Kisalu & 110 others v Chief Registrar of Lands & 99 others (Environment & Land Petition 22 of 2018) [2025] KEELC 630 (KLR) (19 February 2025) (Judgment)

Neutral citation: [2025] KEELC 630 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND PETITION 22 OF 2018

SM KIBUNJA, J

FEBRUARY 19, 2025

BETWEEN

SIMEON KASIMU KISALU & 110 OTHERS & 110 OTHERS ..... PETITIONER

AND

THE CHIEF REGISTRAR OF LANDS & 99 OTHERS & 99 OTHERS ..... RESPONDENT

JUDGMENT

1. The petitioners commenced this petition through the petition dated 18th December 2018, amended on 9th October 2019 and further amended on 23rd July 2023 and sought the following prayers:

    a. "A permanent injunction do issue against the 9th to 92nd, 102nd respondents herein from trespassing, encroaching, entering, evicting the petitioners from each of his/her respective plot in his/her possession/occupation and /or in any way interfering with the petitioners occupation and enjoyment of each of their respective plot herein.

    b. A permanent order of injunction do issue preventing the 1st, 2nd, 3rd and 4th respondents from issuing the letters of allotment and/or title deeds or certificate of lease or at all and/or having issued the letters of allotment or title deeds to 9th to 92nd, 102nd respondent, the Hon court do call and revoke the letters of allotment and the titles thereof.

    c. A permanent order of injunction do issue against the 1st, 2nd ,3rd, 4th and 8th and/or all the government servants, public officers or security officers both the national and in Taita Taveta County from forcibly evicting the petitioners and others residing and in occupation of their respective parcels of land plots in LJSS.

    d. A declaration that the petitioners were entitled to be given the first priority to own land already in their possession and occupation in arising from the LJSS Taveta and the 1st to 4th respondents be ordered to carry out a survey of all parcels of land in occupation of petitioners and determine

their entitlement of the said land and to issue forthwith the petitioners with the title deeds in respect of the parcel lands in question.

e. The 1st to 5th respondents be ordered to account for and provide the list of the persons who benefitted from the LJSS and/or generally provide list of the names of those issued with title deeds for the court to determine if their was fair and equitable distribution as per the law.

f. An order directing the 6th and 7th respondents to immediately carry out investigations of all public officers involved in the Lake Jipe Settlement Scheme (LJSS) and give account of all the plots these public officers allocated to themselves, their relatives, proxies, cronies and friends with explanation on how they deserved the allocation and to file the report in court within 30 days of the order of the court for action by the court.

g. The honourable court do issue such orders and/or directions it may deem fit in the interest of justice.

h. The costs of the suit be awarded to the petitioners."

The petitioners case is as restated in the affidavit in support of the petition of Simon Kasimu Kisalu, the 1st petitioner, sworn on the 21st August 2024, in which he inter alia deposed that the suit property is approximately 23,000 acres of land in Jipe area extending to Lake Jipe, which is within Taita Taveta County, that belonged to Hon. Basil Criticos, former member of parliament for Taveta Constituency; that the petitioners have been in actual possession and use of the suit property as squatters since the 1970's; that the suit property was in 1992 acquired by the Government of Kenya through the Settlement Fund Trustee from Kenya Trade Development Company, which was a company associated with Hon. Criticos; that the process of creating the settlement scheme commenced with gazattement in the legal notice under section 167 of the Agriculture Act Cap 318, a survey was conducted from 1992 to 1997 where about 1538 plots of 15 acres each and a few others of 20 acres were created during the whole exercise; that the Taita Taveta District Settlement Committee and District Land Selection Committee (DLSC) were the only authorities who decided who would be the beneficiaries; that after the survey, they made their applications for allocations but were surprised that none of them was successful; that the individuals who received allotments were politically connected or relatives, friends, proxies and cronies of officers in DLSC, while others "were able to use money" to acquire the plots and specifically mentioned the 6th to the 86th respondents, who thereafter sold off their parcels; that they had built schools, permanent residences and planted seasonal crops during their occupation of the suit property; that the government had also built social amenities like boreholes and that their eviction is impending though they had not been served with any notice; that the court should allow the petition as they are impecunious and the suit property is their only source of outcome.

2. The petition is opposed by the 1st, 2nd 4th and 5th respondents through the grounds of opposition dated 27th January 2020 filed through the Attorney General, to the effect that:

1. That the Petition is misconceived, frivolous, vexatious and an abuse of the court process.

2. That the Petition is time barred under the Statute of Limitations Act.

3. That the Ex-parte Applicant has not demonstrated how he has been in occupation of the parcel of land lying within Jipe area to claim adverse possession.

4. That Article 66 (1) of *the constitution* provides that the state may regulate the use of land or any interest in or right over any land or any interest of defence, public safety, public order, public morality, public health or land use planning.

3. The learned counsel for the petitioners and 1st, 2nd, 4th & 5th respondents filed their submissions dated 19th August 2024 and 20th November 2024, respectively, which the court has considered.

4. The issues for determination by the court are as follows:

   a. Whether the petitioners have established their claim to the standard required.

   b. Who bears the costs?

5. The court has carefully considered the grounds on the petition, affidavit evidence, grounds of opposition, submissions filed by the learned counsel, superior courts decisions cited thereon and come to the following determinations:

   a. That the proceedings of 27th January 2020 show that the petitioners through their counsel withdrew their claim against the 6th and 7th respondents, that is the Ethics and Anti-Corruption Commission and the Commission on Administrative Justice respectively.

   b. That after the filing of the further/amended amended petition dated the 9th October 2019, the petitioners delayed in personally effecting service. The court severally issued directions on service, including advertisement in both the Standard and Nation newspaper on 23rd June 2022. No service was done allegedly due to the petitioners failing to raise funds for advertisement, and their learned counsel orally sought for review of the advertisement order on 16th January 2024, that was granted thereby deeming the advertisement carried in the Standard Newspaper on 21st December 2023, as sufficient, so as to avoid any further delay in the petition. In one of the subsequent mentions of 9th October 2024, Ms Lugo from the firm of John Bwire & Co. Advocates for the 8th respondent sought for 21 days to file their submissions. That though counsel had filed their notice of appointment dated 11th August 2024, no reply to the petition had been filed, and to date, the 15th February 2025, no submissions have been filed either. No appearances were entered for the other 95 respondents.

   c. The most popular precedent in petitions is the case of Anarita Karimi Njeru v Republic (1980). In Mumo Matemu v Trusted Society of Human Rights Alliance & Another (2013) eKLR where the Court of Appeal held that:

      “

      > “(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.
      >
      > (42) However, our analysis cannot end at that level of generality. It was the High Court’s observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting.” Yet the

principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* (Cap 21) and section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:

> "The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."

(43) The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of *the Constitution* in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown *the Constitution*, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of *the Constitution* and the rule of law, without any particulars.

(44) We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the "epitome of precise, comprehensive, or elegant drafting," without requiring remedy by the 1st respondent."

The petition is based on violation of a plethora of fundamental rights and freedoms, which the petitioners listed in paragraph 47 of the said amended amended petition. They include rights under Articlesa 22(1),(2) & (3)(b), 23(1) & (3), 25(c), 27, 35, 48, 60, 62, 63, 232 and 234 of *the Constitution*. However, the court is unable to determine precisely which of the above listed right and freedoms claimed to have been violated have indeed been violated in relation to the petitioners or any or some of them. On whether or not the County Government of Taita Taveta violated the petitioners' first priority to land settlement in LJSS, that can only be determined once the procedures laid down in resettlements of that nature have been exhausted, as required under the doctrine of exhaustion.

d. The principle of the doctrine of exhaustion and was extensively discussed in Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR, where the court stated as follows:

> " 52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution* and was aptly elucidated by the High Court in R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR, where the Court opined thus:
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> 42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of National Assembly v Karume [1992] KLR 21 in the following oft-repeated words:
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> > "Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."
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> 43. While this case was decided before *the Constitution* of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this

regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine.

This is Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others [2015] eKLR, where the Court of Appeal stated that:

> "It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

The Settlement Fund Trustee (SFT) as described by the petitioners was a body corporate formed through section 167 of the Agriculture Act, which was repealed by the *Agriculture and Food Authority Act* Cap 317 in 2013. SFT's was aptly described in Eliud Nyongesa Lusenaka & Another vs Nathan Wekesa Omacha, [1994] eKLR where the Court of Appeal held as follows;

> " The short answer to that proposition is that land owned by the SFT is not land owned by the Government. Under section 167(1) of the Agriculture Act, the SFT is a body corporate with a perpetual succession and can acquire and own property on its own right and can sue and be sued. The interest of the Settlement Fund Trustees (SFT) is that of a chargee over the parcel of land that it owns."

Further, the same court in the case of Boniface Oredo versus Wabumba Mukile, Civil Appeal No. 170 of 1989(unreported) held as follows:

> " The interest of the Settlement Fund Trustees is really that of a chargee. "It lends money for development to persons to whom it has allocated land and the repayment of such money is secured by a charge upon the property."

Section 135 of the *Land Act* Cap 280 provided for the successor of the SFT's as follows:

> " (1) There is established a Fund to be known as the Land Settlement Fund which shall be administered by a board of Trustees known as the Land Settlement Fund Board of Trustees.
>
> (1A) The Board of Trustees shall be a body corporate with perpetual succession and a common seal, and which shall in its corporate name, be capable of—
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> (a) suing and being sued;
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> (b) taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property;
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> (c) borrowing money or making investments;

(d) doing or performing such other things or acts necessary for the proper performance of the functions of the Agency under this Act and which may lawfully be done or performed by a body corporate."

The way it worked was that the SFT board would advance money to individuals as a loan for purposes of buying land that would be charged as security. From the averments of the petitioners, no such step was taken by the petitioners.

e. However, it is not lost on the court that the National Government and the County Government were tasked with creating settlement schemes for squatters. The court has noted that the petitioners tried to address their issues with the National Land Commission, the 3rd respondent, and that is commendable. The failure by the 3rd respondent to participate in this proceedings denied the court from benefitting from its output. The option of the petitioners filing a petition like in the instant case, should be the last resort, after exhausting all other dispute resolution avenues available. The court deems the claims herein to be in the nature of a normal civil dispute that would have invoked the remedies available under section 13 of the *Environment and Land Court Act*. There being no infringements or violations of any Constitutional rights and freedoms proved by the petitioners, the same is therefore without merit and is dismissed.

f. Costs under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya follow the event unless where otherwise ordered. In this petition, it is only fair and just that each party bears their own costs owing to the fact that first, apart from the petitioners, only the Government offices participated through the Attorney General and secondly, this was essentially a public interest litigation.

6. From the foregoing determinations, the court finds and orders as follows:

a. The petition is without merit and is dismissed in its entirety.

b. Each party to bear its own costs.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 19TH DAY OF FEBRUARY 2025.

S. M. Kibunja, J.

ELC MOMBASA.

In the Presence : Mr Munyithya

Respondents : M/s Kagoi for Mwandeje for 1st, 2nd, 4th and 5th Respondents and Mr. Kilumo for Lugo for 8th Respondent

Court Assistant –Shitemi.

S. M. Kibunja, J.

ELC MOMBASA.