



Ogunja (Suing on his own behalf as well as an official on behalf of the Otiende Estate Self Help Group) & 4 others v County Government of Kakamega (Environment and Land Petition E001, E002 & E003 of 2023 (Consolidated)) [2024] KEELC 3768 (KLR) (25 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3768 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND PETITION E001, E002 & E003 OF 2023 (CONSOLIDATED)
DO OHUNGO, J
APRIL 25, 2024

BETWEEN

MARTIN OCHIENG OGUNJA (SUING ON HIS OWN BEHALF AS WELL AS AN OFFICIAL ON BEHALF OF THE OTIENDE ESTATE SELF HELP GROUP) 1ST PETITIONER

AUGUSTINE MUTALA (SUING ON HIS OWN BEHALF AS WELL AS AN OFFICIAL ON BEHALF OF THE AMALEMBA II ESTATE SELF HELP GROUP) 2ND PETITIONER

AND

THE COUNTY GOVERNMENT OF KAKAMEGA RESPONDENT

AS CONSOLIDATED WITH

ENVIRONMENT AND LAND PETITION E002 OF 2023

BETWEEN

BEVERLY NYALESO WERE 1ST PETITIONER

HADWING A BAHATI 2ND PETITIONER

AND

THE COUNTY GOVERNMENT OF KAKAMEGA RESPONDENT

AS CONSOLIDATED WITH

ENVIRONMENT AND LAND PETITION E003 OF 2023

BETWEEN



TOM ONONO PETITIONER

AND

THE COUNTY GOVERNMENT OF KAKAMEGA RESPONDENT

JUDGMENT

1. This judgment is in respect of three consolidated petitions: ELC Petition Numbers E001 of 2023, E002 of 2023, and E003 of 2023. All the petitions are against a common respondent, the County Government of Kakamega (hereinafter “the respondent”). ELC Petition Number E001 of 2023 was filed on 26th July 2023 by Martin Ochieng Ogunja and Augustine Mutala, through petition dated 26th July 2023. They brought the petition in their individual capacities and as Vice Chairman of Otiende Estate Self Help Group and as tenant and official of Amalemba II Estate respectively and averred that they had been tenants in Otiende Estate and Amalemba II Estate for over thirty years with legitimate expectation to remain in occupation for life. That on 10th May 2023, they and other tenants in the scheme were served by the respondent with notices to vacate on or before 31st July 2023 and in default be evicted. They further averred that the respondent’s action violated Articles 10, 27, 35, 43, and 47 of the Constitution of Kenya.
2. The petitioners in ELC Petition Number E001 of 2023 therefore prayed for judgment against the respondent for:
 - a. A declaration that the Petitioners’ fundamental rights and freedoms to the right to accessible and affordable housing and sanitation as well as their right to fair administrative action and access to information has been breached.
 - b. A declaration that the Respondent and its agents have acted in breach of Article 10, 21 (2), 27, 35, 40, 47 of the Constitution of Kenya.
 - c. An order of *certiorari* to issue and question (sic) the respondent’s decision as contained in the notice to vacate dated 2nd May 2023.
 - d. An order prohibiting the Respondents (sic) whether by itself or through its agents from interfering with the Petitioners and other tenant’s quiet enjoyment of their tenancy in respect of Amalemba and Otiende schemes.
 - e. In the alternative the petitioners and other tenants of Otiende and Amalemba schemes to be compensated and given alternative housing provision.
3. ELC Petition Number E001 of 2023 is supported by an affidavit sworn by Martin Ochieng Ogunja. He deposed that he is in occupation of house number 247 in Otiende estate while Augustine Mutala is in occupation of house number 506. That house number 247 was first allocated in the year 1976 to his father Paul J Ogunja who was a prison officer and that after his father’s demise in 1998, the house was registered in his mother’s name until her demise in 2002 when it was passed to him upon surrendering copies of his identity card and passport. He added that most tenants of Otiende and Amalemba schemes acquired their houses in the same way and that most have lived in the houses for more than 30 years. That neither he nor the other tenants of Amalemba and Otiende have received any eviction notice from the National Housing Corporation which was originally in charge of the housing programme nor the defunct County Council until recently when the County Government of Kakamega took over the management of the two housing schemes.



4. Mr Ogunja went on to depose that he and his family had a legitimate expectation to stay in the house for their lifetime since they are of age. That they had dutifully paid the set rent since acquisition and that they are committed in payment of county rates through which they have been contributing towards the resources of the county thereby entitling them to enjoy resources provided to the public by the respondent and the Republic of Kenya. He also stated that management of the scheme alternated between the defunct local authority and National Housing Corporation until they were notified through letter dated 25th October 2022 that the corporation had handed over management of the scheme to the respondent.
5. Mr Ogunja further deposed that through letter dated 2nd May 2023, he and all other tenants of Otiende and Amalemba schemes were ordered to give vacant possession of their houses to the respondent on or before 31st July 2023. That their advocate on record wrote to the respondent requesting for more information regarding their tenancy but the respondent had not yet responded to the letter. That upon receiving the notice to vacate, they reached out to the Senator Kakamega County, the Speaker Kakamega County Assembly and the County Executive Committee Member for Lands, Housing, Urban Areas and Physical Planning Kakamega County but all in vain. He added that the notice to vacate was as a result of the respondent's decision to reserve the house exclusively for its staff and that the schemes were established to provide affordable and decent housing to residents of Kakamega pursuant to Article 43 of the Constitution.
6. The respondent opposed the petition through a replying affidavit sworn by Kelvin Marangu, the Acting Director responsible for Housing in the County Government of Kakamega. He deposed that National Housing Corporation entered into a partnership with the defunct Municipal Council of Kakamega to initiate and oversee the development of Housing Schemes pursuant to Section 8(1) (a) of the Housing Act which led to the successful construction of Otiende Estate and Amalemba II Estate. That in view of its corporate power to enter into contracts, to hold and dispose of property, to invest and generate returns, the National Housing Corporation entered into lease agreements with tenants since the rental houses were intended to generate revenue for the construction of more houses.
7. Mr Marangu deposed further that after the promulgation of the Constitution of Kenya 2010 Otiende and Amalemba Rental Schemes were handed over to the respondent by virtue of Section 134 of the County Government Act 2012 but the National Housing Corporation continued to manage them for the sole purpose of collecting rent to clear its outstanding loan arrears due from the respondent. That upon the respondent paying off the aforementioned loan arrears in full, the National Housing Corporation handed over the Management of the rental schemes to the respondent on 1st November 2022 after which the respondent communicated the change of management to the petitioners through notice dated 25th October 2022. He added that the respondent assumed ownership of the rental schemes and the petitioners were required to make all payments to it from 1st November 2022.
8. Mr Marangu further deposed that on 4th April 2023, the respondent's County Executive Committee passed a resolution to allocate all county owned houses exclusively to county staff and that all tenants who were not the respondent's staff be notified to vacate. That subsequently, the notice dated 2nd May 2023 was issued giving the petitioners three months' notice to vacate the premises on or before 31st July 2023. He added that that position was affirmed by the National Housing Corporation through its letter dated 22nd September 2023 addressed to the respondent's advocates. That the petitioners' claims that their rights were violated by the respondent are misguided as termination of lease agreements is not a constitutional matter but a purely contractual issue and that under clause 21 (d) of the petitioners' leases, either the tenant or the corporation could terminate the leases by serving the other party with a three months' notice. He also stated that the respondent's decision to reserve the houses exclusively



for its staff did not need consultation with the petitioners since the relationship between the parties is inherently contractual and that it was never the intention of the respondent or that of the National Housing Corporation that the agreements with the petitioners run in perpetuity. That the relationship between the petitioners and the respondent is a landlord and tenant one.

9. The petitioners filed a supplementary affidavit sworn by Martin Ochieng Ogunja. He admitted the history of the schemes as narrated above by Mr Marangu as well as existence of landlord tenant relationship. He also conceded that the tenancy was not meant to run in perpetuity and added that it was pursuant to a government policy to enable residents of Kakamega County to access decent and affordable housing. That the tenancy agreements had an option to purchase, and that the respondent had deliberately failed to provide the petitioners with documents disclosing the true nature of the schemes.
10. ELC Petition Number E002 of 2023 was filed on 19th July 2023 by Beverly Nyaleso Were and Hadwing A. Bahati, through petition dated 19th July 2023. The cause of action in the petition is largely similar to that in ELC Petition Number E001 of 2023. Beverly and Hadwing averred in their petition that their families were allocated houses number 248 and 243 respectively in Otiende Estate and that they had dutifully paid rent. That they were also served by the respondent with notices to vacate on or before 31st July 2023 and that in doing so, the respondent acted in breach of Articles 1, 10, 19, 21, 27, 43, and 61 of the Constitution of Kenya. They therefore prayed for judgment against the respondent for:
 - a. A declaration that the decision of the respondents executive committee communicated to the petitioner vide the letter dated 2/5/2023 is unconstitutional for having been made contrary to articles 1 & 10 of the Constitution and directly offending the provisions of article 19, 20, 21, 27, 43(b) & 61(1) of the Constitution.
 - b. An order of *certiorari* to bring into this court and quash the said resolution.
 - c. General damages for breach of the petitioner's rights to affordable housing.
11. ELC Petition Number E002 of 2023 is supported by an affidavit sworn by Beverly Nyaleso Were. She deposed to similar facts as those in the supporting affidavit in respect of ELC Petition Number E001 of 2023 and added that upon receiving the notice to vacate, she wrote a letter dated 14th June 2023 to the respondent upon receipt of which the respondent wrote a letter dated 3rd July 2023 threatening to forcefully evict them from Houses Number 248 and 243.
12. The respondent opposed ELC Petition Number E002 of 2023 through a replying affidavit sworn by Kelvin Marangu, the Acting Director responsible for Housing in the County Government of Kakamega. The contents of the affidavit are essentially similar to those in the affidavit that he swore in response to ELC Petition Number E001 of 2023.
13. ELC Petition Number E003 of 2023 was filed on 24th August 2023 by Tom Onono, through petition dated 24th August 2023. The cause of action in the petition is largely similar to that in ELC Petition Numbers E001 of 2023 and E002 of 2023. Tom Onono averred in the petition that he is a tenant in house number 513 in Otiende Estate and that he was also served by the respondent with notices to vacate on or before 31st July 2023. He further averred that the respondent acted in breach of Articles 10, 21(2), 27, 35, 40, and 47 of the Constitution of Kenya. Tom Onono therefore prayed for judgment against the respondent for:
 - a. A declaration that the Petitioner's as well as all the affected tenants' fundamental rights and freedoms to the right to accessible and affordable housing and sanitation as well as their right to fair administrative action and access to information has been breached.



- b. A declaration that the Respondent and its agents have acted in breach of Articles 10, 21(2), 27, 35, 40, and 47 of the Constitution of Kenya.
 - c. An order of *certiorari* to issue and quash the Respondent’s decision as contained in the notice to vacate dated 2nd May 2023.
 - d. An order prohibiting the Respondents whether by itself or through its agents from interfering with the Petitioner and other tenant’s quiet enjoyment of their tenancy in respect of Amalemba and Otiende schemes.
 - e. In the alternative the petitioner and other tenants of Otiende and Amalemba schemes to be compensated and given alternative housing provision.
14. The respondent opposed ELC Petition Number E003 of 2023 through the replying affidavit sworn by Kelvin Marangu in ELC Petition Number E001 of 2023.
 15. All three petitions were consolidated and ELC Petition Number E001 of 2023 selected as the lead file. The petitions were canvassed through written submissions.
 16. The petitioners argued that the suit properties were constructed by the National Housing Corporation on the basis of a national housing policy whose objective was provision of progressive realization of the right to accessible and adequate housing for the residents of Kakamega Municipality pursuant to Article 43 (b) of the Constitution. They relied on the case of Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021) (Judgment) in support of that argument. They further contended that corporation is a parastatal that was established for the benefit of the public and draws its funds from the exchequer. The petitioners therefore contended that given that the corporation is funded by the exchequer and in turn it funded the respondent to construct the suit premises governed by the said national policy that was to benefit the petitioners and others, the respondent could not take a decision affecting such rights and benefits without the participation of the petitioners and all affected parties in terms of Article 10 of the Constitution. The petitioners relied on the case of Robert N. Gakuru & Others v Governor Kiambu County & 3 others [2014] eKLR and further argued that depriving them and other tenants who are not the respondent’s staff the option to purchase and own the suit premises amounts to a violation of their right to property contrary to Article 40 of the Constitution. They also contended that that prior to instituting the petitions, they formally requested for all documents and programs pertaining to the allocation of the suit premises, but none was provided hence their right to information under Article 35 of the Constitution was contravened.
 17. The petitioners also argued that the suit premises are public land as defined under Article 62 of the Constitution and are held by the respondent in trust of the people of Kakamega County and the public in general. That the petitioners are residents of Kakamega and taxpayers and that the suit premises were designated for their benefit and not to be reserved for the exclusive benefit of the respondent’s employees. They therefore contended that their right to equal treatment under Article 27 of the Constitution was breached.
 18. The petitioners went on to argue that the notice that the respondent served on them was not a notice to terminate their tenancies pursuant to clause 21(d) of the lease agreement since the said clause provides that the party terminating the lease shall serve on the other party a three months’ notice indicating intention of such termination. They further argued that the notice served upon the petitioners was a notice to vacate and not one to terminate. That the wording of the notice fortifies their argument that the notice was occasioned by ulterior motives and that it cannot amount to a valid notice of termination in terms the lease agreement. The petitioners therefore urged the court to grant the reliefs sought.



19. On its part, the respondent argued that the issues raised by the petitioners are not constitutional in nature but contractual since the petitioners admitted that there existed a landlord and tenant relationship. That, consequently, the dispute between the parties is governed by the law of contract and that the petitioners' claims that their constitutional rights were violated are misguided. Relying on the cases of *Joseph Chilumo & 29 others v County Government of Kilifi* [2017] eKLR and *Stanley Kamere & 26 others v National Housing Corporation & 2 others* [2015] eKLR, the respondent further argued that its decision to reserve the premises exclusively for its employees is not discriminatory and did not require consultation with the petitioners. That in view of the cited cases, courts have acknowledged that despite the respondent's implementation of a policy aimed at facilitating affordable housing, the fundamental nature of the association between the involved parties remains primarily contractual.
20. The respondent further argued that the petitioners did not indicate with precision which provisions of the *Constitution* were violated and did not avail particulars detailing the manner of any violation. The respondent relied on the cases of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR, *Kenya Youth Parliament & 2 others v Attorney General & 2 others* [2012] eKLR, and *Githunguri Dairy Farmers Co-operative Society Ltd v Attorney General & 2 others* [2016] eKLR and argued that the petitions and the supporting evidence are inadequate to enable the court to determine whether rights were violated as alleged. The respondent therefore argued that the petitions failed to meet the competency threshold and urged the court to dismiss them with costs.
21. I have considered the consolidated petitions, the affidavits, and the submissions. The issues that arise for determination are whether the petitions disclose any constitutional issue and whether the reliefs sought should issue.
22. There is no dispute that the relationship that between the parties is one of a landlord and tenant. The petitioners have themselves admitted as much. The petitioners however seek to persuade the court that since the suit premises are public land as defined under Article 62 of the *Constitution* and are held by the respondent in trust of the people of Kakamega County and the public in general, they as residents of Kakamega and taxpayers are entitled to the benefit of the suit premises in view of the right to accessible and adequate housing pursuant to Article 43 (b) of the *Constitution*. They also contend that they ought to have been given a chance to participate in the decision to require them to vacate, pursuant to Article 10 of the *Constitution*.
23. Procedural law regarding constitutional matters is that where ample alternative or statutory avenues for resolution of a dispute exist, the alternative or statutory options for redress must be followed and the constitutional jurisdiction should not be invoked. This is what is called the principle of constitutional avoidance. It abhors the practice of bringing ordinary disputes to the constitutional court. See *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR. An ordinary claim disguised as a constitutional matter and filed in the constitutional court is a claim filed in the wrong court. See *Sumayya Athmani Hassan v Paul Masinde Simidi & another* [2019] eKLR.
24. To the extent that the petitioners admit that they have a landlord and tenant relationship with the respondent, the resolution of the dispute between them must be pursued through an ordinary suit filed pursuant to the law of contract and in view of the terms of their leases. The petitioners themselves seemed to appreciate that since towards the end of their submissions, they advanced arguments as to whether the notice that the respondent served on them amounted to a valid notice of termination in terms the lease agreement. It is clear to me that the petitioners have not demonstrated a constitutional issue beyond the contractual issues arising from the leases.



25. Although the petitioners claimed that their right to information under Article 35 of the *Constitution* was contravened because the respondent failed to provide to them documents pertaining to the allocation of the suit premises, I note that to the extent that the petitioners admit the existence of a contractual relationship through lease agreements, they cannot turn around and claim not to be aware of the details of their contractual relationship.
26. I find that the petitions do not disclose any constitutional issue and, in the circumstances, the reliefs sought cannot issue. I find no merit in the consolidated petitions. I dismiss them with no order as to costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 25TH DAY OF APRIL 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the Petitioners

No appearance for the Respondent

Court Assistant: M Nguyayi

