



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NYERI**

**ELC PETITION NO. 16 OF 2015**

**(Formerly CONSTITUTIONAL REFERENCE NO. 18 OF 2015)**

**IN THE MATTER OF INTERPRETATION OF THE CONSTITUTION OF KENYA, 2010**

**THE RESIDENTS OF CHANIA METHODIST WITEMERE VILLAGE**

**VIZ ERNEST WAGURA KIGANO AND 87 OTHERS .....  
PETITIONERS**

**-VERSUS-**

**THE HON. ATTORNEY OF THE REPUBLIC OF KENYA**

**THE COUNTY COMMISSIONER, NYERI COUNTY**

**THE DISTRICT COMMISSIONER, NYERI MUNICIPALITY,**

**THE DISTRICT OFFICER MUKARO**

**THE CHIEF MUKARO ..... 1ST RESPONDENTS**

**THE COUNTY GOVERNMENT OF NYERI**

**THE GOVERNOR OF THE COUNTY GOVERNMENT OF NYERI ..... 2ND RESPONDENTS**

**JUDGMENT**

**Introduction**

1. On **7th October, 2015** the petitioners herein, who have described themselves as Residents of Chania Methodist Witemere Village, brought the petition herein seeking, among other orders, a declaration that their constitutional rights are threatened with violation by the respondents; an injunction to restrain the respondents from evicting them from the village and compensation for alleged violation or infringement of their constitutional rights.

2. The petitioners' case against the respondents is that on 5th October 2015, the respondents, without issuing them with adequate notice to vacate their residences and/or without giving them a good reason as to why they should vacate their dwelling premises or providing them with an alternative place to settle, ordered them to vacate their dwelling premises and went ahead and demolished their dwelling places.

3. Vide the supporting affidavit of the first petitioner, **Ernest Wagura Kigano**, sworn on **6th October, 2015**, the petitioners have deposed that the County Commissioner and the Governor, County Government of Nyeri accompanied by administration police officers, arbitrarily ordered them to vacate their residences.

4. Explaining that some of the petitioners have lived in the suit land for over thirty (30) years and have children in neighbouring schools (some of whom are KCPE and KCSE candidates), the petitioners reiterate their contention that they were neither issued with eviction notice nor given any sufficient reason for their eviction.

5. Owing to the alleged unlawful eviction from their dwelling place, the petitioners claim that several of their constitutional rights were violated by the respondents. Some of the petitioners' rights allegedly violated by the respondents include:-

- a) Right to accessible and adequate housing;
- b) Right to reasonable standards of sanitation;
- c) Right to human dignity;
- d) Right to security and security of the person;
- e) Right to reside anywhere in Kenya;
- f) Right to own property
- g) Right to pursue personal development;
- h) Right to live in dignity
- i) Right to receive reasonable care and assistance from the state;
- j) Right to access justice and fair hearing.

6. The petition is opposed through the replying affidavits of James Gichuki Kiretai; Oduor Makoniare. The affidavits were sworn on 29th October, 2015, 1st December, 2015 and 2nd December, 2015 respectively.

7. The respondents' case, as can be discerned from the replying affidavits of the above mentioned Government officers, is that the petition is misconceived, misguided and untenable. In this regard, it is argued that rights and freedoms are not absolute but subject to certain limitations..

8. It is contended that, in the circumstances of this case, the limitation of the petitioners' rights was justified. In support of that contention, the respondents have explained that the petitioners had occupied an area that posed a security risk to themselves (respondents had occupied a slopy and mud areas prone to mud slides).

9. Pointing out that petitioners have no ownership documents to the suit land, the respondent term them land grabbers and the petition scandalous, frivolous, vexatious, devoid of any merit and an abuse of court process.

10. Based on the observations made by the court when it visited the suit premises on 27th October, 2015 the respondents reiterate their contention that the impugned evictions were justified as they were aimed at arresting the risk likely to befall the petitioners if they continued to stay on the suit property.

11. The respondent have also explained that the suit land is a public land (conservation area) unavailable

for private use and unfit for human habitation.

12.The impugned evictions are said to be part of the safety measures taken by the respondents to avert the eminent security risk, the petitioners were facing.

13.In a rejoinder, counsel for the petitioners, vide the further affidavit he swore on 11th November, 2015 has complained that petitioners' premises were demolished during the pendency of the suit herein and maintained that the the petitioners' constitutionalrights were violated by the respondents. For that reason he maintained that the petitioners are entitled to compensation for violation of their constitutional rights.

14.The petition was disposed of by way of written submissions.

15.In the submissions filed on behalf of the petitioners, counsel for the petitioners admits that the premises are slopy but contends that they are habitable by landless people.

16.Concerning the assertion that the premises are a security risk, especially because of the expected *el nino* rains, the petitioners explain that no landslides or massive erosion was witnessed in the previous *el nino* rains and even the current ones.

17.He reiterated the contention that the petitioners were not issued with eviction notice or given good reasons for eviction or provided with alternative land to settle or compensated.

18.The impugned evictions are said to have rendered the petitioners destitute (Internally displaced).

19.Based on the provisions of **Article 40** of the Constitution, which protects the right to property, it is submitted that eviction of the petitioners amounts to a breach of their constitutional rights. For that reason, it is submitted that the petitioners are entitled to monetary compensation.

20.On quantum of damages, it is submitted that damages awardable to the petitioners are pegged on the discretion of the court or subject to valuation of demolished houses. There being no valuation tendered in respect of the demolished premises, the court is urged to award general damages of Kshs. 1,000,000/- to each of the petitioners. (The situation in this suit is compared to the 2007/2008 post election violence where the victims were compensated with 4 acres of land and Kshs.400,000/= each by the government).

21.Based on an article published in the Kenya Law Journal Volume (2) 2015 at page 19 entitled "The Right to housing in Kenya: From law to Practice", the court is urged to take judicial notice of the amount of money set aside (15 billion) to settle *el nino* squatters, while considering the petitioners' claim.

22.In the submissions filed by the 1st respondent (Attorney General), it is submitted that whereas the petitioners claim to have been in actual occupation and possession of the suit land, no evidence was given to support those allegations.

23.Reference is made to the site visit by the court and submitted that it was observed that the structures that were subject of demolition were newly constructed, not more than a month old.

24.Concerning the contention by the petitioners that the suit land is habitable by landless people, based on the report of the Nyeri Land County Surveyor and that of an Environmental Impact Land Expert, it reiterated that the suit land is a high risk sloppy and muddy area, prone to mudslides, massive soil erosion and thundestorms.

25Owing to the said environmental conditions, it is submitted that the lives, health, social-economic development of the petioners and their children was under great risk.

26.It is further submitted that owing to the foregoing situation, the government was justified in urgently intervening in order to arrest the situation. Besides, the area is said to be a conservation area (public utility), unavailable for appropriation for private use and unfit for human habitation.

27.It is pointed out that the court declined to grant conservatory or interim orders sought by the petitioners and submitted that the reason for the refusal was because it was convinced that there was immense danger and risk to the lives of the petitioners and their children.

28.On the issue of compensation, reference is made to the petitioners' suggestion that they ought to be treated as the victims of post election violence and submitted that the present case cannot be equated to that of the post election victims because the post election victims were evicted from their private lands; evictions were not carried out by the government of the day and that there were no environmental risks that led to the evictions.

29.Terming the suggestion by the petitioners vague and incomparable to the current situation, the 1st respondent urges the court to disregard it.

30.With regard to the law applicable, it is submitted that the petitioners have not demonstrated that they have any right to the suit land and that they deserve the enjoyment of social and economic rights in terms of **Article 43** of the Constitution.

31.It is contended that social economic rights can only be realised progressively, subject to the available resources and international cooperation and not in the manner suggested by the petitioners.

32.Based on the decision in the case of **John Harun Mwau and other v. Attorney General & 2 others and Satrose Ayuma & 11 others v. Registered trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 Others HCC Petition No.65 of 2010 KLR**, it is submitted that the Government's role to provide housing and reasonable standards of sanitation is distributed amongst the Ministry of Housing and National Housing Corporation and not the 1st respondent herein.

33.On behalf of the 2nd respondent four (4) issues are identified for court's determination. These are:-

- a) whether the petitioners are legal inhabitants of the suit property?
- b) whether the 2nd respondents have authority to issue eviction orders?
- c) whether the petitioners have shown any denial, violation, infringement of or threat to their rights or fundamental freedoms guaranteed in the Bill of Rights? and
- d) Whether the petitioners are entitled to the prayers sought?

34.On whether the petitioners are legal inhabitants of the suit property, reference is made to the classification of land under **Article 61(2)** of the Constitution of Kenya, 2010 and submitted that the suit land is neither private nor community land. Based on the provisions of **Article 62(1)(d)** and **(m)** which defines public land to include:-

**“(d) land in respect of which no individual or community ownership can be established by any legal process;**

**(m) any land not classified as private or community land under this constitution” it is submitted that the suit land is public land.”**

35.Based on **Article 40(1)** of the Constitution and **Section 7** of the Land Act, No.6 of 2012 it is submitted that the petitioners have not demonstrated that they acquired interest through any of the method recognised by law for acquiring land.

36.The term “Witemere” given to the village is said to be suggestive of how the petitioners got interest in the suit property-“by grabbing a piece of public land each for themselves!”

37.Terming the petitioners trespassers into the suit land, the 2nd respondents has submitted that the

petitioners do not deserve any protection from this court.

38. On whether the respondents have authority to issue eviction orders reference is made to **Article 24** of the Constitution which provides for circumstances under which the rights and freedoms guaranteed by the constitution may be limited and submitted that being the legal trustees of the suit land, the 2nd respondents are mandated by law to protect public land as they did in this case, as such they cannot be faulted for discharging their mandate.

39. On whether the petitioners have shown any denial, violation, infringement of or threat to their rights or fundamental freedoms guaranteed in the Bill of Rights, reference is made to the case of **Arita Karimi Njeru vs. Rep (No.1) 1 KLR 154**, where the importance of setting out with reasonable degree of precision that of which a complainant complains about, the provisions said to be infringed and the manner in which the rights and fundamental freedoms alleged to be infringed was stressed and submitted that in the current suit, the petitioners pleadings contain mere statements and allegations of infringement of rights and fundamental freedoms in the Bill of Rights without setting out with precision in what manner those rights were infringed or violated.

40. The petitioners' pleadings are said to be utterly hopeless and as such incapable of being relied upon to make any judicial determination. In this regard, it is pointed out that no particulars were furnished by the petitioners to help the court gauge the veracity of their allegations.

41. It is further submitted that the 2nd respondent did not violate or infringe any of the petitioners' rights because:-

- i) The petitioners are trespassers to the suit land (have no legal rights over the suit land);
- ii) The the petitioners' right to live anywhere in Kenya does not give them right over land owned by the 2nd respondent or the Government;
- iii) The the action complained about was done in the best interest of the petitioners (eviction meant to safeguard the petitioners' right to life);
- iv) The the petitioners rights in question cannot be provided in an area which is unfit for human habitation;

42. Concerning the allegation that the respondents contravened the petitioners' right to dignity and right to pursue personal development; right to live in dignity and right to reasonable care and assistance from the state; it is submitted that the petitioners have failed to show how the 2nd respondents violated those rights. It is explained that based on warnings issued by weathermen concerning the impending *el nino* rains, the 2nd respondents issued eviction notices on the petitioners as a measure of safeguarding their lives.

43. With regard to the allegation that the respondents infringed the petitioners' right to freedom and security of the person guaranteed under **Article 29(a)(c) and (d)**, it is submitted that there is no correlation between those rights and the subject matter of the petition.

44. On whether the petitioners are entitled to the prayers sought, it is submitted that the petitioners are not entitled to the prayers sought. The following reasons are advanced for that submission:-

- k) The rights cannot be enforced in the circumstances of this case;
- i) Declarations of rights cannot issue because the respondents have not violated any of the petitioners' rights;
- m) The petitioners did not demonstrate the kind of interest that they have in the suit land (whether legal or equitable);

n) Respondents were within the law to protect the area because it is public land and unfit for human habitation;

o) The respondents have the right to evict any person who trespasses upon public land upon issuance of due notice, as happened in this case;

p) The claim for material damages was neither particularised nor proven as by law required;

q) Petitioners being trespassers have not put up a case for compensation resulting from compulsory acquisition of land.

### **Analysis and determination**

45. As pointed out herein above, the petitioners instituted the current suit to restrain the respondents from evicting them from the suit land, Witemere Village. The petitioners complaint is that they were neither given good reasons for the order to vacate the suit land nor given sufficient notice to vacate the suit land. The petitioners, who claim that they have no alternative land, also claim that they were neither given alternative land on which to settle or compensated.

46 Simultaneously with the petition, the petitioners brought the notice of motion dated 6th November, 2015 seeking an order of maintenance of status quo pending the hearing and determination of the petition.

47. When the motion came up for hearing, owing to seriousness of the issues raised concerning whether or not the court should order that status quo be maintained pending the hearing and determination of the petition, the court directed that there was need to visit the scene and see for itself how the situation is on the ground. Consequently, the court visited the scene and made the following observations:-

**“The scene is at a valley in Witemere area; a river flows by within the valley:**

**Petitioners’ counsel contended that his clients’ premises was on upper side hence cannot be prone to elnino. Because the petitioners’ land was on the upper side, the petitioner’s felt that they were being discriminated against. It was observed that there were a few houses on the upper side being referred to by counsel.**

**On observation, the said structures appeared not to be more than 6 months old, they appeared to have been built recently going by the new iron sheets which still glittered and the timber that had not been worn out.**

**Again from the many sacks filled up with soil that had been placed along the sides of the valley to hold back the soil (in an attempt to built gabions like structures) it is evident that the residents are trying to hold back the soil.**

**From the above, it is clear that the entire topography is unsafe for residents.**

**Suit property was identified as a conservation area by the district surveyor, Mr. Oduol Mark, who had accompanied the court for the site visit.**

**Court was also informed that the area had alot of potential earth movements as opposed to other suit premises. Identified as an unalienated public conservation area.**

**The court also observed semi permanent structures which could be seeing hanging precariously along the valley”.**

48. Based on the report the court held:-

**“From my observations, I do not find it necessary, at this stage to grant any conservatory**

orders.”

49. Following that determination by the court, parties to the dispute agreed to compromise the motion and instead proceed with the petition.

50. With regard to the petition they agreed to have it disposed of by way of written submissions.

51. Based on the contents of the further affidavit, sworn on 11th November, 2015 by counsel for the petitioners and given the fact that the said contention is not denied by the respondents, it appears that after the court declined to grant conservatory orders in favour of the petitioners, the respondents went a head and evicted the petitioners from the suit land.

52. From the pleadings and the submissions filed in this matter the issues for determination are:-

**a). The legal propriety or otherwise of the petition?**

**b). Whether the petitioners have any legally protectable rights over the suit land?**

**c). Whether the respondents breached the petitioners rights and fundamental rights in carrying out the impugned evictions?**

**d). Whether the petitioners are entitled to the orders sought or any of them?**

**e). What order(s) should the court make?**

**53. (a). The legal propriety or otherwise of the petition?**

On whether the petition meets the threshold of pleadings in constitutional petitions set in **Anarita Karimi Njeru (supra)** and reiterated in many other cases, I having read and considered the petition filed herein, I agree that it falls short of that threshold in that the petitioners have merely flanked out some articles of the constitution which they allege were violated by the respondents without detailing the manner in which those rights and freedoms were violated by the respondents. That notwithstanding, I hold the view that from the pleadings filed, the court is, nevertheless, able to discern what the petitioners' claim against the respondents' is. From the responses filed, I have no doubt that the respondents' understood the case urged against them by the petitioners. Since the essence of the requirements for constitutional pleadings is to ensure the other side is able to appreciate the case urged against it and to be able to adequately respond to it, in the circumstances of this case, being of the view that the respondents adequately responded to the issues raised in the petition to enable the court make a fair determination on the case urged by both sides, I find and hold that the defect in the pleadings did not render the petition fatally defective.

**54. (b) Whether the petitioners have any legally protectable rights on the suit property?**

With regard to this question, I begin by pointing out that it is not in dispute or controverted that the parcel of the land which is the subject matter of this petition is public land; that the same was never alienated in favour of the applicants and that based on the allegation that they have no land of their own, the petitioners' took possession of the land and began developing it (erected houses thereon). In view of the foregoing I find the petitioners' case not to be premised on any legally recognisable right to land. In that regard, see the decision in the case of **Joseph Letuya & 21 others v. Attorney General & 5 others (2014) eKLR** where it was held:-

**“ The process of conferring legal and equitable property rights in land under Kenyan law is settled, and is dependent upon formal processes of allocation or transfer and consequent registration of title, or of certain transactions that confer beneficial interests in land in the absence of a legal title of ownership. The process of allocation of forest land is further governed by the Forest Act that requires a process of excision of forest land before such land can be allocated. The Applicants did not bring evidence of such processes of allocation of title**

to land located in the Mau Forest and solely relied on their long occupation of the same. In addition under law, forest land being government land, cannot be subject to prescriptive rights arising from adverse possession. This court cannot therefore in the circumstances find that they have accrued any property rights in the Mau Forest that can be the subject of the application of section 75 of the old Constitution or Article 40 of the current Constitution.

Notwithstanding the finding of this Court that no property rights are yet to accrue to the Applicants, it is noted that the Constitution now provides for community land under Article 63 of the Constitution, which shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest. Community land under Article 63 (2) (d) includes:

“(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 hunter-gatherer communities;  
or

(iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62 (2). “

These provisions of the Constitution are to be given effect to in and by an Act of Parliament which is yet to be enacted, and once enacted this is the law that will probably eventually settle the issue of the property rights of the Ogiek community in the Mau and other forests in which they claim ancestral rights. In addition, the National Land Commission which is established under Article 67 of the Constitution is mandated to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress. The Applicants claim for property rights is therefore not ripe for determination by this court, and should be pursued through the necessary legislative processes on the community land legislation, and with the National Land Commission.”

55. Also see the case of Parkire Stephen Munkasio & 15 others v. Kedong Ranch Ltd vs. 8 others where it was stated:-

“A lot was said about the petitioners being in occupation of the suit property. To me it matters not whether they are in occupation of it, or they are outside it, at least in so far as the right to property is concerned. If they are in occupation, they are in occupation as trespassers since they have not demonstrated any right over the property which may be protected....”

56. On whether the respondents breached the petitioners’ rights in carrying out the impugned evictions, it is not in dispute that the respondents carried out the impugned evictions. The only point of departure is whether in so doing they breached the petitioners’ rights.

57. In determining this question, I begin from the premise that as the custodians of the suit property, the respondents had power to remove the respondents from the suit property, upon issuing them with a reasonable notice for the impending eviction.

58. In the case of Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others (Supra) it was observed:-

“Kenya, so far as I know, does not have a law governing evictions whether forced or otherwise. Consequently, I must look to international law and the jurisprudence emerging from other countries to discern the ideal situation with regard to the subject. Having said so, I must also say something about the submission made by the 1st Respondent that this Court

cannot refer to International law in the context of this case. I find that submission misguided. I am aware of the Court of Appeal decision in *Rono vs Rono C.A No.66 of 2002 (ur)* and I do not think that the position that international law applies only in cases where it has been domesticated and incorporated is good law. I know that the *Treaty Making and Ratification Act, 2012* was enacted to give effect to Article 2(6) of the Constitution but Article 2(5) on application of international law principles applies squarely to this case. I therefore deem it proper and good practice to seek guidance from international law where our laws are silent or inadequate on an issue such as the one before me.

80. In that regard, the *UN Basic Principles and Guidelines on Development based Eviction and Displacement (2007)* have provided some guidance to States on measures to adopt in order to ensure that development-based evictions, like the present one, are not undertaken in contravention of existing international human rights standards and violation of human rights. These guidelines provide measures to ensure that forced evictions do not generally take place and in the event that they do, then they are undertaken with the need to protect the right to adequate housing for all those threatened with eviction, at all times.

81. The Guidelines *inter-alia* place an obligation on the State to ensure that evictions only occur in exceptional circumstances and that any eviction must be authorised by law; carried out in accordance with international human rights law; are undertaken solely for purposes of promoting the general welfare and that they ensure full and fair compensation and rehabilitation of those affected. The protection accorded by these procedural requirements applies to all vulnerable persons and affected groups irrespective of whether they hold title to the home and property under domestic law.

82. The Guidelines also articulate the steps that States should take prior to taking any decision to initiate an eviction; that the relevant authority should demonstrate that the eviction is unavoidable and is consistent with international human rights commitments; that any decision relating to evictions should be announced in writing in the local language to all individuals concerned sufficiently in advance stating the justification for the decision; that alternatives and where no alternatives exist, all measures taken and foreseen to minimize the adverse effect of evictions; that due eviction notice should allow and enable those subject to the eviction to take an inventory so as to assess the value of their properties that may be damaged during evictions and most importantly that evictions should not result in individuals being rendered homeless or vulnerable to other human rights violations. Finally, that there must be resettlement measures in place before evictions can be undertaken.

83. The Guidelines go further to lay down the conditions to be undertaken during evictions as follows; that there must be mandatory presence of Governmental officials or their representatives on site during eviction; that neutral observers should be allowed access to ensure compliance with international human rights principles; that evictions should not be carried out in a manner that violates the dignity and human rights to life and security of those affected; that evictions must not take place at night, in bad weather, during festivals or religious holidays, prior to elections, during or just prior to school exams and at all times the State must take measures to ensure that no one is subjected to indiscriminate attacks.

84. The UN Guidelines in addition provide what ought to happen after the eviction; that the person responsible must provide just compensation for any damage incurred during eviction and sufficient alternative accommodation and must do so immediately upon evictions. At the very minimum, the State must ensure that the evicted persons have access to essential food, water and sanitation, basic shelter, appropriate clothing, education for children and childcare facilities.

85. These important guidelines have been adopted by the African Commission on Human and Peoples Rights and in its 48th Ordinary Session it adopted the Principles and guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on

**Human and People's Rights. Accordingly, the African position on the right to housing can be understood from the African Commission on Human and Peoples' Rights case of The Social Economic Rights Centre & Centre for Economic and Social Rights vs Nigeria, Com. No.155/96 (2001). In the judgment, the Commission stated that;**

***“Individuals should not be evicted from their homes nor have their homes demolished by public or private parties without judicial oversight. Such protection should include providing for adequate procedural safeguards as well as a proper consideration by the Courts of whether the eviction or demolition is just and equitable in the light of all relevant circumstances. Among the factors a Court should consider before authorising forced evictions or demolitions is the impact on vulnerable and disadvantaged groups. A Court should be reluctant to grant an eviction or demolition order against relatively settled occupiers without proper consideration or the possibility of alternative accommodation being provided. Forced evictions and demolitions of people's homes should always be measures of last resort with all other reasonable alternatives being explored, including mediation between the affected community, the landowners and the relevant housing authorities”***

**I am wholly guided and with that in mind I must now return to the issue whether the Petitioners' right to adequate housing was violated.”**

**59. (c) Did the evictions carried by the respondents' meet the threshold envisaged in that case?**

In answering this question, I note that following issuance of eviction notice on the petitioners, they moved to court with a view of restraining the respondents from evicting them from the suit premises pending the hearing and determination of the petition. This court upon considering the cases urged in support and opposition of the application for interim reliefs and based on a site visit report prepared by itself, declined to grant the reliefs sought.

60. Although this court did not give the reasons for declining to grant the interim reliefs from the site visit report which formed the basis of the court's refusal to grant the interim reliefs one can infer that the reason for deny of the reliefs was the finding that:-

**“...It is clear that the entire topography is unsafe for the residents...”**

61. It appears that after the court declined to grant the interim reliefs the respondents proceeded and evicted the petitioners' from the suit premises by demolishing the structures they had erected thereon. Was such action illegal or unwarranted so as to form the basis of declaration of violation of the petitioners' constitutional rights? I think not. This is so because firstly, the petitioners' had no legally protectable interest in the suit property. The evidence on record shows that the parcel of land on which the petitioners had erected the demolished structures was a public utility (a conservation area); secondly the area was unsafe for human habitation.

62. Similar sentiments were expressed in the case of **Clement Kipchirchir & 38 others v. Permanent Secretary Lands & housing & Urban Development & 2 Others** (2015) e KLR where it was stated:-

**“60. The general position in international law is that where it is necessary for persons to be evicted, such persons need to be evicted in a humane way, and alternatives be offered to them. It is not the position that a State is barred by the ICCPR or the ICSCER from evicting persons. Evictions are indeed permissible so long as the eviction is justified; that there are adequate safeguards to protect the dignity and security of the persons, and alternatives are provided. I cannot say that the eviction of the petitioners was in any way arbitrary or that there was no justification for it. The petitioners were in illegal occupation of the Mau Forest Complex, an important ecological pillar and lifeline to a myriad of species, not to mention that it is probably the most important water catchment in the country. The importance of the Mau Forest is well captured in the *Report of the Prime Minister's Task Force on the***

*Conservation of the Mau Forest Complex*, attached to the Replying Affidavit of the 3rd respondent.

61. From what I can see, the evictions were aimed at conserving the Mau Forest, a forest of great importance, in that it is a water tower and is of huge ecological value. Indeed the lives of many Kenyans depend on the Mau forest. The Constitution at Article 69(1) (b) obligates the Government to work to achieve and maintain a tree cover of at least 10% of the land area of Kenya. The same Article obligates the State to eliminate processes and activities that are likely to endanger the environment. There can be no argument that the presence of the petitioners in the forest was going to endanger the forest and the larger environment. It was not an arbitrary exercise of State power for the Government to move to evict the petitioners. The move to evict them in my view was fully justified.

62. It was alleged by the petitioners that they were forcefully evicted; that they were later in the year 2007 informed to pick ballots for an alternative settlement scheme but that they have never been resettled; and that in the year 2011, they were evicted "*in the most inhuman, degrading and demeaning manner rendering them (the applicants) squatters in their own country...*" (paragraph 12 of the petition). In their prayers, the petitioners have inter alia asked for a declaration that "*the actions of the Government of Kenya of evicting, razing down houses and degazetting private property without due process are brazen, illegal etc..* (prayer (a) ). At paragraph 7 of the supporting affidavit, it was said that the respondents "*not only evicted us but also razed down our houses in the most bizarre, barbaric and uncivilized manner and slashed our crops in the farm thus subjecting us to frustration, dejection, discrimination, inhuman, degrading, and demeaning treatment.*"

63. This of course had been denied by the respondents who have averred that the petitioners were removed because the lands they occupied were illegally occupied and that they were "handsomely" compensated. It will be noted that Ms. Khatambi for the State in her submissions, pointed out that there was absolutely no evidence of the allegations that the houses of the petitioners were razed or that they were subjected to any inhuman treatment.

64. I am inclined to agree with the respondents. There is actually no proof that any of the crops of the petitioners were slashed, their houses razed, or that they were removed in a "*barbaric and uncivilized manner.*" It would not have been difficult to annex photographs, or reports of any such incidences, or even medical examination chits if indeed this is what occurred. The burden of proof was on the petitioners to demonstrate that the respondents evicted them in a manner that is not permissible by the international human rights instruments or by the constitution. I have absolutely no evidence of the matters that are alleged to have happened, and in absence of evidence, I am unable to hold that the petitioners were evicted in a manner that involved slashing of crops and razing of houses. I have in fact looked at the valuation reports annexed, which give the ground situation of two of the land parcels, that is Nakuru/Likia/1427 and 1429. The valuer has indicated that in the parcel No. 1427 there is a forest department camp whereas in the parcel No. 1429, there are no structures. There is no indication of any apparent destruction of any structures on these two parcels of land. Neither is there any indication that the parcels of land were farmed at some point. In short, I have no evidence of the allegations that the Government used arbitrary force or destroyed any of the properties or crops of the petitioners at the time that the petitioners were evicted. Without any evidence, I regret that I am unable to hold that the Government evicted the respondents inhumanely or in a barbaric fashion...."

63. In the circumstances of this case, no evidence has been adduced to make this court resign from the position that the suit premises were unfit for the petitioners. In the circumstances I am inclined to agree with the respondents' that the impugned evictions were necessary as a mechanism for protecting the petitioners from the security threat that faced them.

64. On whether the notice was given to the petitioners or the notice given to the petitioners to relocate was

adequate, from the petitioners pleadings, it is not clear whether the petitioners are complaining about failure by the respondents' to issue them with notice to vacate the suit premises or the adequacy of the notice. I say this because, the fact that as at the time the court visited the suit premises, the petitioners had not been evicted negates a finding that they were not given a notice to vacate the suit premises.

65. On whether the notice given by the respondents was adequate, my view of this matter is that adequacy of an eviction notice is a matter of fact to be determined from the circumstances of the case. In this case, given the impending threat posed on the security of the petitioners by the expected el nino rains, the notice given to the petitioners bearing in mind that they were evicted way after the court declined to grant them interim reliefs, cannot be reasonably challenged.

66. In view of the foregoing, I find and hold that the petitioners have not demonstrated breach of any of their constitutional rights by the respondents.

**67. (d) Whether the petitioners are entitled to the orders sought or any of them?**

Having determined that the petitioners have not demonstrated breach of any of their constitutional rights to warrant issuance of the orders sought against the respondents, I return a negative verdict on this questions.

68. The upshot of the foregoing is that the petition has no merits and is dismissed with costs to the respondents.

**Dated, signed and delivered at Nyeri this 6th day of October, 2016.**

**L N WAITHAKA**

**JUDGE**

In the presence of:

Mr. Kioni h/b for Mr. Muguku for the petitioner

Mr. Kariu for the 2nd respondent

N/A for the 1st respondent

Court assistant - Lydia