



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

PETITION CASE NO.27 OF 2014

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27,28,29,31, 40, 43, 45, 47, 53, 57, 73 AND 232 AS READ TOGETHER WITH 19, 20, 21, 22, 23 AND 24 OF THE CONSTITUTION OF KENYA AND SECTION 19 OF THE SIXTH SCHEDULE OF THE CONSTITUTION OF KENYA SECTION 10, 22, AND 25 OF THE IRRIGATION (NATIONAL IRRIGATION SCHEMES) REGULATIONS UNDER THE IRRIGATION ACT CAP 347.

BETWEEN

**SAMWEL OLWENY OLWENY.....PETITIONER
PETER ORAGE MASARA.....2ND PETITIONER
SILVAN MUNGA AYOO.....3RD PETITIONER
COSMAS OCHIENG OGWANG.....4TH PETITIONER**

(Suing on their behalf and on behalf of other licensees)

VERSUS

**THE HON. ATTORNEY GENERAL.....1ST RESPONDENT
THE MANAGER – AHERO NATIONAL IRRIGATION PILOT SCHEME.....2ND RESPONDENT
THE NATIONAL IRRIGATION BOARD.....3RD RESPONDENT**

JUDGMENT

1. A Samel Olweny Olweny, Peter Orage Masara, Silvan Munga Ayoo and Cosmas Ochieng Owang, the 1st to 4th Petitioners, on their own behalf and on behalf of other aggrieved licensees at Ahero National Irrigation Pilot Scheme, brought this petition under **Rules 11, 12, 13, and 14 of the Constitution**

of Kenya (Supervisory Jurisdiction and Protection of Fundamental rights and Freedom of Individual) High court Practice and Procedure Rules, 2006, **Articles 19, 20, 21, 23, 24, 27, 28 29, 31, 40, 43, 45, 47, 53, 57, 73 and 232** of the Constitution of the Republic of Kenya) praying for the following;

- “i) A conservatory order barring the Respondents from continuing with more demolitions and attempted eviction of the petitioners from the Ahero National Irrigation Plot Scheme site.**
- ii) A declaration that the Respondents are in breach of provisions of Article 47 of the constitution, having failed to follow the laid out procedure for terminating the licenses of the petitioners and therefore failing to accord the petitioner administrative action that is lawful, reasonable and procedurally fair.**
- iii) A declaration that the Respondents are in breach of Article 27 of the constitution, having failed to ensure impartiality in decision making and having practices discrimination in the treatment of some of the licenses of the Ahero National Irrigation Scheme inclusive of the Petitioners.**
- iv) A declaration that the Respondents are in breach of Article 27, 28, 45 and 57 of the constitution, having failed to ensure the petitioners who are aged 71 and 82 years respectively together with their families are allowed to live with dignity and respect and free from abuse.**
- v) An order for compensation to be paid to the petitioners for the unlawful demolitions of their properties.**
- vi) An order do issue directing the Respondents to allow the Petitioners to construct houses in replacement of the demolished ones.**
- vii) An order of damages for infringement of rights of the Petitioners to be paid by the 3rd Respondent.**
- viii) Costs of the petition.”**

B. The petition, is brought against **The Hon. Attorney General, the Manager Ahero National Irrigation Pilot Scheme, the National Irrigation Board**, hereinafter referred to as the 1st to 3rd Respondents.

C. The petition is based on the grounds numbers 5 to 24 of the petition as reproduced herein below;

“5. That the Petitioners are licensees amongst the 519 settled within the Ahero National Irrigation Scheme and in particular upon plot No’s 440 and 14 upon which they and their dependents have resided and cultivated since 1989 and 1969 respectively, the said licensees obtaining from the repealed Irrigation Act Cap 347.

6. That your humble Petitioners acquired certain rights within the said plots, which said rights are only extinguished upon termination of the licenses which procedure for termination is provided for under **Section 27** of the **Irrigation Act 374** and its subsidiary Legislation.

7. That furthermore your humble Petitioners were re-allocated the portions with authority of the 3rd Respondent vide a letter from the 2nd Respondent’s predecessors after consultation with the Land Advisory Committee established by the 2nd Respondent’s predecessors and in the presence of the Chief.

8. That in disregard of the laid down procedures and required notices, the 2nd and 3rd Respondents have demolished 34 houses belonging to licensees including the houses of your Petitioners despite their settlement in those areas with their approval.

9. That the 2nd and 3rd Respondents are in the process of fencing off the plots where the demolished houses are in an attempt to keep out the licensees, inclusive of the Petitioners.
10. That this is a direct violation of the Petitioner's protection of right to their property and privacy (Article 40 and 31 respectively).
11. That the Respondents' actions took place despite most of the Petitioners having stayed in these areas peacefully for over 12 years or more with the permission of the Respondents'.
12. That the Respondents actions are done without the slightest Consideration of compensating the Petitioners for their demolitions and evictions.
13. That consequently the licensees inclusive of the Petitioner and their families now live in temporary polythene covered structures and are exposed to the rains and other elements which is a risk on their security as well as limiting their freedom. A violation of their rights as entrenched in Article 29 of the Constitution.
14. That the 2nd and 3rd Respondents are therefore in breach of **Articles 27** of the Constitution as they have discriminated against the petitioners by selectively demolishing their houses.
15. That having failed to follow the laid down procedure before giving trying to force the Petitioners from the said plots, the 2nd and 3rd Respondents are in breach of Article 47 of the constitution that guarantees the right of fair administrative action.
16. That the Respondents' actions were done without any notice or notification and consultation with the Petitioners. Where purported notice has been given such notice is delivered on the day of the displacement or even after the displacement and destruction has occurred.
17. That further given the ages of the petitioners and the living conditions that the licensees inclusive of the Petitioners as well as those of their families are exposed to, the 2nd and 3rd respondents' are in breach **of Article 28, 45, 53 and 57** of the Constitution.
18. That due to the circumstances surrounding the Petitioner at the moment they are unable to fully enjoy their economic and social rights as entrenched in Article 43.
19. That the Respondents have not upheld the values and principles of their position as well as their responsibilities of leadership as entrenched in Article 232 and 73 of the Constitution in that the Petitioners were not involved in the decision making process before demolition were carried out.
20. That the Petitioners therefore present their humble petition to the Honourable Court in their own interest, in the interest of other aggrieved licensees and in the public interest pursuant to **Article 22** of the Constitution.
21. That the 2nd and 3rd Respondents in blatant disregard of the rights of the Petitioners are now using the police in intimidate the Petitioners and other affected licensees in an effort to completely remove them from the plots in question to the extent that some licensees fearing arrest, have gone into hiding.
22. That in the circumstances, there exists a real and present danger and likelihood, the rights and freedoms of your Petitioners will continue to be breached contravened and abrogated unless the Honourable court intervenes.
23. That based on the above, your Petitioners have filed the petition herein seeking the enforcement of their fundamental rights and freedoms under the Bill of rights as enshrined in the Constitution of Kenya.

24. That it is therefore in the interest of justice that this Honourable Court intervenes by way of conservatory orders restraining the continued contravention of the Petitioners' fundamental rights and freedoms pending the hearing and determination of the petition."

D. The petition is supported by the supporting and further affidavits sworn by Samuel Olweny Olweny on 9th December 2014 and 18th March 2015 and also the affidavits of Ernest Akech Olweny and Richard Arodi Akidi both sworn on the 18th March 2015. Their case is as follows:

i) That Ahero National Irrigation Scheme has 519 farmers including the Petitioners who occupy and cultivate plots within the scheme.

ii) That the 1st and 2nd Petitioners were allocated plot numbers 440 and 14 respectively.

iii) That on the 8th September 2014, the 2nd Respondent, in disregard of the laid down legal procedures, used a bulldozer to demolish five houses, including those of the 1st and 2nd Petitioners. Thereafter other houses of other licensees within the scheme were demolished bringing the total to 34. That the 1st Petitioner reported the matter to the district commissioner who had a meeting with the affected people on 23rd September 2014 and promised to take the matter up with the 2nd Respondent.

iv) That the affected licensees have been living in make shift plastic structures exposing them to a lot of hardships.

v) That the 2nd and 3rd respondents have discriminated against the Petitioners who are elderly in breach of Article 27 of the Constitution.

vi) That the Respondents have breached Articles 28 and 57 of the Constitution that entitles the Petitioners to live in dignity and respect. That the Respondents have also breached Article 47 of the Constitution that entitles the Petitioners to fair administrative action by demolishing their houses without issuing them with the necessary notices and giving them an opportunity to be heard before interfering with their right to property which is in breach of **Article 40** of the Constitution.

vii) That the respondents have attempted to fence off the plots where the Petitioners houses were and unless stopped they will interfere with the Petitioners fundamental rights.

2. The petition is opposed by the 2nd and 3rd Respondents through the replying affidavit sworn by Joel Kipkemboi Tanui, a Senior Schemes Manager Western Kenya Scheme (2nd Respondent), on the 26th February 2015 and the 2nd and 3rd Respondents' response to the amended Petition dated 3rd June 2016. The Respondents case is as follows:

i) That the land from which the Petitioners are being evicted is Public land having been set aside under gazette notice of number 2163 of 8th July 1968 for rice farming by the 3rd Respondent. That the affected residents had been compensated for both the land and their developments and their rights over the land extinguished thereof after resettlement.

ii) That the land was portioned into blocks A, B, C, D, F, G, K, L, M, N, O, and P. That the scheme had covered five distinct clans namely Kamagaga, Wangaya, Kakula, Sidho and Kobura and each clan was represented and engaged in the resettlement.

iii) That each of the displaced persons was given a 4 acre plot under license in the scheme to farm.

iv) That the government of Kenya had established Settlement camps known as Mombasa, Nairobi, Nakuru, Gatundu, Kericho, Tanganyika and Uganda and each of the licensees was allocated a 2 roomed house.

- v) That some areas of the scheme were zoned off for public utilities like public schools, research centres, administration offices for 3rd Respondent, churches and research farms.
- vi) That the 1st Petitioner was allocated a house at Tanganyika Camp and a farm plot in Block N number 440 as a licensee while the 2nd Petitioner was allocated a house at Nairobi Camp and a farm plot in Block A number 14.
- vii) That during the Elmino rains the 2nd Petitioner moved to the land where he is now being evicted as it was designated for a Catholic Church house and nursery school and that is where Masara school was later established.
- viii) That the 1st Petitioner later moved and settled on a portion of land designated for Kore Primary School which has since been established.
- ix) That Sidho Kore (Tanzania Camp) community complained of the unlawful occupation of the land they had set aside for the school and wrote a complaint letter dated 29th January 2011 to the respondents seeking to have the houses built there demolished, those cultivating on it stopped and the land dedicated for the school. The letter is accompanied by a list of 48 people but about nine (9) of them had not appended signatures against their names.
- x) That the Sidho Kore Community (Tanzania Camp) had a meeting on 27th January 2012 attended by 40 people in the attached list and resolved to have those on the school land to be evicted.
- xi) That Ahero Irrigation Scheme Advisory Committee then met and resolved to have the affected persons notified of the resolutions and notices dated 7th May 2012 addressed to Jack O. Ochieng, Winter O. Adera, Bibian Oda, Mr. Ouma Odago [Nyandenga Camp} Samwel Olweny (1st Petitioner) Washington N. Kongo, Maurine O. Ogalo, Harun Omala, Don Kongo, Francis Nyamade [Kore Primary school] and Orage Masara (2nd Petitioner) of Masara Secondary School issued giving them final notice to vacate. That another notice addressed to all famers, Ahero Irrigation Scheme dated 25th April 2012 asking all on illegal occupation of public land to vacate in seven days or risk their houses being demolished was issued.
- xii) That another notice dated 1st October 2014 addressed to Margaret Oda, Bibian Oda, Maurine Ogalo, Samwel Olweny (1st Petitioner) Harun Omala, Francis Nyamache, Washington Gera and Don Okongo referring to the eviction notice of 7th May 2012, eviction exercise of 8th September 2014, the schemes Advisory Committee meeting of 15th September 2014 and the Sub County Commissioner's meeting of 23rd September 2014 to review the grievances of those affected, containing the resolution that no reconstruction would be allowed in the areas in dispute, and that the Committee would identify alternative land for resettlement, were issued.
- xiii) That the Respondents had complied with the law by issuing the requisite notices before carrying out the eviction. That the Petitioners are among the few who are interfering with the rights of the general public and have no legal right to occupy the areas in dispute.
- xiv) That the public interest outweighs the individual interests of the Petitioners.

3. That when the Amended petition came up for hearing on 25th May 2016, directions were taken on filing of written submissions by the Petitioners, 2nd and 3rd Respondents counsel after counsel for 1st Respondent indicated that they shall not be filing any pleadings or submissions. The counsel for the 2nd and 3rd Respondent filed their submission dated 25th July 2016 while counsel for the Petitioners filed theirs dated 26th July 2016. The following are the summaries of the submissions for both sides:

A. PETITIONERS' COUNSEL SUBMISSION;

i) That the Respondents, being public officers are bound by the national values under **Article 10** of the Constitution and hence enjoined to ensure inclusiveness and public participation in decision making which they did not espouse as the Petitioners were not given a forum to be heard before eviction. The learned counsel referred to the dicta in **Kenya Small Scale Farmers Forum & 6 others –V- Republic of Kenya & 2 others** [2013] eKLR and **Keroche Breweries Limited & 6 others -V- Attorney General & 10 others** [2016] eKLR.

ii) That **Article 27 (1) to (5)** of the Constitution of Kenya, **Article 26** of the International Convention on Civil and Political Rights, **Article 12** of the Convention on the Elimination of all forms of Discrimination against Women, **Article 2** of the African Convention on Human and Peoples Rights, **Article 18(3)** of the African Convention on Human and Peoples' rights (ACHPR) and **Article 2** of the Protocol to the ACHPR on the Rights of Women in Africa (Maputo Protocol) emphasizes on equality and freedom from discrimination directly or indirectly. That the act of the Respondents of selective eviction of the Petitioners on account of their being stubborn amount to discrimination and therefore a violation of their constitutional rights of equality and freedom from discrimination.

iii) That the forced eviction of the Petitioners by the respondents hence rendering them homeless and forcing them to live in polythene covered structures without basic amenities has deprived the Petitioners of human dignity and amount to a violation of the constitutional right of human dignity under **Article 28 and 19(2)** of the Constitution. The learned counsel referred the court to the constitutional court of South Africa decisions in **Hoffmaun –V- South African Airway (CCT 17/00[2000] ZACC 17; 2001 (1) SAI; 2000 (II) BCLR 1235;[2000] 12 BLLR 1365 (CC)** in which the court held that “all human beings, regardless of their position in society, must be accorded human dignity and **Dawood –V- Minister of Home Affairs** (2000) (3) SA 936 (CC) which captured the Central role of human dignity in interpreting the catalogue of rights as follows: **“Human dignity informs constitutional adjudication and interpretation of many other rights and it is also of central significance in the limitation analysis”**

iv) That the act of the Respondents in forcefully evicting the Petitioners amount to an infringement of their right to freedom and security of the persons enshrined in **Article 29 (f)** of the constitution that sets out the rights not be treated in a cruel, inhuman and degrading manner. That the act was also contrary to **Article 7** of the International Covenant on civil and Political rights (ICCPR) and **Article 5** of the African Charter on Human and Peoples Rights (ACPHR) which provides that no one should be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The learned counsel referred the court to the decision of **Republic –V- Minister of Home Affairs & Others Exparte Sitamze** (2008) 2 EA 323 and **C K (A child) through Ripples International as her Gardian & Next Friend & 11 others –V- Commissioner of Police/Inspector General of the National Police Service & 3 others** [2013] eKLR.

v) That the acts of the respondents to demolish the houses intentionally and without notice exposed the Petitioners and their dependents, who included school going children, expectant mothers and elderly family members to cruel physical and psychological torture by exposing them to the vagaries of nature and hence inhumane.

vi) That the demolition of the Petitioners houses amounts to arbitrary deprivation of the right to property that is unstrained in **Article 40** of the Constitution as there was no payment as compensation made to the Petitioners by the respondents. That the Petitioners had relocated to where their houses were demolished from with the approval of the 2nd Respondent. That if the 2nd Respondent wanted to review their earlier decisions, then they were obligated to issue appropriate notices allowing those to be affected time to assess the values of their properties, investments, and other material goods and non-monetary losses to be compensated.

vii) That the Respondents act of evicting the petitioners and demolishing their houses amounted to a deprivation of their right to health, housing and reasonable sanitation contrary to **Article 43** of the Constitution, **Article 12** of the International Covenant of Economic, Social and Cultural rights

(ICESCR), **Article 24** of the CRC, **Article 16** of the African Charter on Human and Peoples' rights (Banjul Charter) and **Article 14** of the African Charter on the Rights and Welfare of the Child. The learned counsel also cited the **Hon. Mumbi Ngugi J, in P.A.O. & 2 others –V- The Attorney General** [2012] eKLR and the case of the **Social Economic Rights –V- Nigeria, COM NO.155/96 (2001), Occupiers of 51 Olivia Road, Berea Township, and 197 Main street, Johannesburg –V- City of Johannesburg** (case CCT 24/07) (2008) ZACC 1.

viii) That the Respondents infringed **Article 47** of the Constitution as their act of forcefully evicting the Petitioners without following the due process was unlawful, unreasonable, procedurally unfair and inconsistent with the provisions of the bill of rights and fundamental values in the constitution.

ix) That the Respondents also went against **Articles 53 and 57** of the Constitution on the protection of Children and older member of the society respectively.

B. THE 2ND AND 3RD RESPONDENTS' COUNSEL SUBMISSIONS

i) That among the 3rd Respondent's mandate under **Section 15 (2)(g)** of the Irrigation Act (Repealed) is to provide land in National Irrigation Schemes for public purposes. That in pursuant to that mandate, the 3rd Respondent established Ahero Irrigation Pilot Scheme, the 2nd Respondent, pursuant to **Section 14** of the said Act.

ii) That the Government of Kenya had acquired the land where the scheme is situated and the residents, including the Petitioners, were compensated and thereafter resettled on specific portions of the land as licensees.

iii) That the evictions carried out by the Respondents were not from the parcels of the land that the Petitioners had been allocated as licensees, but from the public utility land that they had occupied and after adequate notices had been issued.

iv) That the Petitioners had been compensated when the land was initially acquired by the 3rd Respondent to establish the 2nd Respondent and are not entitled to any other compensation for the parcels they were evicted from.

v) That the respondents have not violated the Petitioners constitutional rights as alleged but it is the Petitioners who are depriving the other licensees of their rights to enjoy the public amenities settling on the public land. The learned counsel referred to the case of **Satrose Ayume & 11 others –V- Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others** Nairobi H.C.C. Petition No.65 of 2010, paragraphs 72 and 81.

vi) That the process leading to the eviction had been inclusive as the issue had been discussed and approved by the Advisory Committee that comprises some of the licensees. That after the resolutions, the Petitioners were served with seven days notices but they did not comply and hence the evictions. That the Petitioners should move back to the plots that they had been allocated as licensees.

vii) That the Petitioners have not acquired proprietary rights over the portions of land they were evicted from for having been in occupation for more than 12 years as it was public land. The learned counsel referred to the decision in the case **Mwambu Mbuvi Mangi & 15 others –V- Kenya Education & Management Institute & another** (2014) eKLR in which reference was made to the case of **Faray Maharus (administrator of the estate of Khadija Rajab Suleiman) – V- J.B. Martin Glass Industries & 3 others** C.A. No.130 of 2013.

viii) That the respondents being public entities are meant to protect public interests and their action of evicting the Petitioners from public land on which they had settled without the Respondents authority was reasonable and justifiable. The learned counsel referred the court to the case of

Republic –V- Commissioner of Lands & another (2013) eKLR at paragraph 15.

ix) That the respondents have not violated any of the Petitioners' constitutional rights as alleged as public interests overrides individual interests. The learned counsel referred to the case of **Environmental & Combustion Consultants Ltd –V- Kenya Pipeline Company Ltd** (2016) eKLR in which reference was made to the cases of **Anarita Karimi Njeru –V- Attorney General** [1979] KLR 54, **Mumo Matemu –V- Trusted Society of Human Rights Alliance & others Nairobi CACA NO.290 of 2013 [2013] eKLR** and **Meme –v- Republic [2004] I EA 124**.

4. That the following are the main issues for the court's determination;

a) Whether the act of the Respondents of demolishing the house and evicting the Petitioners amounted to a breach of the Petitioners constitutional rights or was lawful.

b) What orders to issue.

5. The court has carefully considered the Petitioners complaints as set out in the Petition, the affidavit evidence by both sides, the written rival submissions by counsel and come to the following determinations;

a) That the facts in this petition agreed by both sides is that the 3rd Respondent established Ahero National Irrigation Pilot Scheme and that the 1st and 2nd Petitioners are among those allocated plots there under license. That within the scheme are some lands set aside for farming, residential camps and Public utilities. That the 1st and 2nd Petitioners are some of the licensees affected when 34 houses were demolished in an attempt to evict the owners from the parcels of land the houses had been constructed.

b) That the Petitioners' position is that they had lived for long on the parcels of land where they had erected the houses which were demolished by the Respondents and that they had acquired proprietary rights over the specified portions. That the acts of the Respondents of evicting them amounted to a breach of their right to property under **Article 40** of the Constitution. That the Respondents' response is that the Petitioners proprietary interest were over the specific plots allocated to them as licensees and not over the parcels that they were evicted from; where they had moved to and constructed houses without the Respondents authority and which parcels of land are part of the public land earmarked for public utilities like schools. That the court has considered the depositions by both sides and submissions by counsel and it is apparent the evictions and demolitions did not take place from the specific parcels the Petitioners had been allocated as licensees. That is, the 1st Petitioner was not evicted from the farm plot at Block N number 440 or his house at Tanganyika Camp demolished. Likewise the 2nd Petitioner was not evicted from farm plot Block A number 14 or his house at Nairobi Camp demolished. That further, the court was not told or given evidence of any licensee who was evicted or his/her house demolished from the space allocated to them as licensees. That the demolitions and evictions were carried out against those who had left their allocated houses and moved to construct houses on land set aside for public use over years for one reason or the other.

c) That the Respondents have given evidence indicating the specific purposes those lands from where the evictions were carried out were for and there has been no rebuttal evidence by the Petitioners. That so long as those lands where the Petitioners had moved to after living their allocated parcels under licensee, remained public land, the Petitioners could not get proprietary rights over them even after staying there for more than 12 years for reasons that there cannot be adverse possession on public land or Government land however long the Petitioners may have been living there with or without hindrance from the Government {see **Mwambu Mbuvi Maingi & 15 others –V- Kenya Education Management Institute & another** [2014] eKLR in which reference was made to the case of **Faraj Maharus (administrator of the estate of Khadija Rajab Suleiman) –V- J.B. Martin Glass Industries & 3 Others C.A. No.130 OF 2013**.

d) That the superior courts have in several decisions addressed the issue of eviction of and demolitions of houses of those living on public lands. That in the case of **Kepha Omondi Onjuro & Others –V- Attorney general & 5 Others** [2015] eKLR the court referred to the judgment in the case of **Satrose Ayuma & 11 Others –V- Registered Trustees of Kenya Railways Staff Retirement Benefits Scheme & 3 others** where Lenaola J, as he then was, held;

“ ... the widespread forced eviction that are occurring in the country coupled with a lack of adequate warning and compensation which are justified mainly by public demands for infructual developments such as road bypasses, power lines, airport expansion and other demands. Unfortunately there is an obvious lack of appropriate legislation to provide guidelines on those notorious evictions. I believe time is now ripe for the development of eviction laws and the same sentiments were expressed by Musinga J, (as he then was) while considering the issues in this matter at an interlocutory state where he stated as follows;

“The problem of informal settlement in urban areas cannot be wished away, it is here with us. There is therefore need to address the issue of forced evictions and develop clear policy and legal guidelines relating thereto.”

The Petitioners learned counsel has submitted that by virtue of Article 2(5) and (6) of the Constitution, the United Nations Basic Principles and guidelines on the position in regard to Development based evictions and Settlement 2007 forms part of the Kenyan law. That therefore the people to be affected by evictions are entitled to appropriate notices for the public hearings where deliberations on the evictions are to be carried out. That the people to be affected should be given the relevant information and adequate opportunity to be heard and participate in all the process and be allowed to present alternatives. That those to be evicted should receive adequate notice where eviction is unavoidable. That the court is in agreement with that submission.

e) That from the evidence presented by the Respondents that is uncontested, the 1st Petitioner was settled in Tanganyika Camp and was given a farm plot in Block N number 440. That the members of Tanganyika Camp decided in 1970's to relocate from the land they were occupying to pave way for the Kore Primary School. However, when the farming in the scheme collapsed in the 1970's the 1st Petitioner, one Okello Sironi and Oronge Onam came back to the land they had earlier vacated from in favour of the school and took portions of land to settle. Later the Community members discussed with the three and all agreed to vacate from the land except the 1st Petitioner who instead invited other people to join him on the land. That the community continued with their efforts to have the 1st Petitioner and those others who had joined him to leave that land for the school to no avail. That the Respondents annexed to the replying affidavit, a report dated 3rd December 2014 by a joint committee signed by Jacob Ongere, Meshack Orowo, Vitalis Okuta and Laban Aketch. They also annexed a complaint letter dated 29th January 2011 by the Sidho Kore community (Tanzania Camp), with a list containing 48 names and signatures against 29 of the 48 names, the 1st Petitioner's name and signature appear at position 44. The complaint is addressed to the 3rd Respondent through the 2nd Respondent with a request that they assist the community to get those residing on the land meant for the school to leave. That also annexed are copies of minutes of the community meeting at Kore Primary School of 27th January 2012 in which it was resolved among others that those in occupation of the public land will be issued with notices by 2nd Respondent to vacate, failure to which the community will set their houses on fire. The court has taken note of the notices dated 25th April 2012, 7th May 2012 and 1st October 2014 addressed to the 1st Petitioner among others. That the first two letters asked those to whom they were addressed to vacate the land in question. That the time lapsed from the date of the notice of 7th May 2012, being the last one, to the demolition of 8th September 2014 was over two years and hence sufficient for the 1st Petitioner and those others to have made arrangements to vacate and or challenge the decision.

f) That from the Respondents' perspective, the 2nd Petitioner had been settled in Nairobi camp and

was given farm plot in Bloc A number 14 in the 1960's. That later during the Elmino the 2nd Petitioner made a request to the 3rd Respondent to move to public land that was initially a Catholic Church and nursery school and on which Masara Primary school was later established in the 1970's. That as the farming in the scheme had collapsed, the 2nd Petitioner overstayed on that land and when Masara Secondary School was established, he was asked to vacate but he declined. That the notice dated 7th May 2012 was addressed to the 2nd Petitioner among others and it was over two years before the demolition and eviction was carried out.

g) That the Petitioners' position that no notices had been served and where it was served it was on the day of the displacement or after cannot therefore be entirely true in view of the findings in (e) and

(f) above. That the Irrigations (National Irrigation Schemes) Regulations pursuant to **Section 27 of the Irrigation Act Chapter 347** of Laws of Kenya (now repealed) under **Section 42 of the Crops Act No.16 of 2013**, contains provisions on allocation of houses or construction of own houses in the scheme, as follows:

"10 (1) the manager may allocate to a licensee a house to be occupied by him within the scheme, or may permit a licensee to erect his own house.

(2) In either event it shall be the duty of the licensee to maintain his house and precincts to the satisfaction of the manager, and if the manager is dissatisfied with the condition of the house or precincts he may give written notice to the licensee to the repairs which he considers necessary and specify a reasonable time within which they must be completed.

(3) If the licensee fails to complete such repairs within the time specified and to the satisfaction of the manager, the manager may cause such repairs to be carried out and may recover the costs thereof from the licensee.

(4) The licensee may not occupy any house other than that allocated to him without prior permission, in writing, from the manager.

(5) A licensee shall not construct buildings or other works of any kind on his holding or elsewhere in the scheme without the prior consent, in writing, of the manager and in the event of his having erected a structure or building without such consent, the manager may direct, in writing that the structure be removed and the land returned to its original state and if the licensee fails to comply with his direction within one month, the manager may enter the building or structure for the purpose of demolition and any expenses incurred by the manager for the removal of the building or structure may be recovered from the licensee"

That none of Petitioners has annexed documentary evidence to confirm that they had received written authorization or permission from the Respondents before occupying and constructing houses on the plots they were evicted from in September, 2014. The only documentary authority in relation to the 1st Petitioner that was annexed to the supporting affidavit was done by the Senior Manager, Western Kenya schemes. It is dated 8th February 1991 and is addressed to the Assistant chief Ahero Irrigation Scheme. The letter stated as follows:

"RE: PLOT FOR FARMER 440

The above farmer Mr. Samwel Olweny has permission to settle on the Plot. You recall at the Baraza I stated clearly that the plots which had been demarcated and issued were final.

Only more demarcations demarcations was to be stopped. Allow him to occupy his plot as it has already been finalized."

That the court's reading of the letter is that the 1st Petitioner was being authorized or permitted to settle on plot 440 and not a public plot at Kore Primary School from where the eviction took place. That Petitioners have not been evicted from their allocated farm plots like 440 and 14 for 1st and 2nd Petitioner's respectively to which they had been allocated to as licensees. That there has been no demolition of Petitioners' houses that they had been allocated like for 1st and 2nd Petitioners in Tanganyika and Nairobi camps respectively. That the demolitions and evictions took place on the land the petitioners had occupied outside the designated areas as for licensees.

h) That the Respondents having acted in accordance with the community's requests to recover the lands meant and designated for public use, and having notified those affected including the 1st and 2nd Petitioners in 2012 to vacate, cannot be faulted in their action in view of the Provision of **Regulation, 10(5)** of the Irrigation (National Irrigation Schemes) Regulations pursuant to **Section 27** of The Irrigation Act (supra). That had the Respondents not acted as they did, the community had in their resolution of 27th January 2012 indicated they could set the houses on fire or close down the school by moving back to their respective plots which they had voluntarily surrendered for public use. That even though the state has the responsibility to ensure security for each and every person in the country, it would have been an abdication of duty had the Respondents failed to act and instead wait for the community to carry out the eviction by setting the houses on fire as the damage and loss, both to property and possibly human, would have been far greater.

i) That with the findings in (h) above the court finds that as the Petitioners have not been stopped from farming and residing in the houses allocated to them as licensees, the demolition of the houses they had erected at the land designated for Kore and Masara schools and other public purpose facilities did not amount to an infringement of their constitutional rights as alleged. That sufficient notices to vacate had been issued months before following the resolutions by the members of the Community and advisory Committee concerned.

j) That the finding in (i) notwithstanding it is obvious that some of licensees, like the 2nd Petitioner had been allocated houses in areas that were prone to flooding [Elnino effect). That even if the parties did not address the court on whether the two roomed housing allocated to each licensee was adequate or not, the Respondents has a responsibility to ensure that the Petitioners whose houses are in flood prone areas that are unsuitable for human habitation are moved to houses in safer and more secure areas or are allocated spaces in secure areas to put up their housing. That the court has noted that a discussion to address that option had started as confirmed in the letter dated 1st October 2014 by the Senior Schemes Manager, Western Kenya Schemes which is annexed to the Respondents' replying affidavit. That the following portion of the letter is worth noting;

“..... the schemes Advisory Committee meeting of 15th September 2014 and the meeting of 23rd September 2014, where the sub County Commissioner chaired to review the grievance raised by the affected, it was agreed that the following people to immediately move from the area but due to effects of Elnino or through the scheme Lands subcommittee to identity alternative land in the villages irrespective of the size for resettlement.”

The names of the eight people, including that of the 1st Petitioner then follows. This petition was filed on 7th November 2014 and the court was not briefed on the progress of resettlement that was subject matter of that letter. There is a possibility that the resettlement was not pursued any further after the petition was filed and served.

6. That flowing from the foregoing the court finds that the petition has no merit and orders as follows;

a) That the Petition is hereby dismissed.

b) That due to the nature of this petition and the relationship of the parties concerned, each party will bear his/her own costs.

c) That notwithstanding order (a) above, the court directs the Respondents to file a progress report on the resettlement of the eight persons in the letter dated 1st October 2014 and any other licensee whose house is in similar situation to those of the eight within the next 90 (ninety) days.

d) That the court on its own motion, hereby directs the Respondents to withhold any further action on the demolitions of houses and evictions of the Petitioners from the public lands in question for a period of 120 (one hundred and twenty) days to enable the affected Petitioners comply with the notices to vacate and the filing of the resettlement report ordered in (c) above.

e) That the matter will be mentioned after 90 (ninety) days for further directions.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 7TH DAY OF DECEMBER 2016

In presence of;

Petitioners Absent

Respondents Absent

Counsel M/S Olang for Kiu for Petitioners

M/S Otiono for Yogo for 1st to 3rd Respondents

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

7/12/2016

S.M. Kibunja Judge

Oyugi court assistant

Parties absent/s Olang for Kiu for the Petitioners

M/S Otieno for Yogo for 1, 2, and 3rd Respondents

Court: the judgment dated and delivered in open court in presence of M/S Olang for Kiu for the Petitioners and M/S Otieno for 1st to 3rd Respondents.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

7/12/2016