



Anam & another v National Land Commission; National Irrigation Authority (Interested Party) (Environment & Land Petition 6 of 2022) [2025] KEELC 749 (KLR) (18 February 2025) (Judgment)

Neutral citation: [2025] KEELC 749 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ENVIRONMENT & LAND PETITION 6 OF 2022

M SILA, J

FEBRUARY 18, 2025

IN THE MATTER OF THE NATIONAL LAND COMMISSION ESTABLISHED UNDER

ARTICLE 67(1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT, THE

APPLICABLE RULES,

AND REGULATIONS, MADE THEREUNDER

AND

IN THE MATTER OF A COMPLAINT INTO A PRESENT LAND INJUSTICE

INVESTIGATION PURSUANT TO ARTICLE 67(2) (E) AND ARTICLE 252(2) & (3) OF

THE CONSTITUTION OF KENYA 2010 AS READ TOGETHER WITH SECTION 5(1)

(E) OF THE NATIONAL LAND COMMISSION ACT

BETWEEN

PETER OCHARA ANAM 1ST PETITIONER

BENARD OCHIENG OUMA 2ND PETITIONER

AND

NATIONAL LAND COMMISSION RESPONDENT

AND

NATIONAL IRRIGATION AUTHORITY INTERESTED PARTY



JUDGMENT

(Petitioners filing a petition claiming infringement of their constitutional rights due to inaction by the respondent to hear their grievance to what they perceive to be a present land injustice; petitioners' case being that the interested party has placed irrigation infrastructure on their parcels of land and other lands in the area leading to displacement without being compensated; petitioners filing a complaint with the respondent; respondent not acting on the complaint; erroneous for respondent not to act on the complaint as it was a complaint on a present land injustice for which the respondent has mandate to hear; nominal damages for violation of their constitutional right issued; court however not persuaded to issue an order of mandamus to compel the respondent admit the complaint since persons whose land is affected have already filed suits before court seeking redress; prayers in petition, partly allowed)

1. The petitioners herein being residents of North Kadem Ward, Nyatike Sub County, within Migori County, brought this suit before this court vide a petition dated 24 October, 2022 seeking the following orders against the Respondent.
 - a. A declaration be issued to the effect that the issues raised in the complaint by the petitioners dated 26th May, 2022 filed with the respondent against the interested party is a present land injustice requiring investigations as provided for and contemplated under Article 67(2)(e) and Article 252(2) and (3) of the *constitution* of Kenya 2010 and as contemplated under Section 5(1)(e) of the *National Land Commission Act*.
 - b. A declaration be issued that pursuant to Article 67(2)(e) and 252(1)(a), (2) and 3 of the *constitution* with section 5(1)(e) of the *National Land Commission Act*, the *National Land Commission Act* has powers, duties and obligation to admit and investigate the complaint dated 26th May, 2022 filed by the petitioners with the commission and to make recommendations and offer redress.
 - c. A declaration be issued that the refusal to admit, hear and and/or investigate the complaint by the petitioners dated 26th May, 2022 and exercise the jurisdiction and perform the functions conferred by Article 67(2)(e) and 252(1)(a) and (2) of the *constitution* and section 5(1)(e) of the *National Land Commission Act* is an unconstitutional, wrongful and illegal exercise of power, which undermines the rule of law and is a violation of the petitioners rights under Article 47(1) and 50(1) of the *constitution* and constitutes a breach of statute law, including section 4 of the Fair Administrative Actions Act.
 - d. An order of mandamus, compelling the respondent, the National Land Commission to admit, hear and determine the complaint dated 26th May 2022, and to carry out investigation in the manner sought, envisaged and contemplated by the *constitution* at Article 67(2)(e) and 252(1)(a) and (2) thereof and section 5(1)(e) of the Land Commission Act (sic) within reasonable time not exceeding ninety (90) days and appropriate redress be recommended to the Petitioners and to each landowner found to have been adversely affected by the activities of the interested party, in its implementation of Lower Kuja Irrigation Development Project.
 - e. Damages for violation of rights under Article 47 (1) and 50 (1) of the *constitution*.
 - f. The Costs of these proceedings be awarded to the Petitioners
 - g. Any other remedy.



2. The facts in support of the petition are that on 26 May, 2022, the petitioners pursuant to Articles 67 (2) (e) and 252(1) (a) and (2) of the constitution, as read together with section 5(1) (e) of the National Land Commission Act, lodged a complaint with the Respondent against the interested party, who had commenced placing of irrigation infrastructure, required for the implementation of the Lower Kuja Irrigation Development Project, on the petitioners' land, as well as various other parcels of land.
3. Their complaint was that the interested party had declined to follow due process of the law in acquiring wayleaves over the private parcels of land it needed for the project. According to the Petitioners, the interested party took over and eventually trespassed on to various parcels of land, including parcels of land belonging to them, and created wayleaves thereon, without valuation of such properties and/or compensation being made to them as project affected persons through the implementation of the Resettlement Action Plan for the project. They decried that as a result of the said trespass several people have since been displaced, suffered losses, and have never been compensated, contrary to the provisions of the constitution, several statutory provisions, and applicable regulations.
4. The petitioners contend that their parcels of land were affected by the intake point, sedimentary basin, main canal, sub branch canals, main drains, tertiary canals, collector drains, feeders and access roads and other irrigation infrastructure of the Lower Kuja Irrigation Development Project undertaken by the interested party. They aver that they requested the respondent to carryout investigations, and based on its findings, recommend appropriate remedies. The Petitioners also wanted to know what became of the funds which were meant to compensate land owners for lost land, lost structures, and lost livelihoods in the course of the implementation of the lower Kucha Development project.
5. To their dismay, the respondent refused and or neglected to admit, hear, investigate and determine their complaint despite several visits to its offices by their advocates who even sought to have audience with its leadership. The petitioners aver that the respondent's reasons for declining to admit and investigate their complain is allegedly on the basis that the nature of complaint is not the kind covered and contemplated by the provisions of Section 15 of the National Land Commission Act as read together the provision of the National Land Commission (Investigation of Historical land injustices) Regulations, 2017. However according to them the complaint was a present land injustice at the hands of a public entity which can be lawfully investigated and recommendations made be made by the respondent.
6. The petitioners contend that respondent's refusal and/or neglect to admit, hear, investigate and determine their complaint is a clear violation of the respondent's constitutional and statutory mandate conferred to it by Articles 67 (2) (e) and 252(1) (a) and (2) of the constitution as read together with Articles 248(2) (b), 249, 252 and 253 of the constitution, as well as section 5(1) (e) of the National Land Commission Act.
7. They also contend that the respondent's conduct of refusing to admit, publicly hear, investigate and determine the petitioners' complaint. especially the issue of compensation for the wayleaves and public rights created by the interested party on private parcels land, constituted a violation and/or an infringement of the petitioners' and all affected persons' fundamental rights under Article 47(1) and 50(1) of the constitution of Kenya 2010.
8. The petitioners equally contend that the respondent's acts and omissions in refusing to admit their complaint and to investigate it amounted to an attempt to conceal theft of public funds which were meant to compensate persons who were affected by the project, and does not constitute good governance, integrity, and transparency in public affairs.



9. The petitioners assert that this court has a constitutional duty to encourage alternative dispute resolution mechanisms under Article 159(1) of the constitution which will be achieved by granting the orders sought in the petition. They add that as Kenyans, they have a right to a fair administrative action that is expeditious, efficient and lawful, and procedurally fair.
10. The respondent did not enter any appearance nor file any response to the petition. The interested party appointed counsel but did not file anything to oppose the petition. Similarly, only Mr. Odero, learned counsel for the petitioners, filed submissions to urge the petition. Mr. Ocholla, learned counsel for the interested party, stated that the interested party was not taking a position, since the petition seeks the National Land Commission to hear a complaint by the petitioners, and thus the interested party was not going to file any submissions.
11. In his submissions counsel for the petitioners more or less reiterated the legal issues flagged out in the petition, i.e that the petitioners had a legitimate complaint and that the respondent was mandated by law to hear the same. He impressed that his clients' constitutional rights were infringed by the inaction of the respondent. I have taken into account the submissions in full before arriving at my decision.
12. I hold the following view :
13. The mandate of the 1st respondent is outlined in Article 67 of the constitution which provides as follows :-
 67. National Land Commission
 - (1) There is established the National Land Commission.
 - (2) The functions of the National Land Commission are—
 - (a) to manage public land on behalf of the national and county governments;
 - (b) to recommend a national land policy to the national government;
 - (c) to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;
 - (d) to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;
 - (e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;
 - (f) to encourage the application of traditional dispute resolution mechanisms in land conflicts;
 - (g) to assess tax on land and premiums on immovable property in any area designated by law; and
 - (h) to monitor and have oversight responsibilities over land use planning throughout the country.
 - (3) The National Land Commission may perform any other functions prescribed by national legislation.
14. To operationalize the National Land Commission, there was enacted the National Land Commission Act, Cap 281, Laws of Kenya. The statute lays down the functions and powers of the commission at Sections 5 and 6, which provide as follows :-



5. Functions of the Commission

- (1) Pursuant to Article 67(2) of the constitution, the functions of the Commission shall be—
 - (a) to manage public land on behalf of the national and county governments;
 - (b) to recommend a national land policy to the national government;
 - (c) to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;
 - (d) to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;
 - (e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;
 - (f) to encourage the application of traditional dispute resolution mechanisms in land conflicts;
 - (g) to assess tax on land and premiums on immovable property in any area designated by law; and
 - (h) to monitor and have oversight responsibilities over land use planning throughout the country.
- (2) In addition to the functions set out in subsection (1), the Commission shall, in accordance with Article 67(3) of the constitution—
 - (a) on behalf of, and with the consent of the national and county governments, alienate public land;
 - (b) monitor the registration of all rights and interests in land;
 - (c) ensure that public land under the management of the designated state agencies is sustainably managed for the intended purposes;
 - (d) may develop and maintain an effective land information system for the management of public land;
 - (e) deleted by Act No. 28 of 2016, s. 37 (a)(iii);
 - (f) deleted by Act No. 28 of 2016, s. 37 (a)(iv);
- (3) Deleted by Act No. 28 of 2016, s. 37(b).
- (4) Deleted by Act No. 28 of 2016, s. 37(c).
[Act No. 28 of 2016, s. 37.]
- (6) Powers of the Commission
 - (1) The Commission, shall have all the powers necessary for the execution of its functions under the constitution, this Act and any other written law.
 - (2) Without prejudice to the generality of subsection (1), the Commission shall have powers to—



- (a) gather, by such means as it considers appropriate, any relevant information including requisition of reports, records, documents or any information from any source, including any State organ, and to compel the production of such information where it considers necessary;
 - (b) hold inquiries for the purposes of performing its functions under this Act;
 - (c) take any measures it considers necessary to ensure compliance with the principles of land policy set out in Article 60(1) of the constitution.
 - (3) In the exercise of its powers and the discharge of its functions, the Commission —
 - (a) may inform itself in such manner as it may consider necessary;
 - (b) may receive written or oral statements; and
 - (c) is not bound by the strict rules of evidence.
15. From the above, it will be noted that Section 5 (1) of the Act is similar to Article 67 (2) of the constitution in so far as it outlines the functions of the respondent. In this instance the petitioners assert that they have a claim for present historical injustices which the respondent is obligated to hear.
16. On this issue, I agree with the petitioners. In the supporting affidavit, it was deposed that the Commission declined to hear their grievance on the basis that it does not fall within Article 67 (2) (e) of the constitution or Section 5 (1) (e) of the Act. We need at this point to differentiate between historical and present land injustices. Section 15 provides as follows in respect of historical land injustices :
15. Historical land injustices
- (1) Pursuant to Article 67(3) of the constitution, the Commission shall receive, admit and investigate all historical land injustice complaints and recommend appropriate redress.
 - (2) For the purposes of this section, a historical land injustice means a grievance which—
 - (a) was occasioned by a violation of right in land on the basis of any law, policy, declaration, administrative practice, treaty or agreement;
 - (b) resulted in displacement from their habitual place of residence;
 - (c) occurred between 15th June 1895 when Kenya became a protectorate under the British East African Protectorate and 27th August, 2010 when the constitution of Kenya was promulgated;
 - (d) has not been sufficiently resolved and subsists up to the period specified under paragraph (c); and
 - (e) meets the criteria set out under subsection 3 of this section.
17. From the foregoing, it will be observed inter alia that historical land injustices are those that may have occurred “between 15th June 1895 when Kenya became a protectorate under the British East African Protectorate and 27th August, 2010 when the constitution of Kenya was promulgated.” A land injustice that occurred after 27 August 2010, is thus not a historical land injustice. It can only fall under the



- definition of present land injustice. The mandate of the Commission is not only on historical land injustices but also on present land injustices.
18. What I have not seen is rules regarding the hearing of present land injustices. Probably this is a lacunae that the Commission needs to look into so that there are procedures on how such claims can be processed. But the Commission cannot hide behind the absence of rules in order to undertake a mandate that is squarely provided in the constitution and in statute. Even in absence of rules the Commission needs to find a way of addressing such grievances if and when they arise.
 19. It is my conclusion therefore that indeed what was tabled a present land injustice for which the commission had an obligation to accept, investigate, and make recommendations. It is also my conclusion that it was wrong for the Commission to decline to hear the complaint of the petitioners upon being informed of the same and it goes without saying that they failed in their duties. I will thus issue a declaration in terms of prayer (a), (b) and (c) of the petition.
 20. Where I have an issue is prayer (d), which is the prayer for mandamus to compel the Commission to determine the complaint presented by the petitioner. I have an issue here because I am aware that the petitioners and others filed suits in the Environment and Land Court, seeking compensation for the very acts complained of herein. In fact some of those suits are pending before me and in the course of me dealing with them, I was informed that some were dismissed. I cannot feign ignorance of the existence of the suits. Now, if the petitioners and other affected persons have already approached court for redress, then unless, within those suits the court refers the matters for hearing before the Commission, issuing an order of mandamus would serve no purpose. In fact, it has capacity to embarrass the administration of justice, as two institutions would be dealing with the same thing at the same time, and there is serious potential of a conflict of decisions or conclusions. Once the petitioners or the persons that they represent came to court, seeking compensation for the taking of their parcels of land, they divested themselves the need to have the Commission hear their complaint. In essence, you cannot be running two parallel proceedings raising the same issues in two different judicial or quasi-judicial organs. If no suits for compensation had been filed I would have readily granted the order of mandamus, but now that they have already filed suits, then they need to let justice take its course in those suits. It is for this reason that the prayer for mandamus is declined.
 21. The other prayer is for damages for violation of their rights. It was indeed wrong for the respondent to decline to accept the grievance of the petitioners as I have elaborated above. There is however no loss that has been suffered by the petitioners since they have already presented their cases to court. If they succeed in their suits they stand to be fully compensated. However, in appreciation that there was a violation of their constitutional rights and that the respondent abdicated its duties, I will make a nominal award of Kshs. 100,000/= to the petitioners being general damages for violation of their rights to an investigation by the respondent into their alleged present land injustice.
 22. The last issue is costs. As I have said it was not prudent for the petitioners to lodge this claim seeking orders of mandamus then again file suits for compensation. I would have thought that once the suits for compensation were filed, they would have appreciated that a large part of this suit, if not the main one, was overtaken. I cannot however fault them for filing this petition to assert that the respondent failed in its duties. Taking this into consideration the petitioners will have costs but I will cap the same at Kshs. 100,000/= as against the respondent. If there is a lower sum during taxation then it is that lower sum that they will be entitled to as costs. I make no order for or against the interested party.
 23. Judgment accordingly.

DATED AND DELIVERED THIS 18 DAY OF FEBRUARY 2025.



JUSTICE MUNYAO SILA
JUDGE, ENVIRONMENT AND LAND COURT
AT MIGORI

Delivered in the presence of :

Mr. Tom Otieno – Court Assistant

No appearance on the part of M/s Okongo Wandago Advocates for the petitioners

No appearance on the part of the respondent

No appearance on the part of M/s G & A LLP Advocates for the interested party

