



**Lunyasi & 3 others (Suing for and on behalf of the 244 Ngerek Community Families /Members) v Kenya Forest Service & 5 others (Petition E001 of 2023) [2025] KEELC 907 (KLR) (26 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 907 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAPSABET**

**PETITION E001 OF 2023**

**GMA ONGONDO, J**

**FEBRUARY 26, 2025**

**IN THE MATTER OF ARTICLES 2,3,10,19,20,21,22,23,24,27,28,29,40,43,47,48,60,67,162 AND 259 OF THE CONSTITUTION.**

**AND**

**IN THE MATTER OF CONTRAVENTION OF ARTICLES 10,20,4,27,28,40,43,45,47 AND 60 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ENVIRONMENT AND LAND COURT ACT, 2011**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES 2013.**

**AND**

**IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015 AND IN THE MATTER OF THE LAND REGISTRATION ACT**

**BETWEEN**

**JOHN AMUSIBWA LABAN LUNYASI ..... 1<sup>ST</sup> PETITIONER**

**DAVID KIRUI ..... 2<sup>ND</sup> PETITIONER**

**CHARLES SHIRULI ..... 3<sup>RD</sup> PETITIONER**

**PHAMANES KHASIALA ..... 4<sup>TH</sup> PETITIONER**

**SUING FOR AND ON BEHALF OF THE 244 NGEREK COMMUNITY FAMILIES /MEMBERS**

**AND**



THE KENYA FOREST SERVICE ..... 1<sup>ST</sup> RESPONDENT  
NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT  
MINISTRY OF LANDS, HOUSING AND URBAN DEVELOPMENT .... 3<sup>RD</sup>  
RESPONDENT  
MINISTRY OF ENVIRONMENT AND FORESTRY ..... 4<sup>TH</sup> RESPONDENT  
THE ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT  
MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL  
GOVERNMENT ..... 6<sup>TH</sup> RESPONDENT

## JUDGMENT

1. By a Petition dated 19<sup>th</sup> April 2023, the petitioners through Adoli and Company Advocates, are seeking the following orders;
  - a. A declaration that the Respondents' actions omissions under the Chepkumia exchange program in gazetting the Petitioner's land in the Ngerek Village, Chepkumia location, Engwen Constituency in Nandi County as water, catchment area and failing to resettle the Petitioners and making them squatters violated the Petitioners rights under Articles 10,27,28,40 and 43 of *the Constitution* of Kenya (*The Constitution* herein).
  - b. A Judicial Review Order of Mandamus be and is hereby issued compelling the Respondents to secure, survey and gazette land for resettlement of the 244 families of the Ngerek community.
  - c. A judicial Review Order of Mandamus be and is hereby issued compelling the Respondents to ensure peaceful resettlement of the 244 families from the Ngerek community with each family receiving a parcel of land commensurate to the parcel of land ceded to the Government in the Ngerek Engwen Constituency in Nandi County.
  - d. An order for compensation of the petitioners by the Respondents for the houses and other structures that had been erected by each of the 244 families of the Ngerek Community on the land ceded to the Government under the Chepkumia exchange program erected to enable the Petitioners rebuilt their lives after resettlement.
  - e. An order for compensation of the petitioners by the Respondents for violation of their rights under article 27,28,40 and 43 of *the Constitution*.
  - f. Any other orders that the Court may deem fit and just to grant.
  - g. The costs of this Petition be provided for.
2. The petition is anchored on the Supporting Affidavit sworn on even date by John Amusibwa, the 1<sup>st</sup> petitioner herein. The gravamen of the petition is that on or about 1996, the 1<sup>st</sup> respondent earmarked areas of Ngerek and Koiben Villages as water catchment areas and gazetted the same as such. That consequently, the 1<sup>st</sup> respondent launched an exchange program namely, Chepkumia Exchange Programme Settlement Scheme, that would see the petitioners give up their titles in Chepkumia area for an alternative land in Yala and Kapkangani area. That on 22<sup>nd</sup> March 1999, the Chief Conservator of Forests authorized the exchange of 455 Ha of Ngerek Hills and 630 Ha at Kapkangani Forest Block



- Kaimosi, to settle the 351 people evacuated from the Chepkumia area and each individual was to be allocated acreage commensurate with land lost under the program.
3. Further, that during the allocation process, the petitioners were sidelined and only the Koiben Community was successfully resettled. That as a result, the petitioners have been squatters for 27 years and their rights under Articles 10(2), 27, 28, 40 and 43 (1) (b) of *the Constitution* have been violated.
  4. The 2<sup>nd</sup> respondent opposed the petition by a Replying Affidavit sworn on 7<sup>th</sup> February 2024 by Brian Ikol, the Director Legal Affairs and Regulatory Services, who deponed, inter alia; that the 2<sup>nd</sup> respondent received a complaint under Ref. No. NLC/HLI/435/2018 and NLC/HLI/435/2017 from the petitioners against the 1<sup>st</sup> respondent. That the petitioners and the 1<sup>st</sup> respondent appeared before the 2<sup>nd</sup> respondent for hearing. That consequently, having carried out its investigative hearings and prepared its determination thereby, it exhausted its mandate. That the claim against the 2<sup>nd</sup> respondent is irregular and untenable hence, the same ought to be dismissed with costs.
  5. The 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents filed a response to the petition through the Office of the Attorney General. They stated that the petitioners have no locus standi to bring forth the petition since they have not presented any evidence that they have the requisite authority from members of the Ngerek Community. That the petitioners are guilty of laches, since they did not institute proceedings within reasonable timelines. That further, the petitioners have not proven their case to the requisite standard hence, the instant petition ought to be dismissed with costs.
  6. On 14<sup>th</sup> December 2023, the court directed that the petition be heard by written submissions.
  7. Accordingly, Learned Counsel for the petitioners filed submissions dated 22<sup>nd</sup> October 2024 giving a background of the matter and identified the following issues for determination:
    - a. Whether the Petitioners have Locus standi.
    - b. Whether the Petitioners are legitimate members of the Ngerek community
    - c. Whether the Petition is time barred.
    - d. Whether there was an exchange program between the Petitioners and the 1<sup>st</sup> Respondent.
    - e. Whether the Petitioners have suffered violation of their fundamental rights.
    - f. Whether the Petitioners are entitled to the prayers sought.
    - g. Whether the Petitioners are entitled to Compensation
  8. The Petitioners submitted that they filed this Petition in their own interest as members of the Ngerek community and as well as acting in the interest of a group/class of persons being the other members of Ngerek community. That the Petitioners therefore, have the requisite locus standi under Article 22 of *the Constitution* herein. That the Petitioners are legitimate members of the Ngerek community and the list annexed as JA-1 is the true list of members of the Ngerek community. That the Petitioners never slept on their rights to seek justice for the violations raised in the Petition and had made several attempts to resolve the dispute herein, without success. That the delay in filing the Petition has been sufficiently explained even though there is no limitation of time for filing of constitutional petitions on violation of fundamental human rights and freedoms.
  9. Moreover, Counsel stated that the 1<sup>st</sup> Respondent confirmed that Nandi Forest was declared vide legal notice number 174 of 20<sup>th</sup> May, 1964. That the 1<sup>st</sup> Respondent further conceded that Chepkumia land exchange program between itself and the Ngerek community members was initiated in exchange of equal acreages of south Nandi forest reserve from Kaimosi block. The Petitioners aver that they have



- suffered grave violation of their rights as guaranteed under the Constitution. That the instant petition is merited and the same should be allowed. To buttress the submissions, counsel relied on various authorities including Florence Wamukanda and another vs Attorney General and 2 others [2016] eKLR and Bhupendra Somabhai Patel V Kingsway Tyres Limited & Anor (2020) eKLR.
10. The 2<sup>nd</sup> respondent's counsel filed submissions dated 29<sup>th</sup> October 2024 and reiterated the averments in its Replying Affidavit. Learned Counsel submitted that the 2<sup>nd</sup> Respondent exhausted its mandate and gave out recommendations to relevant bodies for compliance. That the 2<sup>nd</sup> Respondent complied with the provisions of Articles 47, 50(1) and 67 of the Constitution, Section 15 of the National Land Commission Act, 2012 and Section 4(3), (4) and 5 of the Fair Administrative Action Act hence, the claim against it is irregular, untenable and the same should be dismissed with costs.
  11. The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents' counsel filed submissions dated 6<sup>th</sup> December 2024 and submitted in part that Chepkumia Land Exchange Program was between the 1<sup>st</sup> respondent and the Ngerek Community. That however, the petitioners have not proven that they are members of the Ngerek community. That there is no evidence that the community's land has been degazetted and that the petitioners' ownership of their original parcels of land have been extinguished and titles thereof cancelled. That the petitioners have not proved how their rights were violated. That there is no authority to sue attached to the petition and as such, the petitioners cannot pursue rights in rem on behalf of people who have not authorized them. To fortify the submissions, reliance was placed on the cases of Ephantus Muriuki Muhoro & 4 others v National Land Commission & another [2018] KEELC 2132 (KLR) and Janmohammed (SC) (Suing as the Executrix of the Estate of the Late H.E. Daniel Toroitich Arap Moi) & another v District Land Registrar Uasin Gishu & 4 others (Petition 17 (E021) of 2023 & 24 (E027) of 2022 (Consolidated)) [2024] KESC 39 (KLR).
  12. It is noteworthy that from 15<sup>th</sup> February 2024 until on or about 17<sup>th</sup> September 2024, the parties herein engaged in out of court negotiations with a view to resolve the dispute in line with Article 159 (2) (c) of the Constitution of Kenya, 2010. However, they failed to reach a consensus thus, were directed to file submissions.
  13. In the foregone account, it is the considered view of this court that the issues for determination herein boil down to whether;
    - a. The petitioners have locus standi to institute and prosecute the instant petition.
    - b. This petition meets the threshold of a constitutional petition and if so
    - c. The petitioners are entitled to the orders sought in the petition.
  14. As regards the first issue, the Court of Appeal in the case of Alfred Njau –Vs- City Council of Nairobi [1983] KLR 625, held inter alia that:

“...Locus standi” literally means a place of standing and refers to the right to appear or be heard in Court or other proceedings and to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding.”
  15. On one hand, the respondents contend that the petitioners have not attached the authority to sue to the petition herein and as such, the petitioners cannot pursue rights in rem on behalf of people who have not authorized them. That therefore, they lack locus standi to bring forth this petition. That the petitioners are also guilty of laches, since they did not institute proceedings within reasonable timelines.
  16. On the other hand, the Petitioners aver that they have the requisite locus standi under Article 22 of the Constitution herein.



17. It is borne in mind that whilst the suit herein is expressed as having been brought on behalf of the petitioners and on behalf of the 244 Ngerek Community families/members, the petitioners did not attach an authority by the alleged members of the community authorizing them to sue on their behalf as by law required. Also, in the list of 244 members annexed thereto, some of the members' names and area to be allocated have been erased and seemingly substituted. Besides, the plot numbers of some members have not been indicated.
18. To that extent, I associate myself with the holding of L. N. Waithaka J. in *Ephantus Muriuki Muhoro* case (supra) that where an action is brought in the name of some of the group members on behalf of others, it is a requirement of law that the other members on whose behalf the action is brought be listed and their authority for filing of the group action be sought and obtained if they are to benefit from the reliefs sought in the group action, especially where remedies of private nature as opposed to public remedies are sought in the suit; see *Kirinyaga United Bar Owners Organization vs. County Secretary Kirinyaga & 6 Others* {2014} eKLR, where it was stated that:
- “... A person who lacks capacity to institute a suit can also bring an action under Article 22(1) through another person. The person bringing the action should clearly indicate his name in the suit stating that he/she is bringing the action on behalf of another or on his own behalf in addition to others who for purposes of clarity must be named and must give authority or mandate if they wish to benefit or obligated from the reliefs sought...” (Emphasis laid)
19. Therefore, I am of the considered view that the petitioners ought to have filed an authority from the other members of the Ngerek Community families to sue on their behalf. Failure by the petitioners to comply with that requirement of the law, however, does not vitiate their right to pursue the claim on their own behalf.
20. Regarding the second issue, the petitioners asserted that the 1<sup>st</sup> Respondent failed to resettle them under the Chepkumia Exchange Program. That thus, they made them squatters and violated their rights under Articles 10, 27, 28, 40 and 43 of *the Constitution*.
21. It is established law that in a Constitutional Petition, a party must state with reasonable precision, the Articles of *the Constitution* that have been allegedly violated and the manner in which the same have been infringed; see *Anarita Karimi Njeru-vs-The Republic* (1976-1980) KLR 1272 and *Mumo Matemu -vs- Trusted society of Human Rights Alliance & 5 others* [2013] eKLR.
22. Notably, in the instant petition, the petitioners alleged that their rights under Articles 10, 27, 28, 40 and 43 of *the Constitution* were violated. The petitioners provided particulars of the alleged infringements at paragraphs 40, 41, 42, 43 and 44 of the Petition. Thus, it is my considered view that this petition satisfies the particularity and precision threshold required of constitutional petitions as held in *Mumo Matemu* and *Anarita Karimi Njeru* cases (both supra).
23. In respect of the third issue, I have perused the petition and reflected on the substance of the dispute. It is clear from the wording of the petition and from the reliefs sought therein that the petitioners are challenging the alleged compulsory acquisition of Chepkumia Area, which they assert is their community land.
24. Section 133D of the *Land Act* 2022 (2012), vests in this court appellate jurisdiction in disputes relating to the exercise of the state's power of eminent domain in the following terms:
- (1) A party to an application to the Tribunal who is dissatisfied with the decision of the Tribunal may, in the prescribed time and manner, appeal to the court on any of the following grounds:



- (a) the decision of the Tribunal was contrary to law or to some usage having the force of law;
- (b) the Tribunal failed to determine some material issue of law or usage having the force of law; or
- (c) a substantial error or defect in the procedure provided by or under this Act has produced error or defect in the decision of the case upon the merits.

(2) An appeal from the decision of the Tribunal may be made on a question of law only.

25. It is therefore, crystal clear that disputes relating to propriety and claims for compensation by persons interested in land which is the subject of compulsory acquisition are to be adjudicated by the National Land Commission through the mechanism of inquiry contemplated under Section 112 of the Land Act 2022 (2012). If there is no satisfactory resolution of the dispute, the next port of call is the Land Acquisition Tribunal established under Section 133A of the Land Act 2022 (2012). If a party is dissatisfied with the determination of the Tribunal, the next appropriate forum is this court. The appellate jurisdiction of this court is, however, restricted to issues of law.
26. On that score, the petitioners lodged complaints with the 2<sup>nd</sup> respondent under Ref. No. NLC/HLI/435/2018 and NLC/HLI/435/2017 from the petitioners against the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent confirmed that the petitioners and the 1<sup>st</sup> respondent appeared before it for hearing. That consequently, having carried out its investigative hearings and prepared its determination thereby, it exhausted its mandate.
27. From the Determination prepared by the 2<sup>nd</sup> respondent herein dated 7<sup>th</sup> February 2019 which is annexed to the 2<sup>nd</sup> respondent's Replying Affidavit and marked as BI 2, I note that the 2<sup>nd</sup> respondent found that both Koibem and Ngerek Communities have a valid claim because they were exchanging land for land with the 1<sup>st</sup> respondent herein. The 2<sup>nd</sup> respondent also found that although the Koibem have taken possession of the area given to them by the 1<sup>st</sup> respondent, the Ngerek Community cannot take possession because their place is occupied by the Kiptuya Community who are not part of the exchange program but a product of political and provincial administration intervention. Thus, the 2<sup>nd</sup> respondent made the recommendations infra:
- a. The 1<sup>st</sup> respondent to facilitate the degazettement of excised area from Nandi South Forest to enable issuance of title deeds to Ngerek and Koibem Communities on land for land basis.
  - b. The Director of Survey together with Nandi County Government to expedite the excision of the forest area that the 1<sup>st</sup> respondent excised from Nandi South Forest and hand over to the Ngerek and Koibem Communities.
28. It is important to note that the findings of the 2<sup>nd</sup> respondent hereinabove remain unchallenged. To that end, I subscribe to the decision of the Court of Appeal in *Commission on Administration of Justice v Kenya Vision 2030 Delivery Board & 2 others* [2019] KECA 322 (KLR), where it was held that:
- “We therefore find nothing in the above Article to suggest that the only remedy available to a beneficiary of the appellant's recommendations for redress to a public entity in the discharge of its undoubted public investigative and oversight mandate is limited to reporting of such findings to the National Assembly. Neither do we find anything in the said Article



to suggest that such recommendations have no force of law and are therefore not amenable to enforcement by a court of law.”

29. Essentially, the Court of Appeal held that the recommendation of a Constitutional Commission, like the Commission on Administration of Justice or in this case, the National Land Commission, have the force of law and are otherwise enforceable by a court of law. The same is a binding pronouncement and creates rights and obligations, which are amenable to be actualized and can thus, not be discarded, disregarded and/or otherwise be overlooked.
30. In my considered view, the 2<sup>nd</sup> respondent having determined the dispute herein, the petitioners should have sought to enforce the same, instead of lodging a new matter in the form of this petition. It is therefore, the finding of this court that the issues raised in this petition have been previously conclusively determined as envisaged under Articles 47, 50(1) and 67 of *the Constitution*, Section 112 of the *Land Act* and Section 4(3), (4) and 5 of the *Fair Administrative Action Act*, 2015.
31. Afortiori, this petition is hereby struck out.
32. Given the nature of this petition and the existence of an element of public interest, each party shall bear own costs.
33. It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAPSABET THIS 26<sup>TH</sup> DAY OF FEBRUARY 2025.**

**G.M.A ONGONDO**

**JUDGE**

Present

1. Mr. David Adoli, Learned Counsel for the petitioners.
2. Mr. Kutei Victor holding brief for Ms. Cheruiyot, Learned Counsel for the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents
3. Petitioners
4. Walter, Court Assistant

