



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

PETITION NO. 11 OF 2013

**IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS ARTICLE 22, 23, 24, 25
OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF RIGHTS AND EQUALITY & FREEDOM FROM DISCRIMINATION,
HONOUR, DIGNITY, PROTECTION OF THE RIGHT TO PROPERTY UNDER ARTICLES 27,
28 & 40 OF THE CONSTITUTION**

OF KENYA

BETWEEN

JOHN MBUGUA GIKONYO & 15 OTHERSPETITIONERS

VERSUS

THE HONOURABLE ATTORNEY GENERAL & 10 OTHERS..... RESPONDENTS

AND

PETITION NO. 46 OF 2013

**IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS UNDER ARTICLE 22
OF THE CONSTITUTION OF KENYA**

BETWEEN

**FRANCIS NGUGI GITHUA, STEPHEN WAITHAKA MBUGUA, EUNICE MUTHONI
KINUTHIA & 60 OTHERS..... PETITIONERS**

VERSUS

SETTLEMENT FUND TRUSTEES..... 1ST RESPONDENT

COMMISSIONER FOR LANDS2ND RESPONDENT

ATTORNEY GENERAL3RD RESPONDENT

(CONSOLIDATED)

JUDGEMENT

Background

1. There are two petitions before me for determination, **Petition No 11** and **Petition No 46** both of 2013. The two petitions relate to the same parcel of land located at **Moi Ndabi Settlement Scheme** and have the same parties. Petition No. 11 was filed on **12th April, 2013** together with an application under certificate of urgency. The petition is founded on the grounds that the Government had allocated the petitioners land in **Moi Ndabi Settlement Scheme** in **1993**. In **1997**, due to the El Nino rains some parcels of land in the Settlement Scheme became inhabitable and the petitioners were relocated elsewhere. They believed that they were to retain the land they previously occupied and are now disgruntled because the 2nd and 3rd respondents have allocated this land to the 4th- 6th respondents and issued them with title deeds.

Petition No. 46 was filed by the 4-6th respondents on 23' **June, 2013**. The petitioners herein were allocated the land previously occupied by petitioners in petition No.11. They contend that they were rightfully allocated this land but the Government had failed to provide them with security so that they could access and enjoy their land.

2. On **22nd May, 2013** all parties agreed that the two Petitions be consolidated. It was further agreed that **Petition No.11 of 2013** be the lead file while Petition No.46 would be a reply to Petition No.11. All interlocutory applications were abandoned and parties agreed to dispose of the petitions by way of written submissions. The petitioners in petition No.11 (**hereafter referred to as the petitioners**) filed their written submissions on 7th **August, 2013**, the 1st -3rd respondents (**hereafter referred to as the 1st-3rd respondents**) filed their written submissions on **26th March, 2014** and the petitioners in petition No.46 (**hereafter referred to as 4th- 6th respondents**) filed theirs on **23rd July, 2013**.

The Petitioners Case and Submissions

3. In **Petition No 11**, the brief facts are as follows: That there were tribal clashes between the Kikuyu and Maasai communities in **1993** in the Enosupukia area and the petitioners were internally displaced as a result. Following a directive by the former President of the Republic of Kenya, **H.E. Daniel Toroitich Arap Moi**, the Petitioners were allocated some land in **December, 1994** in the area known as **Moi Ndabi Settlement Scheme, Phase I (hereafter referred to as Phase I)**. Each Petitioner was allocated 2.5 acres. They settled on the land, lived and went about their business for quite some time until misfortune struck again, this time in the form of the El Nino rains in **1997**, which rendered the land they had been allocated inhabitable.

4. The Government once again stepped in to help and in **2006**, identified another parcel of land for the petitioners to move to. The Petitioners were moved to the new location where each petitioner was allocated 2.5 acres.

5. The petitioners swore a supporting affidavit through **John Mbugua Gikonyo** on **19th March, 2013**. In their minds, they knew that their allocation of the 2nd parcel of land was in addition to the initial allocation in phase 1. Each petitioner would therefore possess 5 acres in total as per the Government policy as contained in the Ndung'u report (**JMG 5**). They would now be at par with their counterparts, the Maasai and Kalenjins who together with them were affected by the tribal clashes but who had been allocated 5 acres each in phases 11 and 111; They were however, very surprised when they later found complete strangers in "their" land who claimed to have been allocated the same land by the Government.

6. These allocations had caused a lot of tension in the area and criminal cases had even been instituted against them and their relatives (**JMG 6 i, ii, Hi**); that it was manifestly unfair and a violation of their rights that the Government had failed to issue them with title deeds for Phase I, but had instead allocated their land to strangers and proceeded to issue these strangers with title deeds, thereby reducing the petitioners allocation from 5 acres to 2.5 acres and exposing them to grave security risks.

7. In this regard, the petitioners seek the following orders;

(i) A declaration that the 1st - 3rd respondents have failed to offer the Petitioners the necessary protection to settle in and use their parcels of land.

(ii) A declaration that the petitioners are the rightful owners of the parcels of land in Moi Ndabi Settlement Scheme and that the allocation to the 4th- 11th respondents is a violation of the Petitioners human rights.

(iii) A declaration that the 1st -3rd respondents had no right to allocate the suit property to the 4th - 11th respondents.

(iv) Conservatory orders be granted to restrain the respondents by themselves, their servants and/ or agents from entering, occupying or in any way dealing with the Moi Ndabi Settlement Scheme.

(v) That the 1st - 3rd respondents secure the area to ensure peaceful occupation by the petitioners.

8. In their submissions, the petitioners stated that the Constitution should be interpreted according to **Article 259**: in a manner that advances the rule of law, human rights and fundamental freedoms contained in the Bill of Rights. The purpose of recognizing human rights is contained in **Article 19(2)** as preserving the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings. This includes granting conservatory orders as contained in **Article 23**.

9. It is their contention that their right to own property under **Article 40** has been violated. This should be treated seriously as was demonstrated in **Maisha Nishike Limited v The Permanent Secretary, Ministry of Lands & 5 Others [2013]** eKLR which borrowed from the decision in **Rev Dr Timothy Njoya & 6 others v the Attorney General & 4 others**, where the court held that the Constitution must be read so as to give meaning to the aspirations and values of the people as it is a living document with a soul and a consciousness that must be upheld at all times.

10. The petitioners' further contend that they have been discriminated against, stripped of their dignity and lacked adequate security which the Government had a duty to provide under **Articles 27, 28 and 29** of the **Constitution** respectively. They relied on the case of **Waweru v Republic KLR (E&L) 1** where the court stated "**the law does not permit discrimination either of itself or its effect**". They urged the court to allow the Petition with costs.

The 4th - 6th Respondents' case and submissions

11. The 4th- 6th respondents' case is contained in **Petition No. 46 of 2013**, where they instituted a petition against the same respondents as these in Petition No.11 of 2013. A joint supporting affidavit was sworn by **Francis Ngugi Githua, Stephen Waithaka Mbugua and Eunice Muthoni Kinuthia**, the 4th-6th respondents herein, on **4th October, 2012**. In their joint affidavit, they set out the facts of their case as follows: that they were allocated land within Phase I in 2009 by the Government after payment of all the requisite fees and after the previous owners were compensated and relocated to **Crater and Siro** areas. Dissatisfied with this turn of events, the previous allottees forcefully stopped them from occupying the land in Phase I. As a result, the area became a security risk and they were forced to live in rented temporary structures within Moi Ndabi area as they could not access their land despite having title deeds to their respective portions (**FK 1**). Like the petitioners, they blame the 1st -3rd respondents for escalation of insecurity in Phase I.

12. They seek the following orders:

(i) A declaration that the 1st -3rd respondents have failed to offer the Petitioners the necessary protection to settle in and use their parcels of land.

(ii) That the 1st - 3rd respondents be ordered to secure the area to ensure peaceful occupation by the Petitioners within a stipulated time.

In the alternative, they seek that:

(iii) The respondents be ordered to sufficiently

compensate the Petitioners and allocate them available pieces of land or financial compensation within a stipulated time.

(iv) The respondents bear the costs of the Petition.

13. The 4th -6th respondents' filed their submissions on **23rd July, 2013** in Petition No.46. They reiterate the version of events as contained in the petition and the supporting affidavit sworn therein.

The 1st- 3rd Respondents' case and submissions

14. The Petitions herein were opposed by the 1st -3rd respondents. The 1st respondent is the **Hon. Attorney General**, the 2nd respondent is the **Settlement Fund Trustees (hereafter referred to as SFT)** while the 3rd respondent is the **Commissioner of Lands**. They were all represented by the Hon. Attorney General.

15. Their case is stated in the replying affidavit of **Tom Jomo Nyang'au** sworn on **12th February, 2014**, who is the District Land Adjudication and Settlement Officer in charge of Gilgil and Naivasha Districts. He admits that indeed there were tribal clashes which prompted the Government to act and the El Nino rains which altered the Government's response. His point of departure begins when he states that the relocation of the victims of the tribal clashes was to be done in three phases according to the communities of the victims: Phase 1 was to be for the Kikuyu community where each victim was to be allocated 2.5 acres, Phase 2 for the Maasai community where each victim was to be allocated 5 acres and Phase 3 for the Kalenjin community where each victim was to be allocated 5 acres.

16. The victims were duly settled but after sometime, part of the land in Phase I was adversely affected by the El Nino rains which rendered the land inhabitable. On request by the victims, the Government agreed to relocate the flood victims to higher ground in Phases 2 and 3. The petitioners from Phase I were to get 2.5 acres in the new locations equivalent to what they had received in Phase 1. In exchange they were to rescind all claims to the land in Phase 1. The petitioners accepted these conditions and signed a register **(TJN 1)** and **(TJN 2)** to that effect.

17. The land in Phase 1 then reverted back to the Government and their allocating agency, SFT was now free to allocate it to other landless Kenyans. Phase I was thereafter allocated to the 4th - 6th respondents and Kenya Wildlife Service **(TJN 4)**. According to the deponent, there was no violation of the rights of the Petitioners as this process was carried out in consultation with them and they consented to the conditions set. In his view their Petition is frivolous and should be dismissed with costs.

18. In their submissions, Counsel for the 1st-3rd respondents relied wholly on the replying affidavit alluded to above and the exhibits attached therewith. He also relied on correspondence between the various Government agencies. In conclusion he submitted that this petition did not raise any substantive issues regarding the violation of fundamental freedoms and human rights of the petitioners and the same should be dismissed with costs.

Analysis

19. I have considered the petitions, their supporting affidavits, the replies thereto and submissions by the respective parties. I find the issues for determination to be as follows-

(a) Whether the rights of the petitioners in petition No.11 have been violated

(b) Whether the rights of the 4th-6th respondents have been violated

(c) Whether any of the parties in (a) and (b) are entitled to the remedies sought.

(d) Costs

20. In a petition, the court should be concerned with whether the acts complained of in the petition, were committed and amounted to an infringement of the petitioner's rights and what reliefs should thereafter be accorded. There are several High Court decisions which have dealt with the issue of breach of fundamental freedoms and human rights. In those decisions the Courts have held that the rights and duties of individuals are regulated by private law while the duties imposed by the Constitution under the provisions of the Bill of Rights are owned by the State. The duty to uphold human rights

under Article 21 is vested on the state and not the citizens. In **Minister of Home Affairs V Bickle & Others (1985) L.R.C. Cost 755** cited with approval by Lenaola J. in **Hon. Uhuru Kenyatta v The Nairobi Star Limited (High Court Petition No. 187 of 2012)**:

"It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be involved at all. The Court will pronounce on the Constitutionality of a statute only when it is necessary for the decision of the case to do so (Wahid Munwar Khan V The State AIR (1956) Hyd 22...Courts will not normally consider a Constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provisions or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the declaration of rights."

21. In order to be granted the reliefs sought, a petitioner in a constitutional matter is expected to plead the particular provision that he alleges to have been contravened, cite the act which he alleges to have been contravened and the manner in which the said act contravened his rights aforementioned. In the case of **Anarita Karimi Njeru vs Attorney General [1979] KLR 154** the court held that in matters concerning enforcement of fundamental rights and freedoms, a Petitioner must plead with particularity that of which he complains, the provision said to be infringed and the manner in which the particular right is violated as was held in the case of. **Matiba vs. Attorney General High Court Misc. Applic. No. 666 of 1990** the court held that-

" An applicant in an application under Section 84 of the Constitution is obliged to state his complaint, the provisions of the Constitution he considers has been infringed in relation to him and the manner in which he believes they have been infringed. Those allegations are the ones which if pleaded with particularity invoke the jurisdiction of this court under the section. It is not enough to allege infringement without particularizing the details and manner of infringement."

22. In the present case, the matter concerns the interference with the petitioners' ownership, use and enjoyment of land they allege belongs to them as well as a claim to ownership by the 4th -6th respondents. Ordinarily, these are matters that can be dealt with under the realm of Private law and the petitioner's interests to the property can be protected and upheld by the remedies provided for under land law, tort and civil law. However, the actions of the 1st-3rd respondents, who are State actors and the allocating authority of the parcels in dispute to the respective parties, have made this into a case ripe for hearing as a petition.

Violation of the Petitioners rights

23. Article 40 of the **Constitution** provides: that a person is entitled to acquire, own or dispose property of any description anywhere in the country. It also prohibits the state from arbitrarily dispossessing a person of his property without compensation.

24.The petitioners state that the 1st_3rd respondents had allocated the land in Phase I to them together with the land they were allocated later. The 1st-3rd respondents had however dispossessed them of this land by unlawfully allocating the same to the 4th-6th respondents. This land was part of their entitlement of 5 acres as per the Government policy contained in the Ndungu report. The 1st_3rd respondents deny this allegation and state that due process was followed and the petitioners adequately compensated and relocated to another area of equal proportion; that it was only after the Land reverted back to the Government that **SFT** in exercise of their statutory mandate, allocated the land to other landless Kenyans, including the 4th- 6th respondents.

25.The petitioners have not exhibited any document to support their allegations and have failed to demonstrate that there was any agreement or understanding between them and the Government of Kenya that they were entitled to 5 acres of land. There is also no document adduced of any agreement or understanding between them and the Government, that after being relocated from Phase I, they would retain the 2.5 acres previously allocated to them. I therefore find that no evidence has been presented in this Petition on how any of the rights they allege have been violated by the 1st - 3rd Respondents.

26.In support of their case, the 1-3rd respondents have exhibited documentation showing exactly what happened from the time the petitioners were allocated land in Phase 1 to when they were resettled in Phases 2 and 3 and even how the 4th-6th respondents were allocated the land in dispute.

27.**(TJN1)** is a letter from the Director of Land and Adjudication and Settlement addressed to the District Land and Adjudication and Settlement Officer Nakuru, referenced; **"letters of offer for Moi Ndabi flood victims."** The letter in part states, **" the above letters of offer are ready for your collection and distribution to the flood victims. Please note that this cancels all previous allocations by this office and that of the District Commissioner. Please ensure that you explain this fact to individual settlers as they collect their letters of offer since it was their desire to be moved to higher grounds as a group"**

28.**(TJN2)** appears to be an extract from a register named Moi Ndabi relocation register dated **2nd September, 2002**. The author is unknown but the contents therein are clear. It states in part **" Notes for release of letters.**

1. Inform the relocated allottees of the cancellation of the old allocation documents as per Director's letters ref; C/DS/0034/32 dated 3rd December (not clear). They must be informed their previous plots have reverted to (not clear)

2. "They should sign against their names after the information."

Attached to this letter is a list of names appended thereon with signatures beside their names, identity card numbers and number of new plot numbers.

29.In a meeting convened by the **District Settlement Plot Allocation Committee**, chaired by the **District Commissioner** on **22' May, 2009 (TJN3)** the minutes under **Min 2/DSPAC/2009**, subheading, **"Repossession in Moi Ndabi settlement scheme "** Paragraphs 2,3

and 4 states as follows: **The committee noted with concern that some of the allottees in phase 11 and 111 of the scheme have not developed their plots since allocation in 1994 and yet there were many genuine squatters within the area who need to be settled.**

In September and October 2008 the District Land Adjudication & Settlement office carried out a ground occupancy exercise to establish the abandoned plots for repossession. A total of 194 plots were identified for repossession and reallocation from the entire scheme including those plots left after relocating former allottees of phase 1 to other plots within phase 11 and 111....."

30.TJN4 is a brief by the Chief land Adjudication officer Naivasha in relation to this case giving a history

of the plots as outlined in the current petition.

31. From the exhibits above, it appears that the Petitioners fully participated and consented to the reallocation from Phase 1 to Phase 11 and 111 in the settlement scheme.

They were given land equivalent to what they held in the previous area. Although it is not clear why their counterparts in phase 11 and 111 were given 5 acres and them 2.5 acres, they appear to have agreed to the conditions set out by the Government. I find that the petitioners were fully compensated having being given parcels of land equal to what had been lost during the floods and they signed against the relocation plan accepting these terms.

Violation of the rights of the 4th-6th respondents

32. Before I go into the merits of this petition, I have noted that the petitioners in petition No.46 filed their petition as 3 petitioners and 60 others. I have gone through the documents attached to the petition to ascertain who the other 60 petitioners are but I have neither seen a list or a letter of authority from the 60 other petitioners. For that reason I find the other 60 not properly on record and I will consider this petition only in relation to the three petitioners named therein.

33. The history of how the 4th -6th respondents found themselves in Phase 1 has been clearly laid out . They were among squatters being resettled by the Government. The process by which land in Phase I reverted to the Government had also been elaborately explained. In my view the Government appears to have followed the required procedure in both repossessing land previously occupied by the petitioners and later reallocating it to the 4th-6th respondents and other allottees.

Determination

34. The principle under **Article 27** is that all persons are equal before the law and none is entitled to special treatment; That the laws made apply to and benefit all persons to whom they relate and they are not to be impartially applied or administered. Discrimination refers to preferential treatment that is accorded to a person either on the basis of race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. The provision may only be violated by a difference in treatment between persons who are in comparable situations which has objective and reasonable justification. **Article 28** provides that every person has inherent dignity and the right to have that dignity respected and protected. **Article 29** provides that every person has the right to freedom and security of the person, which includes the right not to be subjected to any form of violence from either public or private sources, torture in any manner, whether physical or psychological, treatment or punishment in a cruel, inhuman or degrading manner.

35. It is true that the petitioners and the 4th -6th respondents have the right to equal protection and equal benefit of the law and are entitled to full and equal enjoyment of all rights and fundamental freedoms. It is also true that they have the right of protection, security and to dignity. The petitioners probably feel that they got a raw deal compared to the Maasais and the Kalenjin but this petition is not about that. It is about the land they previously occupied in Phase I and whether there were adequately compensated when they were relocated. In my view, the petitioners have not demonstrated that they were dispossessed of their land and that they did not get fair compensation. I therefore do not see any discrimination demonstrated by the petitioners that the 1st - 3rd respondents had unfairly and without justification applied the law or subjected them to different treatment in respect to their entitlement.

36. On the issue of security, it is true that the state has a duty to ensure that its citizens are not subjected to any form of violence from either public or private sources or subjected to torture in any manner, whether physical or psychological. The Government has demonstrated how it resettled the petitioners and 4th-6th respondents in their respective parcels of land. After resettling them, the Government also had a duty to ensure that peace and order was maintained in those areas. Each allottee has a right to access and enjoy land allocated to them. For this reason I find that the Government has failed to provide security to the 4th-6th respondents to enable them acquire, settle and use their respective parcels of land.

I therefore make the following orders in the consolidated petitions:

(i) Petition No 11 is hereby dismissed.

(ii) I declare that the 1st-3rd respondents have failed to offer the 4th-6th respondents the necessary protection to settle in and use their parcels of land.

(iii) I order that the 1st - 3rd respondents do secure the area to ensure peaceful occupation by the 4th - 6th respondents within 60 days.

(iv) Each party to bear their own costs

Dates, signed and delivered in open court at Nakuru this day of 19th September 2014.

L N WAITHAKA

JUDGE

PRESENT

E N Nganga for the petition No. 46 of 2012

N/A for Petitioners in Petitioner No.11 of 2013 Emmanuel Maelo : Court Assistant

L N WAITHAKA

JUDGE