



Gikonyo & 12 others v National Land Commission & 5 others (Environment & Land Petition 8 of 2017) [2024] KEELC 682 (KLR) (15 February 2024) (Ruling)

Neutral citation: [2024] KEELC 682 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND PETITION 8 OF 2017**

JO OLOLA, J

FEBRUARY 15, 2024

**IN THE MATTER OF ARTICLE 10(2), 23, 28, 40, 67(2)
& 258(1) OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF SECTION 5 OF THE
NATIONAL LAND COMMISSION ACT NO. 5 OF 2012**

AND

IN THE MATTER OF SECTION 111 OF THE LAND ACT NO. 6 OF 2012

AND

**IN THE MATTER OF HISTORICAL LAND INJUSTICES SET OUT
IN SESSIONAL PAPER NO. 3 OF THE NATIONAL LAND POLICY**

AND

**IN THE MATTER OF DEPRIVATION OF LAND PARCELS NO. THEGENGE/
KARIA 730, 731, 732, 733, 734, 735, 736 AND OTHER ADJACENT LANDS**

BETWEEN

DAVID KARIUKI GIKONYO 1ST PETITIONER
MAGDALINE WANGAI MUREBU 2ND PETITIONER
JOHNSON MAHUGU KIRUGUMI 3RD PETITIONER
ISAIAH KAMUNYA SOLOMON 4TH PETITIONER
STEPHEN KABUCHI MARUGA 5TH PETITIONER
JOESL GATHUNGU KANJURU 6TH PETITIONER
NAHASHON NDERITU GITHINJI 7TH PETITIONER
JOSEPH WAMBUGU GICHA 8TH PETITIONER



FRANCIS GITHENYA KAINGI 9TH PETITIONER
MARGARET NYANDIA NDIGA 10TH PETITIONER
TABITHA WATETU NDEGWA 11TH PETITIONER
GRACE KAGURE MACHARIA 12TH PETITIONER
WANJOHI RWAGATHA FRANCIS 13TH PETITIONER

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT
MINISTRY OF LANDS AND PHYSICAL PLANNING 2ND RESPONDENT
MINISTRY OF SPORTS, CULTURE AND THE ARTS 3RD RESPONDENT
HONOURABLE ATTORNEY GENERAL 4TH RESPONDENT
AGRICULTURAL SOCIETY OF KENYA 5TH RESPONDENT
SPORTS KENYA 6TH RESPONDENT

RULING

1. By the Notice of Motion dated 14th December, 2022 but filed herein on 16th February 2023, the thirteen (13) Petitioners herein urge the Court to transfer the matter herein to the National Land Commission (the 1st Respondent) for hearing and determination.
2. The application which is supported by an Affidavit sworn by John Mahugu Kirugumi (the 3rd Petitioner) is based on the grounds:
 - (i) That the gist of the Petition is historical land injustices which resulted into deprivation of land parcel Nos. Thegenge/Karia/730 to 736 and adjacent lands belonging to the Petitioners;
 - (ii) That the 1st Respondent is mandated by the *Constitution* and the *National Land Commission Act* to initiate investigations on its own initiative or on a complaint into present or historical land injustice and recommend appropriate redress;
 - (iii) That no prejudice whatsoever will be occasioned to the Respondents if the orders sought are granted; and
 - (iv) That it is in the interest of justice to grant the orders sought.
3. The Agricultural Society of Kenya (the 5th Respondent) is opposed to the application. In a Replying Affidavit sworn on its behalf by its Chief Executive Officer Batram Muthoka Mutinda, the 5th Respondent avers that on 24th October 2017, the Petitioners herein filed an application seeking to have the Petition certified as raising substantial questions of law and thereby requiring the Honourable the Chief Justice to appoint a bench of three (3) Judges to hear the same.
4. The 5th Respondent avers that by the current application, the Petitioners appear to have changed tune and now want to subject it to the 1st Respondent which was in existence prior to the institution of this suit. It is the 5th Respondent's case that before running to Court, the Petitioners ought to have first exhausted the alternatives available before invoking the Court's jurisdiction.



5. The 5th Respondent further avers that the 1st Respondent is already a party to this suit and it cannot therefore make decisions concerning this case without bias.
6. I have carefully perused and considered the application as filed by the Petitioners as well as the response by the 5th Respondent herein. I have similarly perused the submissions and authorities placed before me by the Learned Advocates representing the Parties herein.
7. By their application herein dated 14th December 2022, the Petitioners have urged the Court to have this matter transferred to the National Land Commission (itself the 1st Respondent herein) for hearing and determination. The 5th Respondent is of the contrary opinion and urges the matter be dealt with before this Court.
8. By their Petition dated 15th June 2017, the Petitioners have sought the following prayers:
 - (a) A declaration that the alienation of the Petitioners ancestral land from the years 1942-1956 now comprised of all those parcels of land known as Title Nos Thegenge/Karia/730 to 736 by both the Colonial Government and the Independent Kenya Governments and the consequent allocation to various Government institutions without following the due process of the law and without any compensation amounts to historical land injustice by virtue of Article 67(2) (e) as read together with Section 5 of the [National Land Commission Act](#) and as set out in Sessional Paper No. 3 of 2009 of the [National Land Policy](#).
 - (b) A declaration that the inactions of the 1st Respondent in addressing the complaints raised by the Petitioner contravenes Article 1(1), 10, 21 and 67(2) of the [Constitution](#) of Kenya;
 - (c) A declaration that the inactions of the 1st and 2nd Respondents of addressing the complaints raised by the Petitioners through the letters dated 9th February, 2017 and 17th March, 2017 contravenes the fundamental rights and freedoms of the Petitioners enshrined in Article 28 and 40 of the [Constitution](#) of Kenya;
 - (d) A declaration that the actions of the 3rd and 6th Respondents of proposing the construction of Ruring'u stadium on parcel No. Thegenge/Karia/732 (and) 733 without consent and/or compensation on the Petitioners contravenes the fundamental rights and freedoms of the Petitioners enshrined in Article 28 and 40 of the [Constitution](#) of Kenya and are therefore null and void;
 - (e) An order of mandamus compelling the 1st, 2nd, 3rd and 6th Respondents to jointly pay the Petitioners the sum of Kshs.544,000,000/- being the fair market value compensation for the 85 acres of their ancestral and native land; and
 - (f) An order of mandamus compelling the 1st, 2nd, 3rd, 5th and 6th Respondent to pay the Petitioners the sum of Kshs.100 million being mesne profits for loss of user of the Petitioners' lawful land for the 59 years which the Petitioners have not enjoyed the use of their land.
9. Some six (6) years after they filed the Petition, the Petitioners by the application before the Court now appear to be of the view that the 1st Respondent is a better avenue for resolution of the dispute as it is clothed with the mandate to initiate and deal with investigations into present or historical land injustices and to recommend appropriate redress. It is further the Petitioners case that they could have originally filed this suit before the 1st Respondent Commission but they were unable to do so because at the time, the 1st Respondent was yet to enact the [National Land Commission \(Investigation of Historical Land Injustices\) Regulations](#) 2017 which are now in place.



10. A reading of both the application and the response thereto reveals that the conflict as to the right forum to hear the dispute stems from a confusion as to the roles of this Court and that of the Commission as created under the *Constitution* of Kenya, 2010.
11. As it were, Article 68(c)(v) of the *Constitution* enjoined Parliament to enact legislation to enable the review of all grants or dispositions of public land to establish their propriety or legality. Parliament thereafter enacted the *National Land Commission (NLC) Act* in 2012. Section 14 of the *said Act* empowered the NLC to undertake review of grants of public land to establish their propriety or legality. The review was initially to be undertaken by NLC within five years from 2nd May, 2012 when that Act came into force.
12. Other land statutes enacted after the promulgation of the *Constitution* gave the NLC additional functions. These include being consulted by the Cabinet Secretary alongside the County Government regarding the *Constitution* of land registration units and their variation under Section 6 of the *Land Registration Act*; management of public land under Part II of the *Land Act*; administration of public land under Part III of the *Land Act*; acquisition of land for public purposes and payments of compensation under Part VIII of the *Land Act*.
13. The NLC's other mandate pursuant to Section 14 of the *National Land Commission Act* includes alienation of public land on behalf of and with the consent of the National and County Governments; ensuring state agencies manage the land they hold in a sustainable manner for the intended purpose and developing and maintaining an effective land information system for the management of public land.
14. The Environment and Land Court (ELC) on the other hand is mandated under Article 162 of the *Constitution* to hear and determine disputes relating to the environment and the use, occupation and title to land. Section 101 of the *Land Registration Act* clothes the ELC and Courts subordinate to it with the jurisdiction to hear and determine disputes, actions and proceedings under the Act whose object is to revise, consolidate and rationalize the registration of titles to land. The ELC and the subordinate Courts are granted similar jurisdiction by Section 150 of the *Land Act* whose object is to give effect to Article 68 of the *Constitution*, revise, consolidate and rationalize land laws as well as to provide for the sustainable administration and management of land and land based resource.
15. That *Constitution* goes ahead to classify land as either public, community or private. It defines public land under Article 62 thereof. Registered land held by a person under a freehold title, land held under a leasehold tenure or any land declared to be private land under the law do constitute private land under Article 64 of the *Constitution*.
16. It is also proper to state that the procedure for acquisition of public land was set out under the repealed Government Lands Act. Under the current legal framework, title to land may be acquired in the manner prescribed by Section 7 of the *Land Act*, which is through allocation, land adjudication process, compulsory acquisition, prescription, settlement programs, transmissions, transfers, long-terms leases of private land exceeding 21 years or in any other manner prescribed by law.
17. That being the case, if there was a dispute as to how land was acquired such as in this case where I understand the Petitioners to be stating that their ancestral land was taken by the Government and other private people without compensation, then it is the ELC that is the right forum to determine the dispute. If their contention was that the land in question was public land and that it was improperly or illegally acquired, the NLC will come in.
18. Arising from the foregoing, the roles to be played by the NLC on the one hand and ELC on the other are clearly delineated by the law. The jurisdiction of the NLC to review grants of public land does not



extend to dealing with interest over private land. That role falls within the domain of the ELC and Courts subordinate to it.

19. It was also apparent as seen from the orders sought in the Petition that they are seeking various declarations and orders of mandamus to compel certain Government agencies to take various actions in favour of the Petitioners. Those are judicial review remedies that can only emanate from this Court. The NLC as a quasi-judicial body has no power to grant an order of mandamus. That being the case, it was clear to me that the application by the Petitioners herein is misguided and of no use to themselves. The same is devoid of merit. I hereby dismiss the same with no order as to costs.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THIS 15TH DAY OF FEBRUARY, 2024.**

J. O. OLOLA

JUDGE

In the presence of:

Mr. Macharia for the Petitioner/Applicant

Ms Wambui holding brief for Wawira for the Attorney General

No appearance from the 1st, 5th and 6th Respondents

Court assistant - Kendi

