

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MOMBASA
ELCPET NO. 110 OF 2015

ELIJAH MWAZIGHE MSECHU

ATHMAN BAKARI KALAMA

TITUS HARAMBEE

MOHAMMED HASSAN MUHALO

(Suing on their own and on behalf

of 10 others, as individuals and

members of KAGUJO SELF HELP GROUP)

PETITIONERS

VERSUS

PETER MATHIGU GICHAMBA 1st

RESPONDENT

BROOKCEDRON ENTERPRISES 2nd

RESPONDENT

THE SECRETARY FOR LANDS,
HOUSING & URBAN DEVELOPMENT 3rd

RESPONDENT

THE COUNTY GOVERNMENT OF MOMBASA 4th

RESPONDENT

THE NATIONAL LAND COMMISSION 5th

RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 6th

RESPONDENT

ABDULLA M. EL-MANDRY 7th

RESPONDENT

AND

KAMALI ABUBARI JILO

ALI KHAMIS

JOASH PETE

RONALD SHINYANGE

ZABLON MWAISANA

JUMADAR SOMOBWANA

ABUBAKAR SHEIKH AHMED

FAITHIYA

WILFRED ACHIENG'

JUMA S, MWATELA

KHADIJA HASSAN

MARGARET CHIZI

SHEBAN KHALIFAN

NURU MZEE SAID INTERESTED

PARTIES

JUDGEMENT

1. Vide the amended petition dated 17th April 2019, the petitioners inter alia averred that they entered into MN/II/122, suit property, with the 1st respondent's consent on the following terms:

- a) *Payment of a stand premium known as 'Kilemba' which was equivalent to more than seventy per cent of the nominal market value of such portion each petitioner occupies; and*

b) Payment of ground rent by each petitioner and interested party as a tenant on monthly or annual basis to the 1st respondent.

They alleged that though they have been paying ground rent for over nine years, the 1st respondent has proceeded to allocate and offer land for sale on the said parcel to third parties, without making provision for alternative housing for them, and thereby exposing them to the possibility of being evicted from the suit property; that the 1st respondent's rights to property cannot override their rights to adequate and accessible housing and contravenes *Article 43 (b)* of the Constitution. The petitioners therefore sought for inter alia the following:

A. A declaration that the action by the 1st Respondent in selling and threatening to sell portions of all that parcel of land known as title number: MN/II/122 (hereinafter the "Suit Property") at a time when the Petitioners were in physical occupation of the Suit Property thereby rendering the Petitioners subject to demolition of their houses now erected on the suit property

and forceful eviction therefrom And potentially subjecting the petitioners to a state of homelessness contravenes the provisions of:

a) *Article 2 (5)* of the Constitution of Kenya (2010) which provides that the general rules of international law shall form part of the law of Kenya and in particular contravenes the United Nations General Comment 4 which provides for the right to adequate housing;

b) *Article 28* of the Constitution of Kenya which guarantee human dignity and that every person has inherent dignity and the right to have that dignity respected and protected;

c) *Article 43 (1) (b)* of the Constitution of Kenya 2010 which guarantees, inter-alia the right to accessible and adequate housing;

d) *Article 47 (1)* of the Constitution of Kenya which guarantees inter alia the right to fair administration action.

B. A declaration that the right to adequate housing is a primary and/or fundamental right which may

not be derogated from under the guise of the Government providing land to investors And that in the disposal of public land, allocation of the land for housing of otherwise homeless citizens has greater priority than allocation of land to 'investors' and other business entities;

C. A declaration that all rights set out in the Bill of Rights as may only be enjoyed by the physical persons are superior to such rights as may be enjoyed equally by physical persons and bodies corporate; And

D. A declaration that the right to adequate housing is a primary and/or fundamental right which may not be derogated from under the guise of the Government providing land to other 'homeless' or 'deserving' applicants such as the 1st respondent when the said land is already in the permanent adverse possession and occupation of other homeless persons namely the petitioners herein;

E. A declaration that the common law contractual relationship known as a 'Tenancy at Will' is repugnant to, mutually exclusive with and contravenes the provision of;

a. Article 43 (1) (b) of the Constitution of Kenya 2010 which guarantees *inter alia*, the right to accessible and adequate housing;

b. Article 60 (a) and (b) of the Constitution of Kenya 2010 which provides that all land in Kenya be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the principle(s), *inter alia* of equitable access to land and security of land rights;

c. Article 27 (1) of the Constitution of Kenya 2010 which guarantees equal protection of the law and equal benefit of the law between 'landlord' and 'tenant' alike;

- d. Article 28 of the Constitution of Kenya 2010 which guarantees the protection and respect of every person's inherent dignity;
- e. Article 29 (d) of the Constitution of Kenya 2010 which guarantees freedom from torture in any manner, whether physical or psychological; And
- f. Article 29 (f) of the Constitution of Kenya 2010 which guarantees freedom from cruel, inhuman or degrading treatment, including arbitrary termination of tenancy and arbitrary evictions contemplated under a 'Tenancy at Will'.

F. A declaration that the common law principle of eminent domain pursuant to which the government issues title deeds to land, including the title to the suit property is repugnant to, mutually exclusive with and contravenes the provisions of Article 6 (1) of the Constitution of Kenya 2010 which provides that all land in Kenya belongs to the people of Kenya collectively

as a nation, as communities and as individuals in so far as the Respondents may seek to enforce the principle of eminent domain through eviction of the petitioners from the suit property;

G. That this Honourable Court make such Orders, issue such Writs and give such directions as it deems appropriate to prohibit the respondents from interfering with the peaceful stay of residents of the suit property until such time as the National Land Commission shall have addressed itself to the validity and propriety of the allocation of the suit property to the 1st respondent over and above other landless Kenya Citizens such as the Petitioners.

H. That this Honourable Court do make such further orders, issues such as writs and give such direction as it may consider appropriate for the purpose of enforcing and/or securing the proper administration of justice, having regard to all the circumstances, by the aforesaid subordinate

courts and/or administrative offices and/or officials;

I. That this Honourable Court do make orders for the judicial review of the actions of the Registrar of Titles and/or the Land Registrar, Mombasa which Judicial Review will be seeking orders of:

a. Certiorari to quash the decision of the Registrar of Titles and/or the Land Registrar, Mombasa to the effect that no official search or postal search may be carried out in respect of any parcel of registered land without first producing a copy of the title deed in respect whereof an official search and/or postal search is sought;

b. Mandamus directed to the Registrar of Titles and/or Land Registrar, Mombasa compelling him/her or them to conduct promptly and issue an official search and/or postal search in respect of the suit property herein, namely title number 122/Block II/Mainland North Mombasa upon payment by the

petitioners/Plaintiff herein of the requisite official fee;

J. That the petitioners /plaintiff herein be registered as the proprietor of the freehold or leasehold interest over all that parcel of land known as title number 122/Block II/Mainland North Mombasa, for reasons that the petitioners/plaintiff s have become entitled to the said land by adverse possession;

K. That the order referred to in paragraph one (1) herein above be registered against the freehold or leasehold title issued by the Government of Kenya in respect of the said title number 122/Block II/Mainland North Mombasa, in terms of the Limitation of Actions Act Cap 22.

L. That the costs of this application be provided for.

2. The 1st & 2nd respondents opposed the petition through the replying affidavit sworn by Peter Matihu Gichamba, the 1st respondent, sworn on the 24th May 2017, inter alia deposing that he carries out a business in the name of the 2nd respondent; that the right to housing is a duty bestowed upon

the government, and not private entities; that he bought the suit property out of his own diligence and he is the registered owner, with indefeasible title; that he entered into a lease with some of the petitioners for temporary occupation, and the lessees were to occupy a portion of the land so as to erect Swahili type house, (without land); that the house constructed would have 5 to 10 rooms with common bathroom and toilet facilities and the said rooms would be rented to the public for an average rent of Kshs.2,500- 5,000 per room p.m; that the agreement was therefore for construction of temporary houses, but not for ownership of the land; that despite earning rent, the petitioners and interested parties have never paid him the ground rent as agreed, and hence his action to distress for rent; that there was a specific term in the lease that if the ground rent was not paid, then he would be able to auction the said property to another tenant; that the suit property is private and not public land, and is therefore not available for community ownership; that the orders prayed for cannot be granted as the sanctity of his title to land would be destroyed.

3. The 4th respondent also opposed the petition through the replying affidavit Jimmy Waliaula, the then Director Legal Services, but now County Attorney, sworn on 4th December 2017, in which he inter alia deposed that the dispute is solely between the petitioners and the 1st and 2nd respondents, as it is based on a lease between them, that is common arrangement known as house without land; that the petition does not raise any constitutional issues or any infringement of constitutional rights; that the 4th respondent does not owe any fiduciary duty to the petitioners, whose claim is based on contract and therefore of a commercial nature, to which the 4th respondent is not privy to.

4. During the hearing, the petitioners called Elijah MwazigheMsechu, who testified as PW1. He relied on his affidavit sworn on 15th January 2015 and the list of documents filed on 12th January 2015 as his evidence in chief. He told the court that sometime in 2005 he bought a piece of land from the 1st respondent at Kshs.125,000 and built his house there. That the agreement was that he was to be paying Kshs. 300 p.m after the lapse of the first six months, which he dutifully paid. That sometime in 2010, the 1st respondent refused to

accept the payment and demanded for more money. He further stated that the 1st respondent had promised to get them titles later at the time of entering into the agreement, but he failed to do so. That they added the 7th respondent in the petition after finding that he was the ratepayer for the property from the 4th respondent's records. Further that the 1st respondent has threatened to evict them and there are almost 200 houses on the suit property. On cross-examination, PW1 admitted that the lease agreement attached by the 1st respondent was for building a house without land measuring 40 by 30 feet. He was adamant that they paid for the plots and therefore they had a constitutional right to the plots, and that the 1st respondent's rights cannot override their right to housing. He further agreed that their self-help group was not party to the lease agreements in 2005, as it was registered in 2014. He added that they been paying ground rent but they stopped after filing this suit. On re-examination, PW1 stated that they wanted the court to interpret their lease agreements in accordance with the constitution.

5. The 1st & 2nd respondents called Peter Mathigu Gichamba, the 1st respondent, who testified as DW1. He relied on his depositions in the affidavits sworn on 24th May 2017 and 9th March 2020 together with the list of documents dated 2nd February 2021, as his evidence in chief, and reiterated that the suit property is private land, and that the four petitioners are his tenants. He elucidated that he had made lease agreements with each of the tenant, petitioners, that inter alia provided that each tenant would build a Swahili house and be paying ground rent. That the lease agreements provided that he had allowed them to erect a Swahili house without land on a space measuring 40 by 50 feet upon payment of Kshs.125,000, which amount he termed as 'Kilemba'. That he had given them a grace period of six months to build their houses and thereafter pay monthly rent of Kshs.300 as ground rent. That the lease further provided failure to pay ground rent entitles him to distress for rent against the lessee. He added that he is owed around Kshs.30,000,000 by the various groups of tenants, who were on his land, and that he had instructed an auctioneer to distress for rent, and some that some of tenants paid while others filed applications to

stop the distress. That he he signed the lease agreements with the 1st to 4th petitioners before the 2010 Constitution, but they were updated after its commencement. He told the court that he does not know the 7th respondent, and that he pays rates directly to the 4th respondent. That the amount of money paid as 'Kilemba' refers to payment made to start a relationship over land in is a Swahili culture and that the amount is never refundable. That any of his tenant in such a relationship who intends to sell his/her Swahili house must obtain prior approval from him.

6. The 3rd and 6th respondents called Sheila Soita, a Land Registrar, who testified as DW2. She relied on a list of documents dated 14th September 2021 and stated that the suit property is 5.9 acres, and summarized details of the entries on the register of said land as follows:

- i. Entry No. 5 - transfer to Abdullahi Mohamed Eleudi on 12th October 1960.
- ii. Entry No. 6 - charge to A.F.C for Kshs.15,000 on 10th September 1974.
- iii. Entry No. 7 - discharge of charge on 5th March 1980.

- iv. Entry No. 8 - caveat on 3rd June 1992 by Francis Gichamba Mathingu claiming purchaser's interest.
- v. Entry No. 9 - order from the High Court order dated 27th August 1993 vesting title upon Benedeta Njeri Njuki.
- vi. Entry No. 10 - title issued on 28th August 1993 in favour of the Benedeta Njeri Njuki.
- vii. Entry No. 11 - transfer to Peter Mathigu Gichamba dated 22nd May 1998 for a consideration of Kshs.200,000.
- viii. Entry No. 12 - charge dated 7th December 1998 to Barclays Bank for Kshs.400,000.
- ix. Entry No. 13 - Caveat by Safaricom Ltd claiming lessee's interest on 30th September 2008.

DW2 further stated that according to the documents in her possession, the suit property belongs to the 1st respondent. On cross-examination, DW2 stated that the suit property had defined boundaries set by the Director of Surveys in 1921.

7. The 4th respondent closed their case without calling any witness. The learned counsel for the petitioner, 1st & 2nd respondents, 3rd & 6th respondents filed their submissions dated 24th July 2025, 15th October 2025 and 30th July 2025 respectively, which the court has considered.

8. From the parties' pleadings, affidavit and oral evidence, the following issues arises for the court's considerations:

a) *Whether the petition raises any constitutional questions for determination.*

b) *Who bears the costs?*

9. The court has meticulously considered the parties' pleadings, affidavit and oral evidence tendered by PW1, DW1 & DW2, submissions by the learned counsel for the parties, and come to the following determinations:

a) In the case of Mukhobi versus Mukhobi & Another [2025] KEELC 5276 (KLR) the court held as follows:

"The threshold for constitutional petitions was set in the case of Anarita karimi Njeru -vs The Republic (1979) eKLR where it was held that constitutional petitions should set out with a reasonable degree of precision the petitioner's complaint, the provisions of the constitution alleged to have been infringed and the manner in which those provisions of the constitution have been infringed."

In the above case the court also cited with approval the case of Mumo Matemu -versus- Trusted Society of

Human Rights Alliance & 5 others (2013) eKLR in which the Court of Appeal stated that:

“It is our finding that the petition before the High court was not pleaded with precision as required in Constitutional petitions. Having reviewed the petition and Supporting Affidavit we have concluded that they did not provide adequate particulars of the claims relating to the alleged violation of the Constitution of Kenya and the Ethics and Anti-Corruption Commission Act, 2011, accordingly the Petition did not meet the standard enunciated in the Anarita Karimi Njeru Case”

b. In this petition, the right that has been clearly, or precisely brought out is that of affordable housing, under *Article 43 (1) (b)* of the Constitution. It is clear from the pleadings herein and testimonies tendered that there is no dispute about who is the registered owner of the suit property. It is also clear that the petitioners' claim is about eviction from the suit property that according to PW1, they had bought. *Article 43 (1) (b)* is the right 'to accessible adequate

housing and to reasonable standards of sanitation' and has been termed in the constitution as one of the economic and social rights, which according to *Article 21 (2)* of the Constitution provided for as follows:

"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"

c. The doctrine of progressive realization of rights was discussed in the celebrated case of Musembi & 13 Others versus Moi Educational Centre Co. Ltd & 3 Others [2021] KESC 50 (KLR) the Supreme Court held as follows:

"From the foregoing, it is manifestly evident in the present context that the mandate to ensure the realization and protection of social and economic rights does not extend to the 1st respondent, a private entity. Even though the 1st respondent has a negative obligation to ensure that it does not violate the rights of the petitioners, it is not under any obligation to ensure that those rights are

realized, either progressively or immediately. The court of Appeal thus correctly held that the progressive realization of article 43 rights was the mandate of the State, and that obligation does not extend horizontally to private entities. We hasten to add however, that private entities have the obligation, under article 20(1) not to violate article 43 rights as non-violation of all rights in the Bill of Rights applies both horizontally and vertically and binds both the State and all persons. We so find.”

- d. Applying the above reasoning to the this petition, the petitioners claim against the 1st & 2nd respondents, who are private entities fails, is not their responsibility to provide the petitioners with the housing right. The petitioners have also not shown how the 3rd, 4th, 5th, 6th, and 7th respondents would be obligated to protect them against the 1st respondent’s moves to distress for rent in accordance with their specific lease agreements that they voluntarily entered into over portions of the suit property.

e. Looking at the petitioners' core of the dispute and the prayers sought, the court is of the view that it would have been better pursued through an ordinary civil suit. in the case of Bethwell Allan Omondi Okai versus Telkom (K) Ltd (Founder) & 9 Others [2013] KEHC 6925 (KLR) where the court cited with approval the case of Alphonse Mwangemi Munga & 10 others versus African Safari Club Limited [2008] eKLR, and held as follows:

".....the Court stated that whereas a party has unhindered access to the High Court under the Constitution:

"....that does not give the licence to every litigant to come to court by way of a constitutional application even where there is no constitutional issue arising and where there are adequate remedies provided in other laws to cover such situations. This court has considered similar applications where the Petitioners seek to enforce service contracts by way of constitutional applications and have held them to be an abuse of

Court process - eg in Rashid Odhiambo Aloggoh & 245 Others vs Haco Industries Ltd HCC Misc 1520/1999, and Stephen Ndiboi & 27 Others vs Brookside Dairy Ltd Misc Applic. No. 764/05."

From the foregoing, i find that the petition is without merit and is for dismissal.

f. In section 27 (1) of the Civil Procedure Act it states as follows:

"Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the

court or judge shall for good reason otherwise order.”

The petitioners have been unsuccessful in their petition, and as it was for their individual benefits, as opposed to public benefits, they will bear the costs for the 1st & 2nd respondents, but the 3rd, 4th & 6th respondents being public entities will bear their own costs.

10. From the foregoing determinations, the court finds the petitioners have failed to establish their claim against the respondents to the standard required by the law. The court therefore orders as follows:

a) The petition is hereby dismissed.

b) The petitioners to bear the costs for 1st & 2nd respondents.

c) The 3rd, 4th and 6th respondents being public entities will bear their own costs.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 10TH DAY OF DECEMBER 2025.

S. M. Kibunja, J.
ELC MOMBASA.

IN THE PRESENCE OF:

PETITIONERS : Mr. Ngombo

RESPONDENTS : Mr Matheka for 1st and 2nd Respondents

Mr. Randiek for 4th Respondent

INTERESTED PARTIES : No appearance

KALEKYE-COURT ASSISTANT.

S. M. Kibunja, J.
ELC MOMBASA.