



**Gadi & 51 others v National Transport & Safety Authority
& another (Environment & Land Petition E001 of 2024)
[2024] KEELC 5350 (KLR) (Environment and Land) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5350 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT & LAND PETITION E001 OF 2024**

EK WABWOTO, J

JULY 19, 2024

BETWEEN

**ERESTINA MALEMBA GADI 1ST PETITIONER
RAPHAEL MWAWASI ZENA 2ND PETITIONER
PRISCILLA MKAMSAU MWASARU & 49 OTHERS 3RD PETITIONER**

AND

**NATIONAL TRANSPORT & SAFETY AUTHORITY 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT**

JUDGMENT

1. This judgment is in respect to the petition dated 22nd January 2024 filed by the petitioners herein. In the said petition, the petitioners have described themselves as residents of Sofia Riverside area of Voi Sub County, Taita Taveta County.
2. The 1st Respondent is a statutory body established to an Act of Parliament with the key objective of harmonizing the operations of the key road transport departments and held in effectively managing the road transport sub section and minimizing loss of lives through road crashes.
3. The 2nd Respondent is the Attorney General whose office is established under Article 156(1) of the [Constitution](#) and is the Principal Legal Adviser to the Government.

The Petition

4. In the petition, the Petitioners seeks the following orders:-



- a. A declaration that as a result of the long uninterrupted and continuous occupation of the suit land the petitioners have acquired rights to own and occupy land which is protected under Article 40 of the Constitution of Kenya.
 - b. An order of judicial review in the form of mandamus do issue compelling the 2nd Respondent to liaise with the relevant offices to carry out survey of the land and issue title deeds to the petitioners.
 - c. A declaration that the act of forceful takeover of the petitioners' land breaches the right to own property as guaranteed in Article 40 of the Constitution.
 - d. Any other relief this Honourable court would be pleased to issue.
 - e. Costs of the petition.
5. The petition is supported by the affidavits of Raphael Mwawasi Zena, Rajab Mngola Musa and Erestina Malemba Gadi all sworn on 22nd January 2024.
 6. The petition was opposed by the Respondents vide grounds of opposition dated 12th March 2024.
 7. Pursuant to the directions issued by this court, it was directed that the petition be canvassed by way of written submissions upon which parties were granted an opportunity to highlight on the same. The petitioners filed written submissions dated 12th May 2024. No written submissions were filed by the Respondents but they were granted an opportunity to make oral submissions during the plenary hearing of the main petition.

The Petitioners case

8. It was the Petitioners case that the suit parcel is situated in Voi Sub-County or near the Voi river bridge and is totally distinct from the National Transport and Safety Authority offices and inspection area.
9. It was pleaded that the Petitioners have been residing in the said area since 1936 and they had a meeting on 2nd October 2005 upon which they resolved not to vacate the land.
10. It was contended that the petition had been filed seeking to address issues of historical land injustices. The petitioners have been in continuous occupation and they have acquired rights over the same. It was contended that the Respondents action are in breach of their right to protection of property contrary to Article 40 of the Constitution and Loss of Economic and Social Rights contrary to Article 43 of the Constitution.
11. It was averred that having occupied the land for 80 years they deserve to be issued with ownership documents of the property and further that they had a legitimate historical injustice complaint which was lodged in the National Assembly and County Assembly.
12. The Petitioners also filed written submissions dated 12th May 2024 wherein the Petitioner submitted on the following issues:- whether the reliefs sought can be granted and who should bear costs of the petition.
13. It was submitted that as a result of the long and interrupted and continuous occupation of the suit land the petitioners have acquired rights to own and occupy the same and any action of forceful take over will be an infringement of their right to property. It was also submitted that pursuant to Article 43 of the Constitution the Petitioners are entitlement to the right to accessible and adequate housing and the reasonable standards of sanitation. The following cases were cited in support of the petition Mitu-Bell Welfare Society v Kenya Airports Authority & 2 Others; Initiative for Strategic Litigation in



Africa (Amicus Curiae) (Petition 3 of 2018) [2021] (KLR) (11th January 2021) (Judgment) and *Irene Grotboom and Others v The Government of the Republic of South Africa & Others* [2001](12) SA 46.

14. Learned Counsel Mr. Mwazighe made oral submissions on behalf of the Petitioners and added that Section 134 of the [Land Act](#) provides for a mechanism of how national government can settle squatters.

The Respondents case

15. The Respondents in opposing the Petition filed grounds of opposition dated 12th March 2024 and also made oral submissions during the plenary hearing of the Petition. It was the Respondents contention that the Petitioners have not demonstrated proof of the said land. They have not provided title to land or allotment letters and have no colour of right to the land. It was contended that the Petitioners can be compensated upon proof of ownership of the land but as it is the intended project should be undertaken to enable its prompt completion.
16. Learned Counsel Ms. Saru for the Respondent while making her oral submissions added that the land is public land and it cannot be claimed for use by the Petitioners since Article 40 of the [Constitution](#) has some limitations. It was also submitted that the Petitioners have admitted that the land is a “triangle” and further that they have not proved their stay on the land. It was further submitted that the Petitioners ought to have raised their issues with the National Land Commission and in the circumstances, they have not exhausted the alternative disputes resolution mechanism before filing the Petition.

Analysis and Determination

17. The court has considered the case put forward by the Petitioners, the Respondents, the written submissions filed by the Petitioners and the authorities referred to therein and is of the view that the following are the salient issues for determination herein: -
- i. Whether the Petitioners have the legal right to the suit property.
 - ii. Whether there is any violation of the Petitioner’s rights.
 - iii. What are the appropriate remedies if any.
18. The Petitioners allege violation of their right under Article 40 of the [Constitution](#) which provides 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...”
19. The Petitioners contended that they have been residing in the suit land since 1936 and have acquired ownership by reasons of a long uninterrupted occupation. It was also contended that during that period they have not had any problems until recently when they started receiving threats of evictions from government offices. The Respondents in disputing the Petitioners occupation of the suit property maintained that the said property was public land and as such the Petitioners cannot have any right or claim over the same.
20. Section 7 of the [Land Act](#) No. 6 of 2012 sets out the mode of acquisition of title to land in Kenya. It stipulates that title to land may be acquired through; allocation, land adjudication process, compulsory



acquisition, prescription, settlement programs, transmission, transfer, long term leases exceeding twenty one years created out of private land or in any other manner prescribed in an Act of Parliament.

21. In the instant Petition, the Petitioners have laid claim to the land on the basis of continuous occupation of the land from the time of their ancestors from 1936. On this basis, it can be inferred that the Petitioners claim to the land is with regard to acquisition by way of adverse possession having been in the said property for over 12 years. On this particular aspect it is evident that a claim of adverse possession cannot be maintained on government of public land.
22. Having considered the entire petition together with the affidavits sworn in support of the petition, it is evident that the Petitioners have not adduced any documentary evidence demonstrating their ownership right to the suit property and can therefore not maintain a claim for violation of their right to property under Article 40 of the Constitution.
23. The next issue for consideration is whether the Respondents action and or the intended evictions of the Petitioners will be a violation of their constitutional rights to property and the economic and social rights stipulated under Article 43 of the Constitution.
24. Article 2 and 20 of the Constitution impose an obligation on all persons and all state organs to respect and abide by all the provisions of the Constitution. Article 2(1) provides that ‘This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.’ At Article 20(1), the Constitution provides that ‘The Bill of Rights applies to all law and binds all State organs and all persons.’
25. Article 43 of the Constitution contains the constitutional guarantee to social economic rights. The relevant provision of this Article is as follows:
 43.
 - (1) Every person has the right—
 - (a)
 - (b) to accessible and adequate housing, and to reasonable standards of sanitation;
26. Article 43 of the Constitution imposes on the state a positive obligation to ensure access by its citizens to social economic rights.
27. In the instant petition, while it is clear that the Petitioners have not been able to bring forth any evidence and or documentation showing their ownership to the suit property, it is indeed evident that they have been residing in the said properties and have put up structures and other properties in the said property a position which was not controverted and or denied by the Respondents since the Respondents only filed grounds of opposition stating that the Petitioners were residing on public land set aside for use by the 1st Respondent.
28. The court recognises that there may be instances when eviction of people residing on public land may be necessary for one reason or the other however even in such instances, there is a need to follow due process to those to be affected. It is not for the Respondents to merely state that the said persons are residing on public land and ought to be evicted.
29. Section 152G of the Land laws (Amendment) Act, which brought forth far reaching charges in management of evictions which includes the following procedure: -
 - a. Be preceded by the presentation of the formal authorizations for the action;



- b. Where groups of people are involved, government officials or their representatives to be present during an eviction;
 - c. Be carried out in a manner that respects the dignity, right to life and security of those affected;
 - d. Include special measures to ensure effective protection to groups and people who are vulnerable such as women, children, the elderly, and persons with disabilities;
 - e. Include special measures to ensure that there is no arbitrary deprivation of property or possessions as a result of the eviction; f) Include mechanisms to protect property and possessions left behind involuntarily from destruction;
 - f. Respect the principles of necessity and proportionality during the use of force; and
 - g. Give the affected persons the first priority to demolish and salvage their property.
30. Courts have equally time without number pronounced themselves on the said matter. The Court of Appeal in *Benson Wekesa Milimo v National Land Commission & 2 others* (2021) eKLR held that;
- “...the notice served on Benson was clear that he was being evicted from unlawful occupation of a public land. Even assuming for the sake of argument that Benson was in unlawful occupation of public land, it was mandatory for the Commission to comply with section 155 of the *Land Act*, by first serving Benson with a notice to show cause as to why he should not be required to vacate that land, and secondly, informing Benson in that notice, of his right to be heard. It is only after failing to show cause as to why the land should not be vacated, that an eviction notice could issue. The Commission failed to demonstrate that it complied with these statutory provisions, and therefore, due process was not followed in issuing the impugned notice.”
31. Equally in the case of *William Musembi 13 others v Moi Educational Centre Co. Ltd & 3 others* [2021] eKLR which reiterated the importance of following the laid down procedures in evictions stating that the Court in laying out principles that an evicting party must comply with which include the duty to give notice in writing; to carry out the eviction in a manner that respects the dignity, right to life and security of those affected; to protect the rights of women, the elderly, children and persons with disabilities and the duty to give the affected persons the first priority to demolish and salvage their property, it applied international principles of law later clarified by this Court in *Mitubell* and which were crystallized as law in Section 152(A) – (H) of the *Land Act*. The Petitioners submitted that these principles flow from UN Guidelines on Evictions: General Comment No.7 which in *Mitubell* was stated are intended to breathe life into the Right to Dignity and Right to Housing under the ICCPR and ICESCR respectively hence these principles were applicable to the eviction of the Petitioners as a matter of obligation by the State under international law as provided for in Articles 2(5) and 2(6) of the *Constitution*.
32. Similarly, in *Mitu-Bell and Fatuma Khamis Bilal & 3505 others v Kenya Railways Corporations & 6 Others* [2021] eKLR the Apex Court of the land held that even where eviction of people may be necessary, there is need to follow the due process.
33. In the instant petition, the court has not been furnished with any evidence as to whether the intended eviction will follow the laid down provisions of the law. In the said circumstances, this court cannot just sit back and wait for the intended evictions to be undertaken albeit without following the applicable provisions of the law.



34. In the absence of any evidence demonstrating that the intended evictions shall be with the law, this court must then consider what are the appropriate reliefs to grant herein.
35. The Petitioners have sought for several reliefs as stipulated in the Petition. The Petition sought a declaration that as a result of the long uninterrupted and continuous occupation of the suit land they have acquired rights to own the property and also an order of mandamus compelling the 2nd Respondent to liaise with the relevant offices to carry out survey of the land and issue title deeds. It however emerges that this being public land the said reliefs cannot be granted since a claim of adverse possession cannot be implied in land set aside for public case.
36. In a constitutional petition, the court can set out any appropriate reliefs. This court is also alive to the findings made in the Supreme Court case of *Mitubell* which crystallized into statute law vide the various amendments made to Section 152 of the *Land Act* which must always be complied with. The principles include the duty to give notice in writing and the duty to give the affected persons the first priority to demolish and salvage their goods and further the requirement to have them treated humanely and with dignity.
37. In conclusion, this court proceeds to issue the following orders:-
- a. That in view of the fact that the Petitioners have been in occupation of the suit land before it was set aside for public use by the 1st Respondent, the National Land Commission is hereby directed pursuant to Article 67(2)(e) of the *Constitution* to investigate the Petitioners claim and make appropriate recommendations on their interest to the land and or their resettlement within 180 days.
 - b. That pending compliance to order (a) above there shall be no eviction of any party currently residing in the suit property as at the time of filing this petition.
 - c. Each party to bear own costs of the suit.

Judgment accordingly.

Dated, Signed and Delivered virtually at Voi this day 19 day of July, 2024.

E. K. WABWOTO

JUDGE

In the presence of:-

Ms. Kyalo h/b for Mr. Mwazighe for the Petitioners.

Ms. Saru for the Respondents.

Court Assistants: Mary Ngoira and Norah Chao.

