



Jefwa & 11 others (As Committee Members and Representatives of Majaoni Primary School) v Njenga & 11 others; Muslim for Human Rights (MUHURI) (Interested Party) (Environment & Land Petition 1 of 2017) [2024] KEELC 6125 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6125 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION 1 OF 2017
NA MATHEKA, J
SEPTEMBER 26, 2024

BETWEEN

GEORGE CLEMENT JEFWA 1ST PETITIONER
JAPHETH KAZUNGU MWACHAMBO 2ND PETITIONER
SHAMBA ABDULRAHMAN JUMA 3RD PETITIONER
BADI ABDULRAHMAN JUMA 4TH PETITIONER
MWARO KENGA KAHINDI 5TH PETITIONER
REV. SAMUEL JEFWA SIRYA 6TH PETITIONER
PETER KACHONGO 7TH PETITIONER
GILBERT TSUMA RAI 8TH PETITIONER
MORRIS DZOMBO NGOME 9TH PETITIONER
JUMA MOHAMED WANJE 10TH PETITIONER
SAMUEL TEMBO NYENYO 11TH PETITIONER
JOHN MWASI MWASINGO, STEPHEN RAI & HUMPHREY
TSUMA 12TH PETITIONER
AS COMMITTEE MEMBERS AND REPRESENTATIVES OF MAJAONI
PRIMARY SCHOOL

AND

JAMES RAYMOND NJENGA 1ST RESPONDENT
DR. FRANCESCA WANJIKU KAHIU ALL 3 SUED AS REPRESENTING
ESTATE OF LATE NJENGA KARUME-DECEASED 2ND RESPONDENT



DR. STEPHEN NDUNGU	3RD RESPONDENT
DUNCAN NDERITU NDEGWA	4TH RESPONDENT
SAMSON MUREITHI NDUHIU	5TH RESPONDENT
JONATHAN KATANA NZAI	6TH RESPONDENT
ASHANTEE INVESTMENTS LIMITED	7TH RESPONDENT
SULEIMAN ENTERPRISED LIMITED	8TH RESPONDENT
RASHID MOHAMED TWAHA	9TH RESPONDENT
COUNTY GOVERNMENT OF MOMBASA	10TH RESPONDENT
THE NATIONAL LAND COMMISSION	11TH RESPONDENT
THE HONOURABLE ATTORNEY GENERAL	12TH RESPONDENT
AND	
MUSLIM FOR HUMAN RIGHTS (MUHURI)	INTERESTED PARTY

JUDGMENT

1. The petitioners maintained they are the beneficial residents of the following land parcels all subdivisions from the larger Land Parcel No. 384/II/MN (suit property);
 - i. Land Parcel LR 4408/II/MN CR No. 26463,
 - ii. Land Parcel LR 4410/II/MN CR No. 26464,
 - iii. Land Parcel LR 4407/II/MN CR No. 26461,
 - iv. Land Parcel LR 4409/II/MN CR No. 26462,
 - v. Land Parcel LR 4406/II/MN CR No. 26459,
 - vi. Land Parcel LR 4411/II/MN CR No. 26460,
 - vii. Land Parcel LR 5983/II/MN CR No. 26659,
 - viii. Land Parcel LR 5984/II/MN,
 - ix. Land Parcel LR 5985/II/MN,
 - x. Land Parcel LR 7015/II/MN CR No. 31871,
 - xi. Land Parcel LR 6163/II/MN CR No. 28075,
 - xii. Land Parcel LR 6164/II/MN CR No. 28576,
 - xiii. Prison structure at Shimo La Tewa

2. It is the petitioners' case that they alongside 2,500 households comprising of 16,000 residents have occupied Land Parcel No. 384/II/MN for diverse years, spanning from 60 years to 35 years without interruption from anyone including the respondents. In particular, the petitioners maintained that



the suit property was alienated and subdivided on diverse dates by either the Ministry of Lands and Settlement or the Commissioner of Lands as follows:

3.
 - i. 17th November 1989 to the estate of the late Njenga Karume; 9th October 1998 (1st to 3rd respondents) and the same was subdivided and registered as LR No. 4408/III/MN, LR No. 4410/III/MN to Njenga Karume, LR No. 4407/III/MN and LR No. 4409 registered to Duncan Nderitu Ndegwa, the 4th respondent, and LR No. 4406/III/MN and LR No. 4411/III/MN to Samson Muriithi, the 5th respondent.
 - ii. 9th October 1998 to Jonathan Katana Nzai, 6th respondent and registered it as LR No. 7015/III/MN CR No. 31871,
 - iii. 15th and 23rd December 1994 to Ashantee Investment Limited, 7th respondent and registered as LR No. 5983/III/MN CR No. 26659, LR No. 5984/III/MN CR No. 26660 and LR No. 5985/III/MN CR No. 26661.
 - iv. 17th June 1996 Suleiman Enterprises Limited, 8th respondent and registered as LR No. 6163/III/MN CR No. 28075, LR No. 6164/III/MN CR No. 28576. On 7th November 2001 the same was used to secure a loan of Kshs 80,000,000/= from Dubai Bank Limited.
4. The petitioners maintained that in the recent past, the Ministry of Lands has intimated the formation of a settlement scheme for the occupants of the suit property however the petitioners maintained the process has been without consultation from them. The petitioners contended that the actions of the respondents have violated their constitutional right to fair administrative action, right to property, the right to information and the right to public participation. The court was urged to prohibit the 10th to 13th respondents from establishing a settlement scheme within the suit property and order for the cancellation of the said titles and subject the same to an adjudication process.
5. The 1st- 5th Cross-Petitioned stating that they are bona fide purchasers. That at the time they purchased Subdivision Number 3275, there was no person in occupation of the said portion. The squatters were on parts of the original Plot but not on the portion purchased by the 1st - 5th Cross-Petitioners. The Respondents invaded the portion purchased by the 1st-5th Cross-Petitioners on or about the year 2009 prompting the filing of the following cases for their eviction: ELC Case No. 83 of 2012: Duncan Ndegwa vs Mwenga Mramba & 5 Others and ELC NO. 205 OF 2015: James Raymond Njenga & 2 Others vs Mwenga Mramba & 2 Others were are still pending. That the issue in dispute in this Cross-Petition is the illegal and unlawful occupation of the following plots by the Respondents in a manner that infringes on and contravenes the Cross-Petitioners' constitutional rights. That both the High Court and the Court of Appeal had ordered their eviction therefrom in other cases.
6. That the legal position is that the original Plot and the portion subsequently acquired by the 1st - 5th Cross-Petitioners have all along been private land which have exchanged hands from the original owner- Alexander Morrison and finally to the Cross-Petitioners. They seek declarations that the Respondents have breached the Cross-Petitioners' constitutional rights by illegally and unlawfully occupying the Cross-Petitioners' properties known as Sub-divisions Numbers 4406/11/MN (Original Number 3275/2), 4407/11/MN (Original Number 3275/3), 4408/11/MN (Original Number 3275/4), 4409/11/MN (Original Number 3275/5), 4410/11/MN (Original Number 3275/6), and 4411/11/MN (Original Number 3275/7) together with permanent and mandatory injunctions.
7. The court on 9th October 2023 ordered the Regional Surveyor, Coast Region to undertake a comprehensive survey of the properties 4406/II/MN, 4407/II/MN, 4408/II/MN, 4409/II/



MN,4410/II/MN and 4411/II/MN, and for the Attorney General to coordinate and ensure compliance and filing of the report before the court. The said report has never been filed in court, never the less the court will proceed to issue its verdict with the evidence before it.

8. This court has considered the petition, cross petition and submissions therein. The petitioners filed this petition claiming their forefathers had historically been in occupation of the suit property and that they were being forcefully evicted, which would be a violation of their constitutional rights and freedoms. They urged the court to not only cancel the said titles held by the 1st to 9th respondents but also for them to be registered as proprietors to the particular parcels held by each of them. For a constitutional petition to be considered on merit by the court, it has to meet the threshold set out in *Anarita Karimi Njeru v The Republic* [1979] eKLR, where it was held;

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

9. The Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR, emphasised the principles set out in *Anarita Karimi* and held that,

“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.

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. 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.”

10. I have perused the petition and evidence in support and I do note that as much as the petitioners have cited Articles 10, 27, 28, 29, 30, 31, 32, 35, 40, 60, and 62 of *the Constitution*, no particulars of the alleged violations and the manner of the alleged infringements have however, been pleaded. The Petitioners have also not cited the provisions of *the Constitution* which they allege are threatened with violation. It is well established that a petitioner who seeks redress under *the Constitution* must state his claim with precision by reference to the provisions of *the Constitution* violated and the manner of the alleged violation.
11. The petitioners’ claim is that of cancellation of title documents held by the 1st to 9th respondents as well as their registration as the proprietors of their respective parcels of land based on historical land injustices perpetrated by the respondents. The National Land Commission (NLC) is constitutionally mandated by Article 67 (2) of *the Constitution* to advise, oversee and act as a public watchdog over all public land with an additional responsibility to recommend the correction of historical land injustices concerning public land. In particular, Article 67 (2)(e) of *the Constitution*, the NLC is mandated “to



initiate investigations on its own or upon a complaint from any person or, other persons or institutions on land injustices both present and historical and ensure appropriate redress.”

12. The Court of Appeal in *Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others* [2018] eKLR, held that this court does not have to wait for the investigation and recommendation by the NLC before it can entertain a claim founded on historical injustice. The Court of the opinion that;

“...a court has jurisdiction to hear and determine any claim relating to historical injustice whether or not the NLC is seized of the matter. Our conviction stems from our reading of Article 67(2) (e) of *the Constitution*. The Article provides that the NLC can investigate “present or historical” land injustices. We lay emphasis on the word “present.” If the NLC had an initial and exclusive mandate, it would mean that all present cases on land injustices can only be handled by the NLC and not courts of law. This would prima facie render the Environment and Land Courts redundant. We do not think this was intended to be so. Our view is fortified by Section 15 (3) (b) of the *National Land Commission Act* which permit the Environment and Land Court to deal with historical injustice claims capable of being addressed through the ordinary court system.”

13. In as much as the appellate court has declared this court an avenue for addressing historical land injustices, the same can be heard and determined where the court in its discretion is of the view that justice will be done through the ordinary court system. Sila J in *Henry Wambega & 733 others v Attorney General & 9 others* [2020] eKLR was of the view that, even where the court has jurisdiction it may restrain itself from acting on it. He held that,

“This court has jurisdiction to hear claims even those based on historical injustices. What we need to have in mind here is that just because a court is vested with jurisdiction, does not mean that in all cases the court will proceed to exercise that jurisdiction, especially where there is another body that also has capacity to hear that dispute. In other words, depending on the facts and circumstances surrounding the case, the court can defer jurisdiction to another body, or decline to take up the matter altogether, and this would not be because it has no jurisdiction, but because given the surrounding circumstances, it would be best for the court not to exercise its jurisdiction.”

14. In this case, the court is of the view that the petitioners’ grievances can and ought to be heard by the NLC, under Article 67 (2)(e) of *the Constitution* before they can approach this court. This court resonates with the findings in *Ledidi Ole Tauta & Others v Attorney General & 2 others* [2015] eKLR, where a three Judge bench held that,

“In our view it is the National Land Commission that has the mandate to investigate into historical land injustices and make appropriate recommendations for redress. The court is not the appropriate organ to carry out the investigation and/or inquiry and where the law has made provision for a state organ or institution to carry out a specific function that institution should be allowed to carry out its mandate. The court should not usurp the roles of other state institutions. We therefore are of the view, it was premature on the part of the petitioners to come to court without either exhausting the process of obtaining a degazettment of Ngong Hills Forest as a state forest under the provisions of the Forest Act and/or having the National Land Commission exercise its mandate under Article 67(2) (e) of *the Constitution*.”



15. Section 15 of the [National Land Commission Act](#) empowers the Commission with wide jurisdictional powers in dealing with historical land injustices. Where facts are highly contested, the number of persons laying claim unprecedented and need to be ascertained as well as the land being laid claim to in question, the same should be investigated; the best forum for the investigation would be the NLC. This petition lacks specificity, it is general in nature and fails to identify with precision the particular property to which the petitioners lay claim. Save for stating they are entitled to the suit property, they have not specified which portion of the suit property they lay claim to. The petition invites the court to exercise of investigating its claim, which the court did as per the orders issued on 9th October 2023 but the same was never adhered to. In conclusion, the court finds that the issues that the petitioners want addressed ought to be investigated by the NLC as outlined in Section 15 of the [National Land Commission Act](#). Similary, the cross petition appears to be a civil matter which has and is already been handled as a civil matter in court.
16. For these reasons I find that the petition and cross petition herein are not merited and are therefore dismissed with no order as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF SEPTEMBER 2024.

N.A. MATHEKA

JUDGE

