



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MOMBASA

COUNTY COURT NAME: MOMBASA ENVIRONMENT AND LAND COURT

CASE NUMBER: ELCLPET/E025/2024

FAIRPLAY ENTERPRISES LIMITED VS JOHN KATANA AND PERSONS UNKNOWN

JUDGMENT

The Petition

Fairplay Enterprise Ltd (herein referred to as petitioner) filed this constitution petition against John Katana and unknown persons seeking a declaration that the Respondent's occupation and continued presence on the Property is unlawful and a violation of the Petitioner's constitutional rights under Article 40 of the Constitution of Kenya, 2010 He also seeks an order of eviction against the Respondents and any other persons claiming under them from the Property known as L.R. No. MN/ 111/520 Grant No. CR. 27902 located North of Mtwapa Creek, Kilifi District.

Lastly, he seeks a permanent injunction restraining the Respondents, whether by themselves, their agents, servants, employees, or otherwise, from trespassing, entering, constructing, or interfering in any way with the Petitioner's quiet possession of the Property and General damages for trespass. Plus Costs of this Petition.

The legal basis for the petition is Article 20 (2) of the Constitution of Kenya 2010 which guarantees every person the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. The Petition is primarily anchored on Article 40 of the Constitution, which guarantees the right to property.

The Petitioner further relies on the Land Act, No. 6 of 2012, specifically Sections 152A, 152B, 152B, and 152F of the Land Act, 2012, which govern the eviction of unlawful occupiers of private land. Section 152A of the Land Act, 2012 prohibits the unlawful occupation of land, whether private, public, or community land.

The alleged violations are that the Respondents are in unlawful occupation of the Property which constitutes a violation of the Petitioner's constitutional right to property, as guaranteed under Article 40 of the Constitution of Kenya 2010. The continued occupation denies the Petitioner the right to use and enjoy the Property.

Article 20(2) ensures that every individual is entitled to the fullest protection and enjoyment of their rights and freedoms, consistent with the nature of those rights. The Respondents' actions directly infringe upon the Petitioner's right to property, justifying the need for court intervention to uphold



these fundamental freedoms.

The Petitioner has faced significant challenges in identifying and notifying all the individuals currently occupying the land, due to the hostility exhibited by the Respondents. This situation necessitates seeking the court's permission to pursue substituted service.

The petitioner contends that under Section 152B of the Land Act, the Petitioner is obligated to issue an eviction notice in writing and in an official language. The law also requires that the notice be published in national newspapers and displayed prominently on the occupied land to ensure proper notification. To comply with statutory requirements and ensure that all occupants are duly informed, the Petitioner has filed this petition and seeks to leave of court to serve the Persons Unknown by way of substituted service, which would involve posting the eviction notice on the land and publishing it in newspapers.

The petitioner contends that the substituted service is necessary to uphold the principles of fair administrative action under Article 47, providing all individuals occupying the land with a fair opportunity to be heard in the petition to ensure that even those occupying the land unlawfully are treated in accordance with the principles of natural justice. Court intervention is thus essential to resolve this dispute and strike a balance between the Petitioner's right to property and the Respondents' procedural rights which can only be done by this court pursuant to its constitutional mandate to protect fundamental freedoms, ensuring compliance with both statutory requirements and constitutional principles.

The petition is supported by the affidavit of Ebrahim Jaani who states that he lawfully acquired the property known as L.R. No. MN/ 1 11/520 Grant No. CR. 27902 and was issued a Grant under the now-repealed Registration of Titles Act, as evidenced by the title deed and accompanying survey plan.

The intention behind acquiring the Property was to develop it for commercial use, taking advantage of its strategic proximity to Mtwapa Creek. This unique positioning serves as a significant asset for the region's commercial growth, making the current unlawful occupation all the more detrimental to the petitioners business and future development plans.

The Respondents entered the Property without any legal right and have continued to occupy it unlawfully, constructing temporary structures and cultivating parts of the land. This occupation is not only unlawful but also infringes upon the Petitioner's proprietary rights guaranteed under Article 40 of the Constitution, which protects the right to property.

The petitioner states that the ongoing occupation of the Property by the Respondents has broader implications, as it deters potential developers and investors from engaging in projects in the area. This situation stifles local economic growth and hampers community development efforts. Despite numerous demands and requests made by the Petitioner for the Respondents to vacate the Property, the Respondents have willfully refused and neglected to comply.

The Respondents t unlawful occupation of the Property constitutes a violation of the Petitioner's constitutional right to property as enshrined in Article 40 as read with Section 152A of the Land Act, 2012. The actions of the Respondents have deprived the Petitioner of its legitimate expectation to utilize and enjoy the Property according to the provisions set forth in the Constitution, the Land Act and the Land Registration Act. The extreme hostility displayed by the Respondents has hindered the Petitioner from identifying and naming all individuals currently occupying the land, necessitating this Petition to seek permission for substituted service in accordance with Article 47 of the Constitution, which guarantees fair and expeditious administrative action. The continued occupation of the Property by the Respondents infringes upon the Petitioner's rights and is contrary to due process, as the Respondents have failed to vacate the land despite lacking any legal basis for their occupation.



The respondents did not file any response.

Petitioner's Submissions

The petitioner submits that he has established lawful ownership and that the respondents' occupation constitutes unlawful trespass and a violation of Article 40 of the constitution of Kenya 2010. The Petitioner has demonstrated lawful ownership of the suit property by way of a duly issued Government Grant under the Registration of Titles Act, being Grant No. CR 27902, together with the corresponding Survey Plan No. 90380, which precisely delineates the boundaries of L.R. No. MN/ III/ 520.

That it is settled law that a registered proprietor enjoys indefeasible title, subject only to challenge on limited grounds such as fraud or illegality, which must not only be specifically pleaded but also strictly proved.

The petitioner cites the case of Wreck Motor Enterprises v Commissioner of Lands & 3 others [19971 KECA 391 (KLR), the Court of Appeal held that:

"A certificate of title issued by the Registrar is to be taken by all courts as conclusive evidence that the person named therein is the absolute and indefeasible owner thereof."

In the present matter, no such challenge has been raised. The Petitioner's title therefore remains un- assailed, and its proprietary interest in the suit property stands established and deserving of the full protection of this Honourable Court.

The petitioner argues that despite such proper and Court-sanctioned service, the Respondents have neither entered appearance nor filed any response to the Petition and have placed before this Honourable Court no competing claim to title or lawful interest in the suit property. The Petition therefore remains wholly undefended, and the evidence adduced by the Petitioner stands uncontroverted.

Under Rule 16 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, a respondent is required to file a response within fourteen (14) days of service, which period has long lapsed without any response. The Respondents have failed to do so. Further, under Rule 20, this Honourable Court is empowered to determine the Petition on the basis of the material placed before it.

The legal position is settled that where a respondent fails to file any response or affidavit, the factual basis of a petition remains uncontroverted. Justice Lenaola (as he then was) in Ngamau Limited v Commissioner of Lands & 2 others [2015] REI-IC 7326 (KLR), the Court observed that "the factual background to it is uncontested because the Respondents... filed no Affidavit to contradict the Supporting Affidavit..."

In the present case, the Respondents have similarly failed to file any response or affidavit to controvert the Petitioner's evidence. The factual foundation of the Petition therefore remains unchallenged and ought to be accepted as proved.

The Respondents entered the suit property without consent or lawful justification and continue to occupy and utilise the land despite demands to vacate. This conduct constitutes trespass, which is actionable per se and does not require proof of damage.

Section 152A of the Land Act provides in mandatory terms that:

"No person shall unlawfully occupy private... land."

Article 40 of the Constitution guarantees every person the right to acquire and own property, and to use and enjoy that property without unlawful interference. The Respondents' actions have deprived the Petitioner of possession and prevented it from utilising and developing the property, thereby interfering with its economic value and intended use. This amounts to an unlawful deprivation of property, contrary to the Constitution.

A registered proprietor is entitled to exclusive possession of land to the exclusion of all others, and that any person in occupation without lawful authority is a trespasser with no enforceable rights. In



Waas Enterprises Limited v City Council of Nairobi [2014] eKLR, the Court held that:
"As a registered proprietor, the plaintiff is entitled to enjoy all proprietary rights to the exclusion of all others..

The same position applies in the present case, The Respondents, being in occupation of the suit property without any lawful basis, have no enforceable interest in the land and cannot defeat the Petitioner's proprietary rights.

The Respondents' continued unlawful occupation therefore constitutes a direct infringement of the Petitioner's constitutional rights. This Honourable Court is accordingly enjoined, under Articles 22 and 23 of the Constitution, to grant the reliefs sought so as to vindicate those rights.

The circumstances in the present case closely mirror those in *Kepha Omondi Onjuro & Others v Attorney General and 86 others*. In that case, the Court was confronted with a large and fluid population of occupiers where individual service was impracticable, and upheld the adequacy of public notice, finding that:

"Having analysed the above it is my considered view that the Relocation Action Plan and the run up to the notice in the Daily Nation to vacate the railway reserve had been carried out within the required legal framework...

The petitioner argues that in the present case, the Petitioner was faced with a group of occupiers whose conduct made personal service not only impracticable but unsafe. As demonstrated in the Affidavit of Service, an attempt at personal service resulted in hostility and the gathering of a threatening crowd, placing the process server at real risk of harm and compelling his withdrawal. In those circumstances, the Petitioner resorted to Court-sanctioned substituted service through publication in a widely circulated national newspaper, thereby ensuring that all persons in occupation were brought to notice of the proceedings.

The process adopted herein was carried out within the required legal framework and satisfies the threshold of procedural fairness. The present case goes further, in that the Petitioner not only ensured public notification but did so following a demonstrated inability to safely effect personal service.

Having so found, the Court proceeded to grant substantive relief directed at a class of unidentified unlawful occupiers, holding that:

"The Respondent's cross-petition succeeds, and it is hereby ordered that the recent illegal occupiers of the Railway Reserve whose names do not appear in the list of the Project Affected Persons do move out of the Railway Reserve and allow the Corporation to proceed with the Resettlement Plan." According to the petitioner, the jurisdiction of the Court to hear proceedings against persons unknown is well established, particularly where such persons are identifiable by reference to their conduct and connection to land. In *Ineos Upstream Ltd v Persons Unknown*, the Court reiterated the same and states the first case which permitted a claimant to sue persons unknown defined by other words of description (without specific statutory authority for that procedure) was *Bloomsbury Publishing Group Ltd v News Group Newspapers Ltd* [2003] 1 WLR 1633. In that case, the judge (Sir Andrew Morritt V-C) said at [211] that it was not material that the description of persons unknown might apply to no one.

The petitioner cites the case of *Hampshire Waste Services Ltd v Intended Trespassers* [2004] Env LR 196, where the judge granted a quia timet injunction to restrain future trespass by protestors. The position that proceedings and orders may issue against persons unknown defined by their conduct is further reinforced by the decision of the Supreme Court in *Secretary of State for Environment, Food and Rural Affairs v Meier* [2009] UKSC 11. In that case, the UK Supreme Court expressly recognized that injunctions have been granted against unnamed trespassers, noting that:

"trespassing protestors were the target of the interlocutory injunction. In *Hampshire Waste Services Ltd v Persons Intending to Trespass and/or Trespassing*... [2003] EWHC 1738 (Ch). Similarly... in



South Cambridgeshire DC v Persons Unknown... the Court of Appeal... granted an injunction against persons unknown 'causing or permitting... caravans... to be stationed... or... occupied on land'... The petitioner argues that in the present case, the Respondents are clearly and sufficiently described as persons occupying L.R. No. MN/ 111/520 and who have entered upon and continue to remain on the said land without the consent of the registered proprietor. This description is neither vague nor speculative; it is anchored to a specific and identifiable parcel of land, thereby rendering it geographically precise, and is defined by the conduct of unlawful entry and occupation, making it conduct-specific and objectively verifiable.

Accordingly, any person found within the suit property without lawful authority falls within this defined class. The 2nd Respondents are therefore legally identifiable as a class, notwithstanding that their individual names are unknown.

Further, the petitioner submits that Sections 152A to 152F of the Land Act expressly contemplate the eviction of unlawful occupiers, including circumstances where such occupiers are numerous and not individually identifiable. In particular, Section 152E recognizes that where such persons are numerous, notice may be effected by publication in a newspaper of nationwide circulation and by display at or near the land. The statutory framework therefore places emphasis on notice, publication, and procedural fairness, rather than on the individual identification of each occupier. In the circumstances and having fully complied with both the Court's directions and the statutory framework, the Petitioner has ensured that all persons in occupation of the suit property were sufficiently identified, duly notified, and afforded an opportunity to be heard. The proceedings and notice issued are therefore proper and sufficient to bind all such persons.

Analysis and Determination.

I have considered the petition and submissions on record and do find that the petitioner seeks enforcement of the bill of rights horizontally against an individual person. I agree with the school of thought which argues that the Constitution is a living document. It is a house with many rooms, windows and doors. It is conservative enough to protect the past but flexible enough to advocate new issues and the future. The Constitutional thinking is premised on State conferred power to the neglect of private power but the law now appreciates the fact that even private individuals and corporate bodies enjoy rights and/or have a propensity to violate rights.

Under the 2010 Constitution of Kenya, fundamental rights have horizontal application, meaning they are enforceable between private parties and not just against the State, as per Article 20(1). This approach binds private entities to respect rights such as property rights, non-discrimination, privacy, and fair labour practices, moving beyond traditional vertical-only application.

Article 20(1) of the Constitution states that the Bill of Rights applies to all law and binds all State organs and all persons. It holds private actors accountable for rights violations, recognizing and that non-state actors often wield significant power similar to the State. However, this approach has its limitations, while the application is broad, it is not absolute. Courts should balance the enforcement of fundamental rights against private law, such as contractual autonomy and trespass and other pure civil causes of action. If parties were to be allowed to file constitutional petitions to pray for eviction and specific performance of contracts, it will open the flood gates for civil suits camouflaged as constitutional petitions.

The petitioner has come to this court to enforce his rights under the provisions of Article 40 of the Constitution of Kenya 2010 that provides as follows:-

40. Protection of right to property

(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.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.(6)The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

I have lifted the whole Article 40 of the Constitution of Kenya to demonstrate that it does not envisage violation of property rights by an individual but by the state. This court finds that the petition seeks to resolve a purely civil dispute between the petitioner and the respondents and that the same is actionable under civil law and not constitutional law and therefore the petition is unfounded. The petitioner ought to file a proper civil suit for eviction of the respondents as provided for by section 152A of the land Act. The petition therefore has no basis and is dismissed with no order as to costs.

JUDGMENT DATED, SIGNED AND DELIVERED ELECTRONICALLY AT MOMBASA THIS 16th DAY OF APRIL 2026.

A.O.OMBWAYO
JUDGE

SIGNED BY/FOR:
HON. JUSTICE ANTONY O. OMBWAYO

