



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 356 OF 2013

BETWEEN

JUNE SEVENTEENTH ENTERPRISES LTD

(Suing on its own behalf and on behalf of and in the interest of 223 other persons being former inhabitants of KPA Maasai Village, Embakasi within Nairobi)**PETITIONER**

AND

KENYA AIRPORTS AUTHORITY1ST RESPONDENT

NAIROBI CITY COUNCIL2ND RESPONDENT

THE CABINET SECRETARY, MINISTRY OF INTERIOR AND COORDINATION OF

NATIONAL GOVERNMENT.....3RD RESPONDENT

THE CABINET SECRETARY, MINISTRY OF LAND HOUSING AND

URBAN DEVELOPMENT.....4TH RESPONDENT

HON. ATTORNEY GENERAL.....5TH RESPONDENT

JUDGMENT

Introduction

1. The petition for consideration is filed by a limited liability company on behalf of 223 other persons being former inhabitants of KPA Maasai Village, Embakasi within Nairobi. According to the deposition sworn by Lawrence Kithinji Mutugi sworn on 5th July 2013, the petitioner claims to be legal owners of LR No. 209/13418, 209/13419, 209/13420 and 209/13421 situated along North Airport Road, Embakasi (“the suit property”). The area is situated near the Jomo Kenyatta International Airport (“JKIA”).
2. The petitioner avers that on or about 18th January 2010, it entered into negotiations with the Deposit Protection Fund (“DPF”), the liquidator of Trust Bank Limited to purchase the suit properties. The petitioner deposited Kshs 6.4 million being 10% deposit of the purchase price,

auctioneers fees and expenses amounting to Kshs 950,000/= and executed a sale agreement. At the time of filing suit, it had paid the sum of Kshs 19.4 million.

3. After acquiring the land, the petitioner's members subdivided the land into plots and offered them for sale for the sum of Kshs 400,000/= each. The petitioner's members and the persons represented by the petitioner continued to reside on the land and put up permanent structures on the suit property. These structures included permanent and semi-permanent dwelling houses, schools, clinics, churches and business establishments.

Petitioner's Case

4. The petitioner alleges that the reason for filing this petition is that on 29th October 2010 officers from the 1st, 2nd and 3rd respondents descended on the suit property in the company of armed police officers and security personnel with bulldozers and earth movers machines. They demolished all dwelling and commercial structures on the suit property and evicted the occupants from the suit property. The petitioner contends that no notice was issued requiring the occupants to vacate the suit property. The petitioner avers that the inhabitants of Maasai Village did not expect to be evicted as notices issued by the 1st respondent were directed to other villages near JKIA.
5. The petitioner avers that the eviction was carried out in a brutal manner without regard to the interests of children, persons with disability and women. That the occupants were not given an opportunity to salvage their personal property and possessions. The occupants were left homeless without food or shelter, suffered mental torture, pain and suffering and untold misery. The children were left without access to education particularly in view of the fact that the year was coming to an end and some students were expected to sit national examinations. To date they have neither been resettled nor received recompense.
6. The petitioner's case is that their rights and fundamental freedoms under the Constitution have been violated. The petitioner avers that the State failed in its duty to observe, respect, protect, promote and fulfil the occupants' fundamental rights and freedoms under **Article 21**. The petitioner submits that the occupants' right to dignity protected under **Article 28** and also the freedom and security of the person under **Article 29** were violated. The petitioner avers that the occupants of the suit property were entitled to fundamental rights to accessible and adequate housing, to reasonable standards of sanitation, health care, clean and safe water in adequate quantities and education under **Article 43** and this was violated by the evictions and demolitions. The petitioner argues that the occupants were entitled to reasonable notice before the eviction was carried out hence there was a violation of **Article 47(1)** which entitles every person to fair and reasonable administrative action.
7. The petitioner relied on provisions of international law to buttress its case. The petitioner cited the provisions of the *International Covenant on Economic and Social Rights* which applies in Kenya by reasons of **Article 2(5)** and **(6)** of the Constitution. The petitioner relied on the case of *Ibrahim Sangor Osman v Minister of State of Provincial Administration and Internal Security Embu Petition No. 2 of 2011 [2011]eKLR* in which the court recognised the applicability and enforceability of the international obligations locally.

Respondents' Case

8. The 1st respondent, the Kenya Airports Authority ("KAA") denies the allegations made by the petitioners through the affidavit of Victor Arika sworn on 18th September 2013. KAA is a statutory corporation established under the *Kenya Airports Authority Act (Chapter 395 of the Laws of Kenya)*. It owns and runs JKIA.
9. The thrust of the KAA's case is that the suit property is outside its jurisdiction and that it had

nothing to do with the evictions and demolitions complained of. KAA avers that it issued notices in the press notifying persons who had encroached on its land to vacate but the notice referred to LR No. 21919 and LR No. 209/13080 occupied by Kyangombe Village and Syokimau at Jomo Kenyatta International Airport and Mitumba Village and Wilson Airport but not Maasai Village. It therefore avers that it is not liable for the demolitions as alleged by the petitioners.

10. KAA also asserts that the petitioner has not shown or demonstrated, either in the pleadings or depositions that it issued instructions to any person to carry out the demolition and eviction.
11. The Nairobi City Council through the affidavit of Karisa Iha, its Director of Legal Affairs, sworn on 14th August 2013 opposes the petition. It denies any involvement in the demolitions and avers that the petitioner has not provided any evidence to prove that it was involved in the eviction and demolitions.
12. The 3rd, 4th and 5th respondents did not file any response to the petition despite being given the opportunity to do so.

Capacity of the petitioner to sue

13. Before I proceed to consider liability of the State, I will deal with the issue of the *locus standi* of the petitioners to agitate the petition. This issue was raised by counsel for the Attorney General, Mr Ngumi, who stated that the petitioner failed to comply with **Order 1 rule 8** of the **Civil Procedure Rules** and that leave was required to institute the suit as a representative suit.
14. As this is a petition filed to enforce fundamental rights and freedoms, the capacity to file a representative suit must be determined by reference to **Article 22(1)** and **(2)** of the Constitution which provides as follows;

22. (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.*

15. Under **Article 260** of the Constitution, '**person**' is defined as including a company, association or other body of persons whether incorporated or unincorporated. It therefore follows that there is no legal impediment for a corporation or other corporate to file a suit on behalf of persons agitating their rights under the Constitution or filing a suit in the public interest. Further, under **Article 22** there is no requirement for the petitioner to seek leave to file a representative suit. **Rule 4(2)** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** made pursuant to **Article 22** echo this position. I therefore find and hold that this suit is properly before the court.

Liability for evictions and demolitions

16. The factual issue to be resolved in this matter is who is responsible for the evictions and demolitions. In other words who authorized, directed or carried out the evictions and demolitions. **Section 107(1)** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* 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.*” It is trite law that the petitioner bears the burden of proving on the balance of probabilities that the respondents are liable for the wrong it alleges.
17. KAA has presented evidence to demonstrate that the suit property lies outside its jurisdiction and that in fact it is not on the flight path. It has also provided evidence that its effort to clear its property of illegal settlements were directed at other locations other than Maasai Village as evidenced by the notices issued to the residents of Kyangombe and Syokimau which are within JKIA land. Apart from a bare averment that KAA officers carried out the evictions and demolitions nothing else points to its involvement either directly or indirectly.
18. The 2nd respondent denies knowledge or participation in the demolition. Apart from the bare averments against it, nothing points to its involvement. The petitioner has not shown or provided any evidence to surmount the express denial by the 2nd respondent.
19. This leaves the 3rd, 4th and 5th respondents who have not opposed the petition. The 3rd respondent is the Ministry responsible for national security and co-ordination of national government. It is in charge of the security forces and local administration including local chiefs. The 4th respondent is the ministry in charge of housing policy while the Attorney General is the Government’s principal legal adviser and is sued on behalf of the State.
20. As regards the failure of the 3rd, 4th and 5th respondents to respond to the allegations against it, I adopt what the court in ***Rumba Kinuthia v Attorney General Nairobi HCCC 1408 of 2004 (Unreported)*** stated; “*Despite the fact that the applicant made very serious allegations against the defendant, government agents, servants and police officers, no affidavit was filed in reply, so that all the facts deponed to by the applicant in his affidavit are what the court will take as representing the correct factual position.*” Similarly in ***Kariuki Gathitu v Attorney General Nairobi Petition No. 1188 of 2003 (Unreported)***, the Court observed that, “*It is now trite that although a party alleging a fact has the onus of proof of that fact, the opposing party is at the very least expected to file a response to those allegations of facts. Where such a party actually appears in the proceedings but neither in pleadings nor in oral evidence does he answer to those facts, then the court can only but take it that those facts as actually uncontested....*”
21. **Section 61** of the *Evidence Act* dispenses with proof where facts are admitted. It provides, “*No fact need be proved in any civil proceeding which the parties thereto or their agents agree to admit at the hearing, or which before the hearing they agree, by writing under their hands, to admit, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings: Provided that the court may in its discretion require the facts admitted to be proved otherwise than by such admissions.*” I therefore have no option but to consider the facts set out in the petition and supporting depositions as true as they implicate the State in the demolition and eviction of the occupants of the suit property.
22. Even in the absence of a plea in opposition to the petition, the petitioner’s evidence affirmatively points to State involvement. Lawrence Kithinji Mutungi, in his deposition, avers that the eviction was carried out in the company of ‘*[para. 10] armed police officers and security personnel with bulldozers and earth movers ...*’ and that ‘*[para. 21] Armed Police officers and other security officers brutally chased petitioners from their houses and proceeded to demolish ...*”
23. The evidence therefore points to the conclusion that the 1st and 2nd respondents were not involved

in the demolitions and evictions complained of by the petitioners. I however find and hold that the State through the agencies of the 3rd respondents was complicit in the evictions and demolitions that are the subject of this suit.

Violation of fundamental rights and freedoms

24. The petitioner's case is principally about unlawful evictions and demolitions that occurred on the suit premises. This issue has nothing to do with the status of the petitioners' land transaction with DPF or whether they own the suit property. The occupants have settled on the land and constructed their houses and it is the fact of occupation that entitles them to protection of the Constitution. In any case **Article 40(1)** of the Constitution is not limited to land but applies to property of any description. In sum, this case has to do with the duty of the State through its various agencies to '*observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Constitution.*'
25. The right to be free from arbitrary, unfair evictions and demolition of property is anchored in the values of the Constitution under **Article 10** among them human dignity, human rights and social justice. More particularly evictions directly violate the State's responsibility to provide access to housing and to reasonable standards of sanitation, to water, education and food.
26. Our Courts have recently made pronouncements on the spate of unlawful evictions in several cases including; ***Satrose Ayuma & Others v Registered Trustees of the Kenya Railway Staff Retirement Benefits Scheme and Others Nairobi Petition No. 65 of 2010 [2013] eKLR, Ibrahim Sangor Osman and Others v Minister of State for Provincial Administration and Internal Security and Others (Supra), Mitubell Welfare Society v Attorney General and Others Nairobi Petition No. 164 of 2011 [2013]eKLR.*** I agree with the principles set out therein and adopt them entirely.
27. The eviction of people from their places of residence and demolition of their houses implicates the full panoply of fundamental rights and freedoms protected by the Constitution. This was expressed by Cameron JA, in ***Tswelopele Non-Profit Association and 23 Others v City of Tshwane Metropolitan Municipality and Others [2007] SCA 70 (RSA)*** where he observed that, "[15] *That the wanton destruction of the occupiers' dwellings violated the Constitution was not disputed. What must be owned is how far-reaching and damaging the breach was. The governmental agencies violated not merely the fundamental warrant against unauthorised eviction, but (given the implicit menace with which the eviction was carried out) the occupiers' right to personal security and their right to privacy. It infringed not only the occupiers' property rights in their materials and belongings, but trampled on their feelings and affronted their social standing. For to be hounded unheralded from the privacy and shelter of one's home, even in the most reduced circumstances, is a painful and humiliating indignity. [16] And it is not for nothing that the constitutional entrenchment of the right to dignity emphasises that 'everyone' has inherent dignity, which must be respected and protected....."*
28. In ***Ibrahim Sangor Osman & Another v Minister for State for Provincial Administration & Another (Supra)***, the court held that a notice to vacate within 21 days issued to the petitioners in that case was unreasonable, and the subsequent evictions were a violation of the rights of the petitioners to accessible and adequate housing under the Constitution. In this case, the situation was more aggravated as no notice of eviction was issued and the manner in which the evictions and demolitions were executed undermined the fundamental rights of the people of Maasai Village. The evictions and demolitions were a clear violation of **Article 28** which protects the right to dignity, **Article 29** which guarantees freedom and security of the person, the right to privacy under **Article 31**, the right to protection of property under **Article 40** and **Article 47(1)** which protects the right to fair administrative action.
29. I also adopt as my own words the sentiments of Mumbi Ngugi J., in ***Mitubell Welfare Society v Attorney General and Others (Supra)*** that, "[54] *Consequently, when the state or a state agency*

such as the 2nd respondent demolishes the homes of poor citizens such as the petitioners who live in informal settlements such as Mitumba village, when it does so after a seven day notice, without giving them alternative accommodation, it violates not only the rights of the petitioners but the Constitution itself and the obligations that it imposes on the state, both at Article 21 and 43, but also in the national values and principles of governance set out in Article 10 which include '(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.'

30. **Article 43** of the Constitution imposes on the State a positive duty to ensure access by its citizens to social economic rights. While access to these rights is progressive and is dependent on the availability of resources, **Article 21(1)** imposes on the State the duty to, “*observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.*” The duty to observe, respect and protect implies that the State has a responsibility to refrain from interfering directly or indirectly with the enjoyment of these rights. Not only is a positive duty imposed by the Constitution to ensure access to these rights but a negative one as well to ensure that the State does not impair the enjoyment of these rights. In ***Grootboom and Others v The Government of the Republic of South Africa and Others (2001) (1) SA 46***, the Constitutional Court considering the provisions of the Constitution of South Africa which are similar to our **Article 43** noted that, ‘*Although the subsection does not expressly say so, there is, at the very least, a negative obligation placed upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing.*’
31. The wanton and brazen destruction of people’s houses and their consequent eviction undermines the State’s duty to the citizen. The rights under **Article 43** are all affected as they are interconnected. Eviction and demolition of the occupants’ houses, however rudimentary, violates their rights of access to health, accessible and adequate housing, sanitation, food, clean and safe water and education which are all guaranteed under **Article 43** of the Constitution.
32. I emphasise that it is the State’s responsibility to protect every Kenyan from unlawful and unwarranted evictions. Instead of being an active participant in eviction and demolition, the State should provide, protect the poor, weak, marginalised and vulnerable by taking positive steps to prevent evictions of the nature complained of. In this case the security apparatus were clearly involved in violation of the petitioners’ rights.
33. It is unfortunate that Kenya does not have specific laws governing evictions. In the ***Satrose Ayuma case (Supra)***, Lenaola J., discussed at length the **UN Basic Principles and Guidelines on Development based Eviction and Displacement (2007)** which provide guidance to States on measures to adopt in order to ensure that development-based evictions, are not undertaken in contravention of existing international human rights standards and violation of human rights. These Guidelines require, among other things, the mandatory presence of government officials or their representatives and neutral observers on site during evictions; that the evictions are not carried out in a manner that violates the dignity and human rights to life and security of those affected; that the evictions are not carried out at night or during bad weather; and that no one shall be subjected to indiscriminate attacks during the eviction.
34. These Guidelines have been adopted by the African Commission on Human and Peoples Rights and in its 48th Ordinary Session it adopted the ***Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and People's Rights***. Accordingly, the African position on the right to housing can be understood from the African Commission on Human and Peoples’ Rights case of ***The Social Economic Rights Centre & Centre for Economic and Social Rights v Nigeria, Com. No.155/96 (2001)***. In its judgment the Commission stated that; “*Individuals should not be evicted from their homes nor have their homes demolished by public or private parties without judicial oversight. Such protection should include providing for adequate procedural safeguards as well as a proper consideration by the Courts of whether the eviction or demolition is just and equitable in the light of all relevant circumstances. Among the factors a Court should consider before authorising forced evictions or*

demolitions is the impact on vulnerable and disadvantaged groups. A Court should be reluctant to grant an eviction or demolition order against relatively settled occupiers without proper consideration or the possibility of alternative accommodation being provided. Forced evictions and demolitions of people's homes should always be measures of last resort with all other reasonable alternatives being explored, including mediation between the affected community, the landowners and the relevant housing authorities”

35. In my view, the **UN Guidelines** are consistent with the principles and values of the Constitution and the fundamental rights protected by the Constitution.

36. I must also mention that Justice Musinga in **Susan Waithera Kariuki and Others v Town Clerk, Nairobi City Council and Others Nairobi Petition No. 66 of 2010 [2011]eKLR** endorsed the **Convention on Economic Social and Cultural Rights (CESCR) General comment 7** regarding the right to adequate housing and forced evictions where the Committee noted as follows;

[15] Appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions which directly invokes a large number of rights recognized in both the international covenant on human rights. The committee considers that the procedural protections which should be applied in relation to forced evictions include:

- a. *an opportunity for genuine consultation with those affected;*
- b. *adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;*
- c. *information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;*
- d. *especially where groups of people are involved, government officials or their representatives to be present during an eviction;*
- e. *all persons carrying out the eviction to be properly identified;*
- f. *evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise;*
- g. *provision of legal remedies; and*
- h. *provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.*

[16] Eviction should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the state party must take all reasonable measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be is available.

37. The cases cited from our courts have emphasised the fact the government has not taken any policy or legislative step to deal with forced evictions despite a wealth of international material on forced evictions. The facts of this case implicate the State in the wanton and destructive practice of forced eviction. This lackadaisical attitude and complicity by the State in carrying out evictions and demolition of property three years after the promulgation of the Constitution undercuts the State obligation to implement rights and fundamental freedoms under **Article 21** of the Constitution which provides as follows;

21. (1) It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.

(2) The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.

(3) All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.

(4) The State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.

38. The evidence before the court is clear that the rights of the inhabitants of Maasai village have been violated. I therefore find and hold that the State through the 3rd and 4th respondents are liable for violation of the rights of the occupants of the suit property under **Articles 28, 29, 43 and 47(1)** of the Constitution.

39. I also find and hold that the State has violated the provisions of **Article 21** by failing to develop and enact a policy and legislation to deal with forced evictions.

Remedies

40. I now turn to consider the remedies. The Court under **Article 23** of the Constitution is entitled to frame an appropriate remedy in the circumstances. In this case, the petitioner, its members and the other occupants have been evicted from the property. The State has not shown any effort to remedy or ameliorate their situation.

41. The court's discretion under **Article 23** to frame the remedy is dependent on the facts and circumstances of each case. The remedy must be tailor made to vindicate the right and to fulfil the promise of the Constitution and in particular the Bill of Rights. It is incumbent upon the petitioner to place before the Court all facts necessary to enable the court frame the appropriate remedy.

42. In the absence of the factual material to enable me frame any other remedy; I think the most appropriate relief to the petitioners in these circumstances is award of damages to vindicate the rights violated. The petitioner has not placed before the court any material to enable the court assess compensation due to each occupant affected by the demolition and eviction.

43. The issue of ordering the petitioner and the inhabitant back the land has weighed heavily on my mind but such an order may interfere with the property rights of third parties. It is not clear whether title to the property has passed from the DPF to the petitioner and I would be reluctant to enter into that inquiry in the absence of the parties and clear evidence.

44. In the circumstances, I consider an award of Kshs.150,000/= per per person most appropriate and reasonable in the circumstances.

Disposition

45. The final orders are as follows;

- a. The case against the 1st and 2nd respondent be and is hereby dismissed with no order as to costs.
- b. It is hereby declared that the State has violated the provisions of **Article 21** by failing to develop and enact a policy and legislation to deal with forced evictions.
- c. It is hereby declared that the rights and fundamental freedoms protected under **Articles 28, 29, 43 and 47(1)** of the Constitution of the occupants of LR No. 209/13418, 209/13419, 209/13420 and 209/13421 situated along North Airport Road, Embakasi ("the suit property") otherwise known as Maasai Village were violated by the 3rd and 4th respondents when they were evicted from the said land on 29th October 2010.
- d. Each of the 223 persons represented in these proceedings by the petitioner is awarded Kshs 150,000/= as damages for violation of their fundamental rights and freedoms.
- e. The petitioner is awarded the costs of the petition.

DATED and DELIVERED at NAIROBI this 14th February 2014

D.S. MAJANJA

JUDGE

Mr Masaviru instructed by Akoto and Akoto Advocates for the petitioner.

Mr Mogere instructed by Mohamed and Muigai Advocates for the 1st respondent.

Mr Ogonde instructed by Murugu, Rigoro and Company Advocates for the 2nd respondent.

Mr Ngumi, Litigation Counsel, instructed by the State Law Office for the 3rd, 4th and 5th respondents.