



**Kenduiwo & 135 others v Cabinet Secretary of Ministry of Defence & 2 others (Environment and Land Constitutional Petition 11 of 2019) [2023] KEELC 100 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 100 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 11 OF 2019**

**EO OBAGA, J**

**JANUARY 19, 2023**

**IN THE MATTER OF ARTICLES 1, 2(2). 3(1), 10, 19, 20, 21, 22,  
23, 28, 40, 43, 47 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF SECTION 107, 108, 109 & 110 OF THE LAND ACT, 2012**

**AND**

**IN THE MATTER OF ARTICLES 25 OF UNIVERSAL DECLARATION OF HUMAN RIGHTS**

**AND**

**IN THE MATTER OF ARTICLE 14 OF THE AFRICAN  
CHARTER ON HUMAN & PEOPLE’S RIGHTS**

**AND**

**IN THE MATTER OF ARTICLE 11(1) OF THE INTERNATIONAL  
COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

**AND**

**IN THE MATTER OF ARTICLE 17 OF INTERNATIONAL  
COVENANT ON CIVIL AND POLITICAL RIGHTS**

**BETWEEN**

**DANIEL KENDUIYWO & 135 OTHERS ..... APPLICANT**

**AND**

**CABINET SECRETARY OF MINISTRY OF DEFENCE ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**



## RULING

### Introduction

1. This is a ruling in respect of a notice of motion dated 16<sup>th</sup> March, 2022 in which the Petitioners/ Applicants seek the following orders:-
  - i. Spent
  - ii. This Honorable court be pleased to issue urgent conservatory orders against the 1<sup>st</sup> Respondent from trespassing the land in dispute pending the hearing and determination of this suit.
  - iii. This honorable court do issue compelling orders against the 1<sup>st</sup> Respondent to reveal the identities of its members of its force who committed the extra-judicial killing.
  - iv. This honorable court be pleased to issue restraining orders against the 1<sup>st</sup> Respondent from committing extra-judicial killing upon the Applicants pending the hearing and determination of the suit.
  - v. Costs be in the cause.
2. The events leading to the filing of this application can be traced to LR No. 8406/6 which was owned by Oxbridge Farms Limited. In 1971, a company known as Kapngetuny Farm Limited purchased the land from Oxbridge Farms Limited. Between 1970 and 1980, the Commissioner of Lands acquired part of the land on behalf of Ministry of Defence for use by Eldoret Military Barracks.
3. Pursuant to the compulsory acquisition, those who were in occupation of the acquired land were evicted from the land in 1980. In 1991, the persons who were occupying the land from where they had been evicted allegedly re-claimed it arguing that the land was not being utilized for the purpose it was acquired.
4. The invasion of the acquired land caused animosity between the Ministry of Defence and the intruders. This made the late president Daniel Arap Moi who was Commander in-chief to ask the Ministry of Defence to cede some land for settlement of squatters. It is not clear whether this direction was ever implemented.
5. As the squatters continued to encroach on the military land, the Ministry of Defence made a formal complaint to the National Land Commission on encroachment of military land in various parts of the country. The National Land Commission made Public inquiries over the issue and made its recommendations contained in a report forwarded vide a letter dated 24<sup>th</sup> January, 2019. In this report the National Land Commission advised the Chief Land Registrar to put restrictions on the titles held by the Ministry of Defence to safeguard the Military Land across the Country.
6. It is as a result of the aforementioned recommendations that the military moved in to secure their land. This is what prompted the Applicants to file a constitutional petition in the Constitutional and Human Rights Division of the High Court in Nairobi seeking the following reliefs:-
  - a. A declaration that the Petitioners are the rightful owners of the property known as LR No. 8406/6 in Uasin Gishu.
  - b. A declaration that the compulsory acquisition; Gazette Notice No. 110 & 111 of 1979 were void as the 1<sup>st</sup> Respondent failed to issue the Petitioners notices as required under the law.



- c. A declaration that the 1<sup>st</sup> Respondent actions in interfering with the Petitioners occupation in LR NO 8406/6 is unconstitutional & violates their right to property.
  - d. An order of certiorari to issue to bring unto this Honourable court the 2<sup>nd</sup> Respondent recommendations dated 24<sup>th</sup> January, 2019.
  - e. An order of prohibition against the 1<sup>st</sup> Respondent from forcefully evicting the petitioners.
  - f. Costs of the petition.
7. The aforementioned petition was transferred to the Environment & Land Court at Eldoret. The application which had been filed contemporaneously with the petition was placed before the court on 10<sup>th</sup> June, 2019 when the court directed that the status quo be maintained pending inter-partes hearing on 20<sup>th</sup> June, 2019. This application was however not heard as it was found out that this petition was related to other two cases pending before the court that is petition No. 23 of 2019 and 78 of 2019. This petition was consolidated with the other two petitions. Efforts to have the order consolidating this petition with the other two was dismissed.
  8. On 25<sup>th</sup> December 2021, the Military Personnel from Eldoret went to the suit property apparently in company of surveyors and started marking beacons. The occupants of the encroached land were not happy with this. The civilian persons became agitated and unruly as can be seen from the video clip attached to the present application. This may have led to the shooting to dead of at least three persons. This is what prompted the Applicants to file the present application.
  9. The Applicants contend that personnel from the 1<sup>st</sup> Respondent used excessive force on unarmed civilians killing five of them. The Applicants contend that the suit property belongs to them and that the killings of 25<sup>th</sup> December 2021 by Police was unjustified. They contend that they have a right to be protected.
  10. The Applicants further contend that there have been no efforts to bring the perpetrators of the killing to book and that if the court does not intervene, the matter will vanish from the memories of Kenya and this will lead to more extra judicial killings.
  11. The Applicants contend that they were not informed of the visit to suit property by the 1<sup>st</sup> Respondents' personnel and that this infringed their right to information as enshrined in the constitution. They further argue that the 1<sup>st</sup> Respondent has failed to name those behind the shooting. The Applicants argue that they need to be treated with dignity.
  12. The Applicants' application was opposed through a replying affidavit sworn on 8<sup>th</sup> April, 2022 by Captain Jane Mugo who argued that the Applicants' application was brought late in the day; that the issues raised should have been raised in a criminal matter; that the suit property was compulsorily acquired and does not belong to the Applicants; that the Applicants are out to delay the conclusion of the main petition; that the attached video clips should not be admitted and that the Applicants are impostors.
  13. The parties were directed to file written submissions. The Applicants filed their submissions on 3<sup>rd</sup> October, 2022. The 1<sup>st</sup> Respondent filed submissions on 7<sup>th</sup> October, 2022. I have carefully considered the Applicants' application as well as the opposition to the same by the 1<sup>st</sup> Respondent. I have also considered the submissions filed by the parties. The issues which emerge for determination are firstly, whether the Applicants have disclosed that they have a prima facie case to warrant issuance of conservatory orders. Secondly, whether this court should issue orders compelling the 1<sup>st</sup> Respondent to reveal the identities of those who were involved in the shooting. Thirdly, whether this court should issue



orders compelling the 1<sup>st</sup> Respondent to stop them from committing extra-judicial killings. Fourthly, which order should be made on costs.

14. On the first issue, the superior courts have consistently held that for a party in a constitutional petition to be granted conservatory orders, he/she must prove that he/she has a prima facie case. In the case of [\*Center for Rights Education and Awareness \(REAW\) and 7 others –vs- Attorney General\*](#) (2011) eKLR, the court held as follows:-

“....At this stage, a party seeking conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and unless the court grants conservatory order there is a real danger that he will suffer prejudice as a result of violation or threatened violation of the Constitution.....”

15. Equally, in the case of Kevin K. Mwiti & others – Vs- Kenya School of Law & others, Justice Odunga (as he then was) stated as follows:-

“....The first issue for determination is whether the Petitioner has established a prima facie case. A prima facie case, it has been held is not a case that must succeed at the hearing of the main case. However, it is a case that discloses arguable constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding wither of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the Applicant is only required to establish a prima facie case with likelihood of success....”

16. In the instant case, the Applicants state that the suit property was purchased by Kapngetuny Farm Limited. They do not state whether they are shareholders of the said firm. The Applicants concede that the Land was compulsorily acquired by the Commissioner of Lands on behalf of the Ministry of Defence. They further state that not all the land was acquired. They have nothing to show that they are occupying the remainder of the acquired land. what they seem to say is that there was no adequate compensation and that they were not given notices when the land was compulsorily acquired.

17. The Applicants also state that they are on the land pursuant to the directive of the late President Daniel Arap Moi who ordered that they be given land. It is clear that the Applicants’ claim is not clearly set out. I therefore do not see what prima facie case they have established to warrant issuance of Conservatory orders.

18. On the second issue, I must state at the outset that what happened on 25<sup>th</sup> December, 2021 was unfortunate. I had the advantage of viewing the video clips attached to the Applicants’ application. There are photographs of three men who lay dead which were annexed to the supporting affidavit and further affidavit in support of the application. In the video footage, one of the dead men is seen trying to pull down a metal gate. I do not know whose gate this was. The next minute, the man lay dead on the ground. Before this man was shot, there were men in military gear armed who seemed not bothered with what he was trying to do. There were loud screams from a multitude of civilian persons.

19. Whatever circumstances led to the killing of the three men, the Holy bible teaches us that all human life is created by and from the hand of God and is therefore precious. Its sanctity should be respected and that is why taking of life is forbidden and that is why shedding of blood of a man is forbidden in Genesis 9 verse 6. Having said this, I must ask the question whether this is the proper court to address these issues which are of a criminal nature.



20. The 2010 constitution created the High Court and courts of equal status. It designated the jurisdiction of each court. The Environment & Land Court's jurisdiction arises from the Environment and Land Court Act. This Act does not give jurisdiction to the court to address issues of criminal nature. The proper court to which this request should have been addressed was the High Court not in this petition. To ask this court to grant such orders will be asking the court to do what is outside its jurisdiction. I therefore decline to grant the order sought.
21. On the third issue, I would adopt the reasoning in issue number two hereinabove. The court does not have jurisdiction to issue such orders. Even if the court had jurisdiction to do so, the facts of this application show that the events of 25<sup>th</sup> December, 2021 happened as an isolated incident. There is no indication that those who perpetrated the unfortunate incident are intent on carrying out a similar action.
22. All in all, barring the unfortunate incident where lives were lost, I find that the Applicants' application is devoid of merit. The same is dismissed with no order as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 19TH DAY OF JANUARY, 2023.**

**E. O. OBAGA**

**JUDGE**

In the virtual presence of;

Mr. Njoka for Mr. Kioko for 1<sup>st</sup> Respondent.

Court Assistant – Akidor

**E. O. OBAGA**

**JUDGE**

**19TH JANUARY, 2023**

