



Mwadime & 109 others (Being Members of Ore Basin Small Scale Farmers Group) v State Department for Correctional Services Ministry of Interior and National Administration & 6 others (Environment & Land Petition E003 of 2024) [2024] KEELC 6867 (KLR) (Environment and Land) (17 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6867 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT & LAND PETITION E003 OF 2024**

**EK WABWOTO, J
OCTOBER 17, 2024**

**IN THE MATTER OF ARTICLE 22(1)(2), 162(2) AND 165(3) OF THE CONSTITUTION
IN THE MATTER OF ALLEGED CONTRAVENTION OF
RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLES
20(1)(2)(3)(4), 23(1)(3), 25(C), 27, 28, 35, 48, 40, 47 AND 159(1)(2) OF THE
CONSTITUTION AND THE FAIR ADMINISTRATIVE ACTION ACT**

BETWEEN

**MASUDI MAKANGE MWADIME & 109 OTHERS (BEING MEMBERS OF ORE
BASIN SMALL SCALE FARMERS GROUP) PETITIONER**

AND

**STATE DEPARTMENT FOR CORRECTIONAL SERVICES MINISTRY OF
INTERIOR AND NATIONAL ADMINISTRATION 1ST RESPONDENT
VOI PRISONS 2ND RESPONDENT
DIRECTOR, LAND ADJUDICATION AND SETTLEMENT . 3RD RESPONDENT
CHIEF LAND REGISTRAR 4TH RESPONDENT
ATTORNEY GENERAL 5TH RESPONDENT
KENYA RAILWAYS 6TH RESPONDENT
NATIONAL LAND COMMISSION 7TH RESPONDENT**



JUDGMENT

1. The Petitioners in the Petition dated 28th February 2024 seeks for the following reliefs:-
 - a. A declaration that the petitioners are ancestral owners of the unsurveyed suit property and as such entitled to the whole of the suit property known as Ore Basin situated along Voi River to the exclusion of all the respondents and/or at all.
 - b. An order do and hereby issue revoking and declaring illegal the alleged allocation to the 2nd respondents of the petitioners unsurveyed ancestral parcel of land known as Ore Basin along the Voi River.
 - c. An order do and hereby issue ordering the respondents jointly and severally to demolish the erected structures in the petitioners suit property and ferry away debris thereof.
 - d. A permanent order of injunction do and hereby issue respondents herein jointly and severally by themselves and or officers, workers, servants, employees, agents etc claiming and working under the respondents from trespassing, entering, encroaching, developing, constructing, erecting, evicting and or in any way interfering with the said unsurveyed parcel of land known as Ore Basin, held and in possession, occupation and use of the petitioners.
 - e. Compensation for the maliciously uprooted and damaged food crops as assessed by the field officer.
 - f. Such and further orders it deems fit in the interest of justice.
 - g. Costs of the petition be granted to the petitioners.
2. The subject petition is premised on the various grounds alluded to and or enumerated in the body thereof and the same is supported by the Affidavit sworn by Masudi Makange Mwadime on 28th February 2024.
3. The Petition was contested by the Respondents. The 1st to 5th Respondents filed a Replying Affidavit sworn by Leonard Ogutu, Chief Inspector of Prisons and Registered Valuer on 15th July 2024 while the 6th Respondent filed a Replying Affidavit sworn by Nathaniel Ochieng, Senior Land Surveyor, on 11th September 2024. No response was filed by 7th Respondent.
4. Pursuant to the directions issued by the court, the Petition was canvassed by way of affidavit evidence, oral and written submissions filed by the parties.

The Petitioners case and submissions

5. The Petitioner's case as presented in the Petition and the Supporting Affidavit sworn by Masudi Makange Mwadime on 28th February 2024 is that the suit property being approximately 1000 acres situated in Majengo, Kaloleni Ward and running along the Voi River Valley between the Nairobi – Mombasa Bridge commonly known as the Ore Basin is an ancestral land in which they are in possession being natives of the area.
6. It was averred that sometimes in 1989 or thereabout, the 2nd Respondent was allocated the suit property under unclear circumstances and without any knowledge or consent of the Petitioners or other Respondents.



7. It was further averred that pursuant to the alleged illegal allocation, the 2nd Respondent with the funding of the 6th Respondent have in mid December 2023 forcibly entered into the suit property and uprooted food crops of several acres and have commenced erecting of permanent structures right in the middle of farms full of food crops. Owing to the said actions, the Petitioners averred that owing to the said actions violated their rights and are entitled to protection by this court.
8. The Petitioners also filed written submissions dated 11th June 2024 through Mwinzi and Associates Advocates. Counsel submitted on the following issues:-
 - i. Whether the Petition herein meets the threshold.
 - ii. Whether the purported acquisition and/or deprivation of the Petitioner's land and allocation of the suit property to the 1st Respondent was legal.
 - iii. Whether the fundamental rights of the Petitioners were violated, threatened, infringed and denied and entitled to the reliefs sought.
 - iv. Who bears the costs of the Petition.
9. Citing the case of *Throp v Holdsworth* (1886) CL.D 639 and Article 165(1) of the Constitution, it was submitted that the Constitution provides a guide on how it should be interpreted, and as such a court of law must always endeavour to interpret and consider the Constitution as a whole with all provisions sustaining and coordinating each other. It was also submitted that the Petitioners had particularized the basis upon which the Petition is founded and thus the Petition meets the thresholds of such petition.
10. On whether the purported acquisition on deprivation of Petitioners of the suit property and allocation to the 2nd Respondent was legal and procedural, it was argued that no legal process was followed and no legal provisions adhered to by the Respondents in depriving the Petitioners of their property. It was also argued that the dispossession of the suit property was without notice, the cases of Mohammed Dagane v Hakar Absbir & 5 Others (2021) eKLR and Mbaki & Others v Macharia & Another, Nelson Kazungu Chai & 9 Others v Pwani University (2014) eKLR and Funzi Development Ltd and Others v County Council of Kwale (2014) eKLR were cited in support.
11. On whether the fundamental rights of the Petitioners have been violated, threatened, infringed and denied and hence entitled to the relief sought, it was argued that the Respondents did not comply with the set legal procedures before the deprivation of the land. It was contended that the said actions by the Respondents have violated, threatened, infringed the Petitioners rights and consequently the court should grant the reliefs sought.
12. During the highlighting of the written submissions filed by the parties Learned Counsel Mr. Mwinzi submitted on behalf of the Petitioners. He added that the Respondents have not shown how the property was taken away from them. The minutes attached in demonstrating the acquisition refer to a different property of which the Municipal Council then had no power to give that land. It was also submitted that there was no evidence how the allotment letter was issued. The allotment letter was kept in secrecy.
13. It was contended that there is no land in Kenya without an owner and that the Respondents ought to have demonstrated who was the owner of the land before the same was acquired and or allocated to the 2nd Respondent.



The case of the 1st to 5th Respondents and their written submissions

14. The 1st to 5th Respondents filed a Replying Affidavit sworn by Leonard Ogutu, the Chief Inspector of Prisons and a Registered Land Surveyor on 15th July 2024. The 1st to 5th Respondents also filed written submissions dated 18th July 2024.
15. It was the 1st to 5th Respondent's case that the disputed land falls within Voi town circle boundary as highlighted on Part Development Plan Department Reference No. TTA/64/90/1 of 1991. Approved Plan No. 83. The said land was allocated to the Government through the then Town Planning Committee vide its meeting held on 1st December 1987 under minute 53/87 after deliberation.
16. It was also their case that the disputed land measuring approximately 40.5ha (100 acres) was reserved as Prison land vide Legal Notice No. 139 of 1999. It was contended that since then the said property has been the property of Kenya Prisons Service since then with the neighbouring residents carrying out small scale farming activities on some portions but not in occupation while part of it being cultivated by the prison authorities.
17. It was averred that sometimes in October 2023 the 6th Respondent commenced the construction of staff houses and also fencing off the land along its boundary as compensation to Kenya Prison Service on the portion of land that was acquired by the 6th Respondent for the construction of the Mombasa – Nairobi Standard Gauge Railway Project. It was also averred that a Notice of Intention to acquire the affected part of the land was published by the National Land Commission through Gazette Notice Number Vol. CXV – No. 74 on 20th June 2014.
18. It was contended that the title processing began in 2020 when the Kenya Prison Service was issued with an allotment letter Ref. 209163/VII dated 3rd July 2020 by the National Land Commission. The said allotment letter was required for the purposes of carrying out survey for title processing.
19. It was averred that the Petitioners seek to claim adverse possession over government land which is statutorily prohibited by the provisions of Section 41 of the Limitation of Actions Act Cap. 22 of the Laws of Kenya.
20. The 1st to 5th Respondents filed written submissions dated 18th July 2024 through Mwanaszumbah Monica, Senior State counsel and she submitted on the following issues:
 - i. Whether the suit property is public land.
 - ii. Whether the Petitioners have a right of ownership over the suit property.
 - iii. Whether the Petitioners constitutional rights have been violated.
 - iv. Whether the 1st – 5th Respondents have a duty to provide settlement to the Petitioners and
 - v. Who should bear costs of the Petition.
21. Citing Article 62 of the Constitution Counsel submitted that from the minutes of the then Town Planning Committee vide its meeting held on 1st December 1987 under minute 53/87 it was clear that the committee resolved to acquire the suit property from Voi Development Company Limited on behalf of the Government of Kenya, subsequently thereafter the said land measuring approximately 40.8 Ha (100 acres) being public land was gazetted and reserved as private land, vide Legal Notice No. 139 of 1999 and upon gazettment the suit property was never available for allocation to the Petitioners or anyone else. The case of Trans-Nzoia Teachers Housing Cooperative Society Limited v Kenya Prisons



Service & Another (Environment & Land Case 153 of 2016) [2023] KE ELC 20604 (KLR) (6th October 2023) Judgement was cited in support.

22. Counsel submitted that a gazette notice is a statutory instrument which falls within the ambit of matters the court is enjoined under Section 60 of the *Evidence Act* to take judicial notice of. It was further submitted that the process of the title processing began in 2020 when the Kenya Prisons Service was issued with letter of allotment Ref. 209163/VII dated 3rd July 2020 by the National Land Commission. It was also submitted that the Petitioners had not produced before court any legal title for the suit property which the 1st to 5th Respondents submitted that it had been reserved for use by the Kenya Prisons Service and is the process of acquiring title for the Kenya Prison Service. It was also submitted that the Petitioners had conceded that the property was public land through unalienated. It was also submitted that the Petitioners are not in occupation of the suit property save for only carrying out small scale farming activities on some portions of the suit property.
23. As to whether or not the Petitioners have a right of ownership over the suit property it was argued that Section 41 of the Limitations of Actions Act excludes public land from being acquired through adverse possession.
24. On whether the Petitioners constitutional rights have been violated, Counsel submitted that the Petitioners have not provided any title deed before this court to have a basis for demanding their alleged right to property and as such no right can flow from an illegal act. Reliance was placed to Section 142 of the Government *Land Act* and the cases of *KKB v SCM & 5 Others* (Constitutional Petition 014 of 2020) [2022] KEHC 289 KLR (22nd April 2022) (Ruling) and *Mombasa Technical Training Institute v Agnes Njeru Charo & 108 Others* [2014] eKLR.
25. As to whether the 1st to 5th Respondents have a duty to provide settlement to the Petitioners, it was submitted that only the state organ in occupation and use of public land can decide on how to utilize the Learned Counsel cited the case of *Law Society of Kenya v Kinywa Head of Public Service & 5 Others; Migot Adholla & Another (Interested Parties)* (Environment & Land Petition E029 of 2022) KE ELC 3962 (KLR) 12th August 2022) (Ruling) was cited in support of the said argument.
26. Counsel concluded by urging the court to dismiss the Petition.

The case of the 6th Respondent and its written submissions

27. The 6th Respondent filed a Replying Affidavit sworn by Nathaniel Ochieng on 11th September 2024 and written submissions dated 13th September 2024.
28. It was the 6th Respondent's case that the Petitioners have not produced any ownership documents in respect to the suit property. It was also their case that the Petitioners had not demonstrated how they had acquired the purported property.
29. It was averred that the allotment letter that had been issued had never been challenged nor set aside. The 6th Respondent also averred that they have no interest on the suit property.
30. The Counsel for the 6th Respondent also submitted on the following issues:-
 - i. Doctrine of exhaustion.
 - ii. Whether the Petition meets the threshold of a Constitutional Petition.
 - iii. Doctrine of a constitutional avoidance.



31. Counsel submitted that the Petitioners ought to have exhausted the applicable alternative dispute mechanism before filing the instant petition. It was submitted that NLC has powers to review all grants or dispositions on public land and as such the Petition is premature.
32. Counsel also submitted that the Petition is ambiguous and does not meet the threshold. The Petition has not pleaded which provisions of the Constitution has been violated.
33. On the aspect of Constitutional avoidance, it was submitted that the Petitioners ought to have moved this court by way of a suit and not a Petition. The court was urged to struck out the Petition on this basis.

Analysis and Determination

34. Upon considering the arguments of the parties, this court proceeds to distil the following issues for determination of the Petition: -
 - i. Whether the court has jurisdiction to hear and determine the petition in view of the doctrine of exhaustion and constitutional avoidance.
 - ii. Whether the suit property is public land.
 - iii. Whether there was any violation of the Petitioners constitutional rights.
 - iv. Whether the Petitioner are entitled to the reliefs sought.
35. The said issues shall be determined sequentially.

Issue No. i

Whether the court has jurisdiction to hear and determine the petition in view of the doctrine of exhaustion and constitutional avoidance.

36. The 6th Respondent raised objection to the Petition on the doctrine of Constitutional avoidance and doctrine of exhaustion. Counsel for the 6th Respondent submitted that the Petitioners had not exhausted the alternative dispute resolution mechanisms for failure to raise their issues with the National Land Commission. It was also submitted that the Petitioners ought to have filed a suit and not to have moved the court vide a Constitutional Petition.
37. The issue of jurisdiction having been raised by a party should be determined at the earliest possible opportunity. This is because jurisdiction is the lifeline of a case and without jurisdiction, a Court ought to down its tools. See Owners of the Motor Vessel "Lillian SS" v Caltex Oil Kenya Limited (1989) KLR 1. A Court's jurisdiction flows from either the Constitution or legislation or both. The Supreme Court in The Matter of the Interim Independent Electoral Commission Constitutional Application No. 2 of 2011 discussed the issue of jurisdiction in the following manner:

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution ; by statute law, and by principles laid out in judicial precedent.... the Lillian "SS" case establishes that jurisdiction flows from the law, and the recipient, the Court, is to apply the same with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation or by way of endeavours to discern or interpret the intentions of Parliament where the wording of legislation is clear and there is



no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court their respective jurisdiction is donated by the Constitution " .

38. In the words of Chief Justice Marshall of the U.S. Supreme Court in *Cobens v. Virginia* 19 U.S. 264 (1821):-

“It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution . We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution . Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is exercise our best judgment, and conscientiously perform our duty.”

39. While the court’s jurisprudential policy is to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute, the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. Thus, in the case of *Dawda K. Jawara v Gambia* ACmHPR 147/95-149/96-A decision of the African Commission of Human and Peoples’ Rights it was held that:

“A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]...the Governments assertion of non exhaustion of local remedies will therefore be looked at in this light ...a remedy is considered available only if the applicant can make use of it in the circumstances of his case.”

40. The Petition as filed by the petitioner cites violations of certain constitutional and statutory provisions. In the case of *R. v Independent Electoral and Boundaries Commission (I.E.B.C.) & Others Ex Parte The National Super Alliance (NASA) Kenya* [2017]eKLR after exhaustively reviewing Kenya’s decisional law on the exhaustion doctrine, the Court held:-

“(46) What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the *Shikara Limited* Case, the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.

(47) This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake.”

41. In the instant case the Petitioners have pleaded violations of their rights and are seeking various reliefs against the Respondent. The said reliefs can only be granted by this court and in view of the foregoing,



it is the finding of this court that the Petition is properly before this court and this court has jurisdiction to determine the same.

Issue No. (ii)

Whether the suit property is public land

42. Article 62(1) of the Constitution defines public land to include:-
- a. Land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date.
 - b. Land lawfully held, used or occupied by any State organ except any such land that is occupied by the State organ as lessee used under a private lease.
 - c. Land transferred to the State by way of sale, reversion or surrender.
 - d. Land in respect of which no individual or community ownership can be established by any legal process.
 - e. Land in respect of which no heir can be identified by any legal process.
 - f. All minerals and mineral oils as defined by law.
 - g. Government forest other than forest to which Article 63(2)(d)(i) applies.
 - h. All roads and thoroughfares provided for by an Act of Parliament.
 - i. All rivers, lakes and other water bodies as defined by an Act of Parliament.
 - j. The territorial sea, the exclusive economic zone and the sea bed.
 - k. The continent shelf.
 - l. All land between the high and low water marks.
 - m. Any land not classified as private or community land under the Constitution .
 - n. Any other land declared to be public land by an Act of Parliament:-
 - i. In force at the effective date or
 - ii. Enacted after the effective date.
43. Article 62(2) of the Constitution further stipulates that public land shall rest and be held by a County Government in trust for the people resident in the County and shall be administered on their behalf by the National Land Commission other than land, held, used or occupied by a National State Organ.
44. In regard to this issue, it was the Petitioners contention that the suit property is ancestral land in their possession and they have been living and cultivating in the land over the years owing to its fertile soil and the access of water for irrigation from the Voi river throughout. It was also contended that the purported claim of ownership of the suit property by the 2nd Respondent in the year 1989 was unclear, unlawfully and contrary to the law.
45. The Respondents on the other hand maintained that the suit land is public land currently in use by the 2nd Respondent.



46. The evidence on record confirms that from the minutes of the Town Planning Committee which was vide its meeting held on 1st December 1987 which was Annexure LO2 confirms that the property was acquired from Voi Development Company Limited on behalf of the Government of Kenya. Subsequently thereafter, the land measuring 40.5ha (100 acres) being public land was gazetted and reserved as Prison land vide Legal Notice No. 139 of 1999. The court has carefully considered the evidence presented herein and it is indeed clear that the Petitioners have not adduced any evidence to prove their allegations that the suit property was their ancestral land. The Petitioners have also not furnished this court with any evidence showing that they are residing in the said property.
47. The evidence on record further shows that subsequent to the gazettment, the process of title began in 2020 when the Kenya Prisons Service was issued with the letter of allotment. The said gazette notice and letter of allotment have not been revoked and no evidence was produced to the contrary.
48. In view of the foregoing, it is the finding of this court that the said suit land is public land, currently set aside for use by the 2nd Respondent.

Issue No. (iii)

Whether there is violation of the Petitioners constitutional rights

49. The Petitioners contend that the 2nd Respondent's actions of acquiring the suit property were illegal, unconstitutional, unlawful and discriminative against them. The Petitioners argued that the Respondents contravened Articles 19, 20, 22, 23, 25, 27, 28, 35, 48, 40, 47 and 232 and 234 of the Constitution.
50. The court in considering the said issues noted that regrettably, the Petitioners failed to place before court evidential material to demonstrate that they were at all times the lawful owners or occupants of the suit property. The Petitioners have equally not placed any evidence before this court demonstrating how the Respondents acquisition of the said property was unlawful. In view of the foregoing, the Petitioners cannot be said to have established a basis of violation of any of their rights as enumerated in the petition. It is therefore the finding of this court that the Petitioners have not established any violations of their rights by any of the Respondent.

Issue No. (iv)

Whether the Petitioners are entitled to the reliefs sought

51. The last issue for determination is whether the Petitioners are entitled to any of the reliefs sought. The court is alive to the fact, that the petitioners their petition alluded to various constitutional violations, but without having availed tangible evidence of violation of his rights and freedoms. The petitioners herein ought to have produced cogent evidence to ensure that the court considers the same. The courts of law are deaf to speculations and irregularities as it must always base its decision on evidence. As held earlier by this court that the Petitioners have not proved their lawful occupation and ownership of the suit property and further having held that the Petitioners have been unable to prove any violations of Constitutional right by any of the Respondents, it therefore follows that the Petitioners have been unable to prove their Petition on a balance of probabilities. I therefore find and hold that the petitioners failed to discharge the burden of proof to the required standard of proof. I find that the petitioners did not give evidence of probative value to enable this court decide the petition in their favour and grant the orders sought. The net result is that they are not entitled to any of the reliefs sought in the Petition.



Conclusion

52. In the end, it is the finding of this court that the Petitioners have failed to prove their case to sustain this petition and it is the holding of this court that no fundamental rights and or other rights of the Petitioners have been violated and or infringed as alleged. In the circumstances, the Petition dated 28th February 2024 is hereby dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 17TH DAY OF OCTOBER, 2024.

E. K. WABWOTO

JUDGE

In the presence of:-

Mr. Mwinzi for Petitioners.

MS. Mwanaszumba for 1st to 5th Respondents.

Mr. Nyamache h/b for Mr. Ngaire for the 6th Respondent

N/A for 7th Respondent.

Court Assistants: Mary Ngoira.

