



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

ENVIRONMENT AND LAND CASE NO. 29 OF 2017

JOSHUA MUTAMBUKI & 557 OTHERS.....PETITIONERS

VERSUS

**CABINET SECRETARY MINISTRY OF INTERIOR & COORDINATION
OF NATIONAL GOVERNMENT.....1ST RESPONDENT**

**CABINET SECRETARY MINISTRY OF LANDS, HOUSING & URBAN
DEVELOPMENT NATIONAL GOVERNMENT.....2ND RESPONDENT**

INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

AND

TANA RIVER COUNTY.....1ST INTERESTED PARTY

KITUI COUNTY.....2ND INTERESTED PARTY

NATIONAL LAND COMMISSION.....3RD INTERESTED PARTY

JUDGEMENT

INTRODUCTION

1. The Petition herein was filed by the Petitioner Joshua Mutambuki and 557 Others on 14th March, 2017 in Kitui High Court before being transferred to ELC Garissa for hearing and determination.

2. In their petition dated 13th March, 2017 the Petitioners are seeking the following orders:

a. Declaratory orders that the acts of omission and commission by the Respondents jointly and severally in not taking action against the invaders illegal entry, occupation and displacement, harassment, intimidation, relocation and interference with the Petitioners quiet enjoyment and occupation of their ancestral land were and amounted to dereliction of duty, negligence, abdication of duty of care, exposed the Petitioners to harm and injuries and were therefore illegal, in breach of statutory duties were contrary to natural and international treaties on protection of the Petitioners human rights and freedom hence unconstitutional.

b. Declaration that the Petitioners are entitled to be compensated for the historical injustices suffered out of systematic/deliberate failures by the Respondents to diligently undertake their mandate as per the rule of law to ensure their safety and protection.

c. Special and general damages for breach of the Petitioners' constitutional rights and freedoms.

d. Costs and interests.

e. Any other relief in favour of the Petitioners.

3. This petition was first filed in Kitui High Court as Petition No. 2 of 2017. However the same was later transferred to ELC Garissa and registered as ELC No. 29 of 2017 after it emerged that the Petitioners' claim is premised on parcels of land located along Kitui County and Tana River boundary spreading from Mwingi North, Mwingi Central, Kitui South Sub-Counties.
4. It was the wisdom of the High Court in Kitui that the Petitioners herein would have access to justice at the ELC Garissa rather than in Kitui where judiciary is yet to post an ELC Judge.
5. When the case was mentioned before me on 9/5/2017 directions were taken to have the County Government of Garissa and Kitui enjoined as interested parties in this petition. The National Land Commission was also directed to be enjoined as an interested party.
6. All the Respondents were then served with summons to appear before court on 31/5/2017 for further directions however none of the Respondents entered appearance nor attended court on the said 31/5/2017.
7. The court then directed the parties to proceed with the hearing of this petition by vi-va-voce evidence. The court directed that Respondents to be served for hearing on 19/7/2017.
8. According to the 1st Petitioner Joshua Mutambuki who is also testifying on behalf of the other Petitioners, he has sued the 1st Respondent for failing to provide them with security from constant attacks by the Somali community. He contends that they have reported numerous incidents to the police and even the chiefs but no steps have been taken. He stated that the area is expansive situated within Ukasi occupied by more than 500 families.
9. The 1st Petitioner further stated that the skirmishes started way back in the year 1992 and that in the year 2006 the problem worsened.
10. The 1st Petitioner averred that the attackers used to attack and leave but in 2006 they decided to settle in their land. He stated that in 1992, they took his father's cattle and on 19th February, 2017 they attacked and killed his father. The attackers also burnt his houses and destroyed properties worth thousands of shillings. He gave his father's name as Mutambuki Katumo. He produced his certificate of death No. 019137 which he also produced in evidence.
11. The 1st Petitioner made a report at the police station but the attackers were not apprehended. He produced photographs of the destruction. The government took action by employing Kenya Police Reservists (KPR) to assist in reinforcing security.
12. The 1st Petitioner is therefore seeking compensation for the death of his father and the destruction of properties.
13. The 1st Petitioner also stated that they made complaints to government agencies and held numerous meetings with the government security agencies including one held with the then Cabinet Secretary for Internal Security the late Hon. Nkaissery sometime in March, 2017.
14. The 1st Petitioner averred that in the meeting with the late Cabinet Secretary Hon. Nkaissery the government agreed to deploy the Kenya Police Reservist (KPR).
15. The 1st Respondent also averred that they have several police stations including Ukasi and Sosoma patrol base. Other proposed police stations include Mwanzele and Katangini.
16. The 2nd witness in support of this petition is Florence Mwenda Kaitha who is also one of the Petitioners herein. She is a resident of Sosoma/Mwanzele village. According to her, they have lost properties and lives through arson and murder. They have not settled in their ancestral land because of insecurity. Their children do not attend school. They decided to live in Sosoma village as internally displaced persons (IDPs). She produced photographs showing the destruction. Properties such as farm produce were destroyed.
17. They reported the incident to the OCS Ukasi. The Divisional Agricultural Officer visited the area and assessed the damage done on their farms running into millions of shillings. The report was also taken to the OCS, Ukasi police station. No action was taken. A total of 31 people were killed as a result of the attack while others sustained serious injuries.
18. The witness also identified a report from the village administrator dated 24/5/2017. The witness also identified numerous medical reports. She confirmed that the government conducted an operation to flush out people from their farms after 31 people were killed in February, 2017 or thereabouts. As a result of the said operation, three people were arrested and charged in court.
19. The 3rd witness was Benard Gitonga Musyili who stated that he lost his brother one Kilungu Musyili who was killed on 21/1/2017 as a result of the attacks. He stated that the late Kilungu Musyili was grazing his animals at Sosoma village when he was attacked. He produced death certificate No. 0434693 showing that the cause of death was gun shots.
20. The police collected his body from the scene and followed the attackers but no suspects were arrested. The witness stated that his cows were shot. They all moved to Sosoma village as internally displaced persons (IDPs). Their area MP visited them but no assistance was given to them.
21. The 4th witness called by the Petitioners is No. 231851 Chief Inspector Antony Karisa attached to Ukasi police station as the Officer

Commanding the station. He was summoned to produce the Occurrence Book No. 5/13/4/2017, 4/6/2/2017 and 6/18/2/2017. He stated that his station covers two locations namely Nguni and Ukasi Locations. Beside Ukasi police station, he also has Sosoma Operation Base headed by an inspector from the Administration Police.

22. He further stated that his division has had cases of attacks by two communities namely; the Somalis and Kambas. The two communities have been fighting for resources. He stated that there is no proper demarcated boundary between Tana River and Kitui Counties.

23. The witness also stated that the Somali herdsmen graze their animals deep into Kitui region where they destroy crops belonging to Kamba farmers. As a result of that, there is usually a conflict and fighting erupt which give rise to fatalities. He said that his station managed to arrest two suspects of Somali origin who were arraigned before Mwingi Law Courts in 2017 Criminal Case No. 67 of 2017.

24. The witness confirmed that an operation was conducted to flush out suspected criminals within the area which has given the residents some semblance of peace and security in the area. He also confirmed that the numerous attacks led to destruction of property and loss of life.

25. The witness further confirmed that Kenya Police Reservists have been employed and new police operational camps have been created in Katangili and Katumba area between Tana River and Kitui to boost the security in the area. The witness said that he has been working closely with the area Members of Parliament and the County Government.

26. The 5th Petitioners' witness is Amos Kivaisho Kithoka. He works in Nguni as a Ward Agricultural Officer. He was summoned to produce an assessment report.

27. The assessment report had been prepared by the District Agricultural Officer one Ngali Mbuvi dated 5/10/2009. The report is in respect of 21 farms. The officer assessed the damage in the 21 farms at Kshs.27,587,900/=.

28. The witness did two other reports dated 10/3/2017 and another on 7/3/2017. The two reports are in respect of 45 farmers based in Ukasi Location and 72 farmers based in Imba Location. The damage caused to the farmers in the first report is assessed at Kshs.100,044,000/=. The second report was assessed at Kshs.2,980,800/=. The two reports were produced in evidence.

29. The 6th Petitioner witness is Nelson Kilonzo Kitema who is a resident of Nguni Division, Mwingi East District. He was the MCA, Nguni Ward from 2013 – 2017. He has a farm in Sosoma area.

30. The said Nelson Kilonzo Kitema stated that he was also affected by insecurity caused by Somali community. He stated that the inhabitants of the area he lives are mostly Kambas who produce farming, keep cattle goats and sheep. The Somalis do not live in that area but they come from Isiolo, Mandera and Marsabit. When these Somalis came, they settled along the border between Garissa, Kitui and Tana River Counties. He stated that whenever there is conflict of resources between the people living around that area, the government comes in between and resolves the dispute(s). The witness also stated that the government has attempted to separate the different communities who have different customary rites and practices.

31. The witness further stated that the land which is a source of conflict is a community land held by County Government in trust for the residents. During this time as a ward representative (MCA), he moved a motion in the County Assembly to identify the boundaries between Tana River and Kitui Counties.

32. He also sought to create police stations/posts at Kaningo, Mandongoi, Mwanzele, Engamba, Endan and Muthaa. The witness also confirmed that as a result of the numerous conflicts in the area, about 16 people have lost their lives and reports made in various police stations/posts.

33. The witness also proposed that the government do identify common boundaries between Tana River and Kitui Counties. The witness further proposed that a police post be created at Kalumba area to respond to any conflict in the area.

34. There is no response by the Respondents who did not enter appearance or file defence despite having been duly served.

PETITIONERS' SUBMISSIONS:

35. Counsel for the Petitioners Mr. Nzili submitted that the Respondents jointly and severally have through acts of omission and commission failed to take action against the illegal entry, occupation, displaced, harassment, intimidation, relocation and interference with the Petitioners' quiet enjoyment and occupation of their ancestral lands in Ukasi Location, Mwingi Central Sub-County of Kitui County.

36. The learned counsel also submitted that the Respondents actions referred in paragraph 35 above amounted to dereliction of duty, negligence, breach of constitutional and statutory obligation to protect the rights and freedoms of the Petitioners.

37. The Petitioners also suffered damages after their farms were destroyed and animals killed. Counsel relied in the case of **Florence Omukanda v Republic [2016] eKLR** and urged this Honourable Court to allow the petition as prayed.

DECISION:

38. This petition alleges violation of various constitutional rights and fundamental freedoms. Beside the allegations that the Respondents have breached their constitutional rights under the Bill of Rights, the Petitioners have also hinged this petition on breach of their constitutional right to property. Their argument is that they have been either harassed, intimidated, chased or killed in their ancestral land.

39. I feel that it is important for the status of the land to be identified and/or defined. It is only then that I can direct my mind whether or not there have been any violations of the constitution by the Respondents.

40. Following the above, I am of the considered view that this petition may be determined if the following issues are addressed:

- a. Is the petition before this court a proper constitutional petition and has it been properly filed?**
- b. What is the status of the land in issue?**
- c. Can the Petitioners' claim rights over the suit land given its status?**
- d. Were there any violations of the constitution by the Respondents towards the Petitioners?**

41. In the background to this petition the Petitioners have stated that they brought this petition in their own behalf and the general public interest under Article 22 and 23 of the Constitution of Kenya, 2010.

42. The Petitioners averred that at all material times they were owners of lands, livestock and farms located along Kitui County and Tana River boundary spreading from Mwingi North, Mwingi Central, Kitui Sub-Counties.

ISSUE NO. 1:

Veracity of the petition as a general public interest:

43. The 557 Petitioners have brought this petition on their own behalf and the general public interest. Article 22 of the Constitution of Kenya, 2010 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....”**

44. My reading and understanding of that Article of the Constitution informs me that the Petitioners are properly before the court in their own right and in the general public interest.

ISSUE NO. 2:

What is the status of the land in issue?

45. It has been argued that the land in issue together with the investments therein including livestock and crops belong to the Petitioners. It is therefore imperative in my view to interrogate into the status of the land in question.

46. Is the land public land, private land or community land? The answer to this question can well be answered in the definitions contained in Articles 62, 63 and 64 of the Constitution of Kenya, 2010 which provides as follows:

Article 62 (1) public land is:-

- a. Land which at the effective date was alienated government land as defined by an Act of Parliament in force at the effective date;**
- b. Land lawfully held, used or occupied by any state organ, except any, such land that is occupied by the state organ as lease under a private lease.**
- c. Land transferred to the state by way of sale, reversion or surrender;**
- d. Land in respect of which no individual or community ownership can be established by any legal process.**
- e. Land in respect of which no heir can be identified by any classification of land;**

- f. All minerals and mineral oils as defined by law;**
- g. Government forests other than forests to which Article 63 (2) (d) (i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;**
- h. All roads and thorough fares provided for by an Act of Parliament.**
- i. All rivers, lakes and other water bodies defined by an Act of Parliament.**
- j. The territorial sea, the exclusive economic zone, and the sea bed.**
- k. The continental shelf;**
- l. All land between the high and low water marks.**
- m. Any land not classified as private or community land under this constitution; and**
- n. Any other land declared to be public land by an Act of Parliament –**
 - i. In force at the effective date; or**
 - ii. Enacted after the effective date.**

Article 63 (2) Community land consists of:

- a. Land lawfully registered in the name of group representatives under the provisions of any law;**
- b. Land lawfully transferred to a specific community by any process of law;**
- c. Any other land declared to be community land by an Act of Parliament; and**
- d. Land that is:-**
 - i. Lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;**
 - ii. Ancestral lands and lands traditionally occupied by hunters –gatherer communities; or**
 - iii. Lawfully held as trust land by the County Governments, but not including public land held in trust by the County Governments but not including public land held in trust by the County Government under Article 62 (2).**

Article 64: Private land consists of:

- a. Registered land held by any person under freehold tenure;**
- b. Land held by any person under leasehold tenure; and**
- c. Any other land declared private land under an Act of Parliament.**

ISSUE NO. 3:

Can the Petitioners claim rights over the suit land given its status?

47. The argument by the Petitioners is that they are owners of the land in issue. That argument has not been supported by any documents.

48. In view of the circumstances of this case, this Honourable Court takes judicial notice that the land in issue between River Tana boundary with Kitui County stretching from Mwingi North and Mwingi Central is un-adjudicated area.

49. As such, the land in issue is therefore a community land held by the County Government under which the land in issue is situated in trust for the inhabitant ordinarily living in that land.

50. In that regard, any violation of rights infringement and/or threats to any right interest in the land in issue under Article 40 of the Constitution can only be and/or pursued by the County Government concerned who are holding those rights and/or interests on behalf of the inhabitants living therein.

51. In order for one to succeed in claims for violation of rights infringement and/or threats to such rights and/or interests recognized under Article 40 of the Constitution of Kenya, 2010 such rights and/or interests should be registered and/or capable of being recognized under the constitution or any other written law of the land.

52. The Petitioners claims in this petition are neither registered nor identifiable under the constitution or any written law. The land in issue has not been gazetted as an adjudicated area.

54. As such, the Petitioners' rights and/or interest in the land in issue can be recognized and/or identified through the County Government within which the land in question is situated.

54. It is therefore my finding that the Petitioner's claim under Article 40 of the Constitution of Kenya, 2010 cannot succeed. In the same breath, the claim for damages also fails as the claim can better be ventilated in another regime and not by way of a petition.

55. The other claim by the Petitioners is found on the Bill of Rights and Fundamental Freedoms. Under Article 21 of the Constitution of Kenya, 2010 provides as follows:

“21(1) It is a fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfill 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 realization 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 disability, children, youth, members of minority or marginalized communities and members of particular ethnic, religious, or cultural communities.

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

56. The Petitioners have made serious allegations of breach of their constitutional rights and fundamental freedoms under the constitution. Breach and/or violation and/or threat to constitution rights and fundamental freedoms are committed by identified individuals and not institutions, state officers or organs.

57. The Petitioner have not identified any individual state officer and/or public officer who has failed and/or neglected to observe, respect, protect or promote their constitutional rights and fundamental freedoms as enshrined in the constitution.

58. State officers and public servants are accountable and indeed liable for their individual commissions and omission. Where a criminal offence is reported to any government agency responsible for prosecuting such crimes but fails to take appropriate action, the victim has numerous options including making an application before the court to institute private prosecution where the offender is identified.

59. There is no evidence adduced by the witnesses in this case indicating that suspects have been identified and that the state has taken no action to prosecute them before a court of law.

ISSUE NO. 4:

Were there any violations of the constitution by the Respondents towards the Petitioner?

60. I have already dealt with the alleged violation of the constitutional right to property and compensation which I held that the Petitioners have not demonstrated a prima facie evidence of ownership of the land in issue and that their expectations would be addressed in a different regime of the law but not through a constitutional petition.

61. I have also noticed that the Petitioners have raised other numerous constitutional concerns which need to be addressed. First, the Petitioners have cited the provisions of Article 238 of the Constitution of Kenya, 2010 which provides under Article 238 (1) as follows:

“238 (1) National security is the protection against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity and other national threats.”

62. It is the responsibility of the national government to promote and guarantee its citizens. The right to protection from any aggression either internally or externally as a social contract.

63. From the evidence adduced by the witnesses called by the Petitioners, it is apparent that the national government has set up a police station at Ukasi Division which covers Nguni and Ukasi Locations. The witness also stated that the government has created Sosoma Operation Base headed by an Administration Police Officer which boosts the security in the division. It has also been stated that Kenya Police Reservists have been deployed to the affected areas to respond to the security situation.

64. The Officer Commanding Station Ukasi Police has narrated how the alleged attacks have been carried out by suspected criminals. He stated that the attacks are caused by conflict of resources such as pasture and water. The conflict is further compounded by boundary dispute

between the different communities between the two counties.

65. The evidence adduced by the Petitioners' witnesses has demonstrated the national government efforts to provide security to the inhabitants of the volatile region. These efforts include the creation of Sosoma Operation Base, the deployment of Kenya Police Reservist (KPR) and the numerous meetings called by the leadership in the two counties in an attempt to resolve the dispute amicably.

66. The Officer Commanding Ukasi Police Station (OCS) in his evidence has also confirmed that he has arrested two suspects in relation to the numerous attacks in the volatile region who have been taken to Mwingi Law Courts and charged in Criminal Case No. 67 of 2017.

67. I find these attacks are spontaneous and not systematic to warrant a conclusion that they are aimed at members of a particular ethnic community.

68. I also find that the national government has responded to the spontaneous attacks by beefing up security and arresting suspects and presenting them before a court of law.

CONCLUSION AND FINAL DISPOSITION:

69. I think I have dealt exhaustively all the issues raised. The long and short of it is that I find and hold that the factual allegations of the Petitioners have not been proved. The Petitioners have therefore failed to demonstrate any infringement violation and/or threat of their constitutional rights by the Respondents.

70. Having found and held as much, I have no option but to dismiss this petition which I hereby do. Costs being a discretionary power, I make no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT GARISSA THIS 20TH DAY OF MARCH, 2018

.....

HON. E. C. CHERONO

E.L.C. JUDGE

In the presence of:

1. Mr. Nzili for the Petitioners
2. Ijabo – Court Clerk
2. Ijabo – Court Clerk