



**Amadeal Trust Limited & another v Kenya Forest Service & another (Environment & Land Petition E050 of 2022) [2024] KEELC 4670 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4670 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION E050 OF 2022**

**J OMANGE, J**

**MAY 23, 2024**

**BETWEEN**

**AMADEAL TRUST LIMITED ..... 1<sup>ST</sup> PETITIONER**

**GREENLAND MOTORS ..... 2<sup>ND</sup> PETITIONER**

**AND**

**KENYA FOREST SERVICE ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Petition arises out of land reference No. 24585 herein referred as the suit property.
2. Vide a Petition dated 7<sup>th</sup> November 2022, the Petitioner seeks the following orders;
  - a. A declaration that the decision of the 1<sup>st</sup> Respondent to arbitrarily evict the Petitioners from LR NO 24585 is in breach of the Petitioner's rights under article 40 of *the constitution*.
  - b. A declaration that the decision of the 1<sup>st</sup> Respondent to repossess the LR No. 24585 without prior notice and due process of compulsory acquisition is procedurally unfair, illegal and ultra vires.
  - c. A declaration that the 1<sup>st</sup> Respondent's unilateral decision to repossess the LR no 24585 against the valid title issued to the Petitioners violated the Petitioner's rights to legitimate expectation.
  - d. A declaration that the actions and omission of the Respondents herein have violated *the constitution* of Kenya and in particular Articles 40, 19, 20, 27, 40, 47, 50, 73, and 233 of *the Constitution*.



- e. A permanent injunction against the Respondents barring them and or its agents from alienating the Petitioner's rights and interests in LR No 245685.
  - f. That an order for general damages for violation of the Petitioner's fundamental rights.
  - g. Costs of the Petition.
3. The Petitioners' case is that they acquired the suit property herein through a process initiated by gazette notice No 1767 dated 3<sup>rd</sup> April 1998, which notice was issued by the then minister of Natural Resources giving 28 days' notice of intention to declare the boundaries of Ngong Road Forest altered to exclude an area of 7.507 hectares which the suit property herein was part of. That following the said alteration, the Petitioners were allotted an area of approximately 0.8 hectares from the excluded area vide an allotment letter dated 24<sup>th</sup> May 1999 which allotment was accepted on 9<sup>th</sup> October 1998 after paying the requisite fees.
  4. That they undertook all processes leading to issuance of a certificate of lease for grant L. R. 104395 on the 10<sup>th</sup> of March 2003. The Petitioners further aver that they have been residing on the suit property since then and paying all land rent and rates to the Nairobi County Government up until June of 2021 when the 1<sup>st</sup> Respondent forcefully entered the property and evicted them.  
  
This act they state has hindered them from utilizing their property as intended infringing on their rights.
  5. In the affidavit deposed by Edison Kiplagat Bundotich the director of the 1<sup>st</sup> Petitioner, he highlights the rights in *the Constitution* which have been violated which include rights to property under Article 40, Article 47 on the Right to Fair Administrative Action and that the Respondents have acted contrary to the principles of public service as provided in Articles 10, 20 and 233 of *the Constitution* and that the acts of repossession of the land violate the procedures of converting private land to public land.
  6. In response to the Petition, the Respondents filed various documents including a Replying affidavit sworn by Evans Kegonde dated 25<sup>th</sup> May 2023 and a response to Petition of even date. Both documents raise the same arguments. Mr. Kegonde deposed that Ngong Road Forest was declared a forest vide notice No. 174 on the 20<sup>th</sup> May 1964. That there was a gazette notice by the then Minister of Natural Resources to alter the boundary of Ngong area reserve after 28 days of publication of the gazette. That the said alteration was not effected since the minister after the expiry of the 28 days' notice, did not issue any declaration to the effect that the alteration had taken place.
  7. That the Petitioners have not proved that indeed the alteration took place. As a result, the suit property herein still remained part of Ngong Forest which is public land. Consequently, the allocation of the suit property to the Petitioners was unlawful. The Respondents argue that as at the time of repossession the Petitioners had not been in occupation and had not developed the suit property. As such their rights were not violated. The Respondents insist that the suit property was un-procedurally alienated to the Petitioners.
  8. The Petitioners filed a further affidavit in response to the Petition. They aver that the gazette notice was self-executing as such there was no need to issue a further notice.
  9. The Petitioners filed submissions dated 4<sup>th</sup> December 2023 reiterating the Petition contents and submitted that the National Land Commission was not a necessary party to the Petition as argued by the Respondents as the land was private land. In any event, they argue that failure to enjoin the National Land Commission did not render the Petition defective.



10. The Petitioners submit that the gazette notice in question herein was self-executing and at the lapse of the 28 days, the alteration as intended by the notice took place altering the boundaries of Ng'ong Road Forest excluding the area as described in the schedule of the gazette notice. Further that it was not a statutory requirement under the Repealed Forest Act, for a follow up notice after the lapse of the 28 days of the actual alteration creating boundaries.
11. That the process was lawful and the notice was issued by the minister who derived his authority from Section 4(2) of the Repealed Forest Act which gave the Petitioners no reason to suspect any actions were carried out in bad faith. The Petitioners submit that this certificate conferred indefeasible title under Section 26(1) of [Land Registration Act](#) which title cannot be subjected to challenge.
12. The Petitioners submit that the occupation of the suit property by the Respondents is a violation of Article 40 of [the Constitution](#) that protects the rights of individuals to acquire and own property and to protection of title. They referred the court to the case of Evelyn College of Design Ltd Vs Director of Children's Department & Another (2013) Eklr and to the supreme court decision in [Attorney General Vs Zinj Limited \(Petition 1 of 2020\)](#) (2021) KESC 23(KLR).
13. Further they submit that the Respondents actions are in violation of the Petitioner's right to fair administrative action.  
  
That the Respondent being aware of the gazette notice being relied on, should have known the suit property is now private land and should have used the legal mechanisms to compulsorily acquire the land and not arbitrarily evict the Petitioners in the manner they did. That the said actions are in violation of Article 47 of [the Constitution](#) and Section 4(3) of the Fair Administration Act which state that administrative acts set to affect rights of individuals should be carried out with notice and after presenting an opportunity for the affected persons to be heard.
14. The Petitioners submit that they are deserving of the declaratory, injunctive and award of general damages sought in the Petition as they have proved infringement under Article 40 and 47 of [the Constitution](#). Lastly, they submit that the issue of alteration of boundaries has been ongoing and as such this case should not be treated differently from others.
15. The Respondent restate their responses to the Petition, the gist of their case being that the then Minister for Environment did not declare alteration of the boundaries of Ng'ong Road Forest after the lapse of the 28 days' notice that had been issued by him vide the gazette notice 1767 of 17<sup>th</sup> April 1998. This they argue meant that the 7.505 hectares is Public land.
16. That the process of alteration of boundary was not complete hence the whole process of acquisition was in contravention of Articles 62(4) of [the Constitution](#). The Respondents placed reliance on the case of Norbixin Kenya Limited Vs the Hon Attorney General Nairobi Civil Suit No 1814/2002
17. Further, it was submitted that the Petitioners cannot claim to be absolute indefeasible owners of the suit property as the suit property which is public land was not degazetted for alienation hence the Petitioners had no good title. This, they emphasized by citing the case of Adan Abdirahani Hassan & 2 others Vs The registrar of titles, Ministry of Lands & 2 others (2013) eKLR.
18. The Respondents submit that the rights of the Petitioners if any did not override the rights of the public. The suit property is a forest in which the public interest must be protected and safeguarded as provided in Section 28 of the [Land Registration Act](#) which clearly provides a proprietor's rights are subject to overriding interests in land.
19. Lastly, the Respondents submit that the Petitioners had not acquired lawful title as the conditions in the allotment letter were not met by the Petitioners within the specified period. Having failed to meet



the conditions no proprietary rights could be conferred under the allotment letter as was stated in the case of Torino Enterprises Limited Vs Attorney General Petition number 5(E006) of 2022. Another case law relied upon was the case of Cycad Properties Limited Vs the attorney General & others HC Petition No 70 of 2010.

20. From the foregoing, having considered the Petition, the supporting affidavit, the annexures, the responses to the petition, as well as the parties' submissions, the following are the issues for this court's determination.
- a. Whether the Petitioners rightfully acquired title over the suit property herein Land Reference No 24585.
  - b. Whether the actions of the Respondents of evicting the Petitioners infringed on the Petitioner's rights under article 40 and 47 of the constitution.

21. The Petitioners are relying on the provisions of Section 4 (2) the Forest Act Cap 385. The Forest Act, Cap 385 was repealed by The Forest Act, 2005, No. 7 of 2005.

However, in the instant suit the applicable law is the repealed Act, Cap 385. Section 4 of the said Cap 385 states as follows;

“

“ 4.

(1) The minister may, from time to time, by notice in the Gazette-

- (a) declare any unalienated Government land to be a forest area;
- (b) declare the boundaries of a forest and from time to time alter those boundaries;
- (c) declare that a forest area shall cease to be a forest area.”

22. It is therefore clear that under Section 4 (2) of the Repealed Forest Act the minister had powers to declare the boundaries of a forest from time to time and also to alter those boundaries. However, Section 4 (2) provides the answer to the issue at stake in this Section. It states... 2) Before a declaration is made under paragraph (b) or paragraph (c) of subsection (1), twenty -eight days' notice of the intention to make the declaration shall be published by the minister.”
23. A plain interpretation of this Section is that the minister is first to issue 28 days of notice before (emphasis mine) making the declaration. In my humble view, this statement implies that after publication of notice of intention to gazette lapses, the minister can then publish a follow up gazette notice declaring that the boundaries of a forest have been altered pursuant to the initial gazette notice.
24. In the instant case, the Minister did not issue a second gazette notice declaring the boundaries of the areas in the schedule have been altered. In the absence of a gazette notice altering the boundaries of the forest by degazettement, the land in dispute was not available for allocation and therefore the title document issued over the suit land was irregularly issued.
25. It follows that since the suit land had not been excised from the Ngong Road Forest by the Minister in charge by virtue of Section 4 of the Cap 385, it remained government land and any title acquired



did not pass good title hence the Petitioners title document remain pieces of paper that unfortunately cannot confer ownership.

26. Whether the actions of the Respondents of evicting the Petitioners infringed on the Petitioner's rights under article 40 and 47 of *the constitution*.

The Respondents have submitted that the suit property was illegally acquired and that the same was public property belonging to the Kenya Forest Services as the forest had not been degazetted. What then are the rights if any of the Petitioners?

Article 40 of *the Constitution* states as follows;

“

“40.

- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property--
  - (a) of any description; and
  - (b) in any part of Kenya.
- (2) Parliament shall not enact a law that permits the State or any person—
  - (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
  - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).
- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-
  - (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
  - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
    - (i) requires prompt payment in full, of just compensation to the person; and
    - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
- 4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
- (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.



- (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

These same sentiments have been echoed in the supreme court decision of Rutongot Farm Limited Vs Kenya Forests Services and 3 others [2018] eKLR that stated as follows;

“Once proprietary interest has been lawfully acquired, the guarantee to protection of the right to property under Article 40 of *the Constitution* is then expressed in the terms that no person shall be arbitrarily deprived of property. The same guarantee existed in Section 75 of the repealed Constitution.”

27. The court’s finding is that the suit land was irregularly allocated to the Petitioners without following the lawful procedure.

Under Article 40 (6) the Petitioners are exempted from protection of Article 40. The land in question is now under the Management of the Kenya Forest Service, the 1<sup>st</sup> Respondent which is charged with the responsibility of managing all state forests and to protect all the forests in Kenya in accordance with the provisions of the Act.

28. The Petitioners claim that they were evicted without consideration of their right to fair administrative action. The question that then arises is whether in instances where a person is found to be in unlawful occupation of a property they still retain the right to be evicted in a manner that ensures they have the protection of the law. In answering this question, I will consider *the Constitution*, domestic and international law. In his paper “Evictions in Kenya; Which way under the new Constitution and the Land Laws Amendment Act 2016? Hon Justice Oscar Angote notes that unlike the South African Constitution, the Kenyan Constitution does not have an express provision on how lawful evictions are to be carried out. The paper highlights cases in which the courts have invoked international treaties, guidelines and conventions to guide evictions.

29. In the case of Kepha Omondi Onjuro & Others versus Attorney General & 5 Others, the High Court held as follows: -

“.....it is imperative at this juncture to appreciate that there is no legal framework existing in Kenya guiding evictions and demolitions..... However, Article 2(5) and (6) of *the Constitution* provides that the general rules of international law shall form part of the law of Kenya and any treaty or convention ratified by Kenya is part of the Law of Kenya.....”

30. Similarly, in the Mitubell Welfare Society versus Attorney General and Others (Mitubell Case) the Court held that:

“This Country has yet to develop legislation and guidelines for eviction of persons occupying land which they are not legally entitled to occupy.

However, as a member of the international community and a signatory to various United Nations treaties and conventions, it bound by such international guidelines as exist that are intended to safeguard the rights of persons liable to eviction. Article 2(5) and (6) of *the Constitution* make the general rules of international law and any treaty or convention that Kenya has ratified part of the laws of Kenya. Consequently, the State, State organs and all persons, in carrying out evictions, should do so in accordance with the United Nations Guidelines on Eviction as enunciated by The United Nations Office of the High Commissioner for Human Rights in General Comment No. 7 “The right to adequate housing (Art. 11.1): forced evictions: (20/05/97) CESCR General comment 7. (General Comments).



31. The UN General Comment No. 7 on the Right to Adequate Housing gave useful guidelines during forced evictions which include;
- a. An opportunity for genuine consultation with those affected;
  - b. Adequate and reasonable notice for all affected persons prior to the scheduled date of eviction
  - c. Information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;
  - d. Especially where groups of people are involved, government officials or their representatives to be present during an eviction;
  - e. All persons carrying out the eviction to be properly identified;
  - f. Eviction not to take place in particularly bad weather or at night unless the affected persons consent otherwise.
  - g. Provision of legal remedies; and
  - h. Provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.
32. It is my humble view that where it is necessary to carry out forceful evictions, implementation of these guidelines would ensure a process that safeguards the inherent human rights and dignity of those affected. In the instant case, the Petitioners contend that their rights were violated in the manner the eviction was carried out. The Respondents on the other hand insist the Petitioners were not in physical possession of the suit property hence the issue of forceful eviction did not arise. I have considered the evidence that was adduced by the Petitioners and find that they did not adduce any evidence that would prove they were in physical possession of the property. Section 2 of the *Land Registration Act* defines eviction as “the act of depriving or removing a person from the possession of land or property which they hold unlawfully either executed upon a successful law suit or otherwise” Physical occupation is therefore a prerequisite to forceful eviction.
33. In view of my finding that physical possession was not proved by the Petitioners. I find that they have failed to prove the case on a balance of probability. The Petition is dismissed. Each party to bear their own costs.

Judgement Signed, Dated and Delivered via Microsoft Teams on 23<sup>rd</sup>

**of May, 2024.**

**JUDY OMANGE**

**JUDGE**

**In the Presence of: -**

**-Mr. Huba for Kiplagat for the Petitioner-No Appearance for the Respondent**

**-Court Assistant: Steve Musyoki**

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**JUDGEMENT PETITION E050 OF 2022**

