1500 petitioners. The petitioners allege violation of fundamental rights and freedoms and is therefore their duty to plead their case with particularity, in the case of **Anarita Karimi Njeru vs. The Republic (1976-1980) eKLR 1272** where the Court established the principle that a person seeking redress from the High Court on a matter which involves reference to the Constitution should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed. The principle in the **Anarita Karimi Njeru** was clarified in the case of **Trusted Society of Human Rights Alliance vs. Attorney General & 2 others, Petition No. 229 of 2012**. The Petitioners in the instant case had failed to meet the test as they have not identified the exact property they were calling the court to protect.

This principle was re-affirmed by the Court of Appeal in the case of **Mumo Matemu vs. Trusted Society of Human Rights Alliance and others, Nairobi Civil Appeal No. 290 of 2012** where the it was stated as follows:

“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 conterminous 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...Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party. 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.”

From the facts of this case it is in my view that the petition lacks any specificity such that it is merely of a general nature in that it fails to identify with precision the particular property to which the Petitioners lay claim. A constitution petition is meant to deal with clear constitutional matters. It is to be applied in clear cases where facts can be ascertained, it is my view that, where there is need for further facts then the petitioner ought to revert to a civil claim.

Be that as it may it is not in dispute that the petitioners were relocated to and given alternative parcels of land and were relocated to Musunji village. From the documents filed with their petition their claim to the National Land Commission is for the issuance of title deeds.

In a similar case of **Hezekiah Mavisi Ondego & 8 others vs. County Government of Vihiga & another (2018) eKLR** where the petitioners were relocated to another parcel of land the court held that;

“The provisions governing compulsory land acquisition by the government do not apply to the instant case, the 1st petitioner took land parcel Mautuma Central Settlement Scheme/1397 in exchange for South Maragoli/Bugonda/2097. The 1st petitioner’s proprietary interest in land parcel South Maragoli/Bugonda/2097 was extinguished when he accepted to move to Mautuma and hence he had no title in the original parcel to subdivide and/or transfer to the co-petitioners or at all. I find that the petition is not merited and I dismiss it with costs.”

Similarly I find this petition is unmerited and I dismiss it with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 28TH DAY OF JULY 2020.

N.A. MATHEKA

JUDGE