



**Waithaka & 2 others v National Land Commission & 4 others (Environment & Land  
Petition 7 of 2019) [2023] KEELC 15928 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15928 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND PETITION 7 OF 2019**

**JG KEMEI, J**

**FEBRUARY 23, 2023**

**BETWEEN**

**PETER KAMAU WAITHAKA ..... 1<sup>ST</sup> PETITIONER  
JOSEPH GAKAU MBUGUA ..... 2<sup>ND</sup> PETITIONER  
JOHN GICHINGA NGURO ..... 3<sup>RD</sup> PETITIONER**

**AND**

**NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT  
ATHI WATER SERVICES BOARD ..... 2<sup>ND</sup> RESPONDENT  
MINISTRY OF WATER & NATURAL RESOURCES ..... 3<sup>RD</sup> RESPONDENT  
ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT  
NORKEN INTERNATIONAL ..... 5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The instant Petition dated June 12, 2017 was initially filed in as Kiambu High Court Petition No 21 of 2017 on June 14, 2017. Upon the establishment of this Court, the matter was transferred to this Court on June 10, 2019 and renumbered Thika ELC Petition No 7 of 2019. The Petitioners crave for Orders against THAT;
  - a. A declaration that entry and commencement of the works by the 5<sup>th</sup> Respondent for the construction of the Kariminu II Dam before the Petitioners add all the affected members of the public within the Kariminu area of Gatundu North Kiambu county are compensated is illegal and in contravention of fundamental rights and freedoms of the individual to wit, articles 31(b), 35, 40, 43 and 47 of the Constitution.



An injunction restraining the Respondents by themselves, their agents, servants, assigns from trespassing into, acquiring, demolishing, excavating, erecting structures, fencing, developing, alienating, disposing of, removing, depleting or otherwise dealing in any way with the Petitioners' lands those of the residents of Kariminu area of Gatundu North Kiambu county until they are adequately compensated by the Respondents.

- c. An order of mandamus directed at the 5<sup>th</sup> Respondent compelling it remove all its machinery, equipment, servants, staff or any of its items from the Petitioners lands.
  - d. An order directed at the Respondents to resettle and or adequately compensate the Petitioners and all the residents of Kariminu area of Gatundu North Kiambu County affected by the construction of the Kariminu II Dam Project.
  - e. The Honorable Court do order compensation of the Petitioners for damages as a result of the infringement of their fundamental rights and freedoms.
  - f. Costs of the Petition.
  - g. Any other or further orders, writs and directions the Honorable Court considers appropriate and just to grant for the purpose of the enforcement of the Petitioner's fundamental rights and freedoms.
2. The Petition is supported by the Affidavit of even date of Peter Kamau Waithaka and Joseph Gakau Mbugua, the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners respectively. They deposed that they were duly authorized to swear the Affidavit on behalf of all the Petitioners and residents of Kariminu area in Gatundu North, Kiambu county. That in the year 2011 the residents of Kariminu area learnt about of a project muted by the Government of Kenya for construction of a dam across Kariminu River (the project) and later on November 13, 2014 a meeting took place between representatives Kariminu residents and the Respondents as shown by copy of minutes, PKW-2. That the purpose of the said meeting was to conduct a public consultation meeting of the effects of the project and signing of agreements with the contractor / excavation of materials from the affected lands and preparation and delivery of the Environmental Impact Assessment (EIA) report.
  3. The deponents further averred that vide PKW3 - a Gazette Notice no 6456 dated August 12, 2016, NEMA issued a notice indicating that the EIA report for the Project was ready for inspection. That according to the report, the project would occasion displacement of persons living on the affected area prompting the need to plan a proper resettlement before commencement of the project. They accused the Respondents for breaching constitutional provisions by entering the Petitioners' lands and commencing the excavations without due compensation. Admitting the beneficial nature of the project to the residents of Kariminu area, the Petitioners averred that their rights under Articles 31(b), 35, 40, 43 and 47 Constitution of Kenya have been and are likely to continue being violated hence the Petition.
  4. The Petition is opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
  5. The 1<sup>st</sup> Respondent filed its Grounds of Opposition dated April 27, 2022 while the 2<sup>nd</sup> Respondent filed a Replying Affidavit dated June 1, 2022.
  6. The 1<sup>st</sup> Respondent contended that the Petition does not raise any specific allegations against it and that for National Land Commission to commence compulsory acquisition of land, it has to be instructed to do so as provided for in law. It denied conducting any proceedings regarding the suit property and thus no cause of action arises against it.



7. The 2<sup>nd</sup> Respondent through its Chief Manager Eng. Joseph Kamau deponed that this Hon Court lacks jurisdiction to entertain this Petition in light of Section 133C of the Land Act as read with Section 9 Fair Administrative Action Act which mandates the National Land Commission to make an inquiry and determine compensation to any person with interests in land. That Section 68 of the Water Act, 2016 empowers the 2<sup>nd</sup> Respondent to inter alia undertake the development, maintenance and management of the national public water works and it is against that background it is constructing the Kariminu II Dam Water supply project. That the 1<sup>st</sup> Petitioner is seeking compensation in respect of certificates of title marked PKW1 of which only Chania/Kanyoni/2575; Chania/Kanyoni/2577; Chania/Kanyoni/2579; Chania/Kanyoni/258; Chania/Kanyoni/2583; Chania/Kanyoni/2584 and Chania/Kanyoni/2709 are affected by the Project and he was duly compensated for them as shown by JK-4 vide an award made on November 13, 2020 and accepted on November 18, 2020.
8. The 2<sup>nd</sup> Respondent further avowed that the 1<sup>st</sup> Petitioner having died on March 22, 2021, over one year has lapsed without any legal substitution in his place and therefore the Petition has abated. On the 2<sup>nd</sup> Petitioner's part, it was deponed that he has no claim over interests in the titles annexed as PKW1 as he does not own any land thereof. the 2<sup>nd</sup> Respondent maintained that it followed the legal due process and the Petition is brought in bad faith.
9. Contemporaneous to filing the Petition, the Petitioners filed a Notice of Motion application of even date seeking in the main temporary injunction against the Respondents from dealing with their lands pending the hearing and determination of the petition. The Hon. Court considered the motion and granted exparte temporary injunction on June 20, 2017. A month later the 2<sup>nd</sup> Respondent vide an application dated July 28, 2017 sought to set aside the exparte orders of June 20, 2017 as well as striking out the Petition with costs. The Court record does not bear any response to the Motion dated July 28, 2017 save for the Petitioners' move to file an authority to plead dated October 4, 2017.
10. Upon transfer of the Petition to this Court, the record shows that the 2<sup>nd</sup> Respondent again filed another motion dated May 27, 2021 seeking in the main the striking out/dismissal of the Petition with costs.
11. The Application is inter alia based on grounds that the 2<sup>nd</sup> Respondent lacked capacity to institute these proceedings as he was not the registered owner of land known as Chania/Kanyoni/397; the 1<sup>st</sup> Petitioner had died on March 22, 2021 and that the Petitioners despite filing this Petition, were actively involved in a parallel statutory exercise for compensation of their land and the same have been concealed from this Court. Similarly, this Motion is unopposed. On June 23, 2021, this Court directed that the Motion dated May 27, 2021 be canvassed alongside the Petition by way of written submissions.
12. Only the 2<sup>nd</sup> Respondents filed its submissions dated June 17, 2022 through the firm of Prof Albert Mumma Advocates. Three issues were drawn for determination to wit; whether the petition has abated by virtue of the 1<sup>st</sup> Petitioner's death; whether the Petitioners ought to exhaust internal grievance mechanism as provided by Section 133C of the Land Act and whether the reliefs sought herein are merited.
13. On the first issue, it was submitted that the 1<sup>st</sup> Petitioner's suit has abated by operation of law following his demise as shown by copy of death certificate – JK8 and failure to substitute him within one year. Reliance was placed on the Court of Appeal of Mutava & Others Vs Managing Director Kenya Ports Authority & Anor [2016] eKLR. That the 2<sup>nd</sup> Petitioner's cause of action is unsustainable as the land parcel Chania/Kanyoni/397 belonged to his late father.



14. Secondly, that all the parcels of land as shown by PKW1 belonged to the late 1<sup>st</sup> Petitioner who was duly compensated on November 18, 2020. That the allegations on breach of Petitioners' rights have not been proven and therefore the reliefs sought are not merited.
15. The 3<sup>rd</sup> Petitioner John Gichinga Nguro filed a notice dated August 2, 2021 and filed on even date to wholly withdraw the petition against all the Respondents.
16. The main issues for determination in my view are; whether the Application dated May 27, 2021 and the Petition dated June 12, 2017 are merited.
17. The Motion dated May 27, 2021 is filed pursuant to Rule 19 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice & Procedure Rules, 2013 commonly referred to as the Mutunga Rules seeking in the main that the Hon Court be pleased to strike out and/or dismiss the Petition dated June 12, 2017 with costs. It is premised on the grounds on the face of it and supported by the Affidavit of Eng Joseph Kamau, the 2<sup>nd</sup> Respondent's Chief Manager.
18. He averred that the Petitioners failed to inform the Court that the 2<sup>nd</sup> Petitioner's claim is based on land parcel Chania/Kanyoni/397 which belonged to his late father who died on 18/01/1986 as shown by copy of death certificate – AW1; that the 1<sup>st</sup> Petitioner's died on March 22, 2021 as shown by copy of death certificate marked AW2 and AW4 is copy of the award and acceptance made in favor of beneficiaries including the 1<sup>st</sup> Petitioner on November 13, 2020. That to that end, this Court lacks jurisdiction to entertain this petition by virtue of Section 112 of the Land Act as read with Section 9 of the Fair Administrative Action Act.
19. The application is unopposed.
20. It is trite that he who alleges must prove. This burden of proof is not lessened even in undefended suits like the instant case. A perusal of PKW1 as filed in the Further affidavit sworn by the 1<sup>st</sup> Petitioner on June 19, 2017 shows all copies of title deeds in respect of Chania/Kanyoni/2575, 2576,2577,2578,2579,2582 and 2588 belong to the 1<sup>st</sup> Petitioner. Title No Chania/Kanyoni/2709 belongs to John Gichingo Nguro, the 3<sup>rd</sup> Petitioner. On June 21, 2022 counsel for the Petitioners informed this Court that he had no instructions from the Petitioners and sought 7 days to file his application to cease from acting. The 2<sup>nd</sup> Respondent filed AW2 which confirms that the 1<sup>st</sup> Petitioner died as per the death certificate registered on March 22, 2021 though the actual date of death is illegible. On that basis and without any evidence to the contrary, I opine that the fact of the 1<sup>st</sup> Petitioner's death is proven on a balance of probabilities.
21. The Court record does not contain any Application for substitution of the deceased 1<sup>st</sup> Petitioner and due to the time lapse of almost two years now, the cause of action has abated by operation of law pursuant to Order 24 Rule 3(2) Civil Procedure Rules. Recourse is made to the Civil Procedure Act / Civil Procedure RulesPR since the Mutunga Rules do not expressly provide for substitution of a Petitioner in event of his/her demise before the determination of a Petition. Order 24 Rule 3 Civil Procedure Rules provides;

' 3. Procedure in case of death of one of several Plaintiffs or of sole Plaintiff [Order 24, rule 3.]

- (1) Where one of two or more Plaintiffs dies and the cause of action does not survive or continue to the surviving Plaintiff or Plaintiffs alone, or a sole Plaintiff or sole surviving Plaintiff dies and the cause of action survives or continues, the Court,



on an application made in that behalf, shall cause the legal representative of the deceased Plaintiff to be made a party and shall proceed with the suit.

- (2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased Plaintiff is concerned, and, on the application of the Defendant, the Court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased Plaintiff: Provided the Court may, for good reason on application, extend the time.'

22. Regarding the 2<sup>nd</sup> Respondent, there is no title in his name in the annexure of copies of titles contained in the Petition and further Affidavit of the 1<sup>st</sup> Petitioner sworn on June 19, 2017. The uncontroverted averment by the 2<sup>nd</sup> Respondent is that the 2<sup>nd</sup> Petitioner's claim in respect of Chania/Kanyoni/397 cannot stand for want of locus standi as the land belonged to his late father Mbugua Gakua – AW1 and in any case due compensation was made and accepted to his beneficiaries on November 18, 2020. This assertion is equally uncontroverted.
23. The Court of Appeal in the case of *Karl Webner Claasen v Commissioner of Lands & 4 Others [2019] eKLR* emphasized that;
- ' (15) In addition, the principle of locus standi has been profoundly reformed by Article 22 and 258 with respect to enforcement of the Bill of Rights and enforcement of contravention of the *Constitution* respectively. In both cases, the right to institute Court proceedings is given to a person acting in his own interest and to others including a person acting in public interest. That is consistent with Article 3(1) which obliges every person to inter alia defend the *Constitution*. Rule 27(3) of the Practice Procedure Rules is also relevant. That Rule gives the Court discretion to proceed with a petition in spite of the wish of the Petitioner to withdraw or discontinue the proceedings. Undoubtedly by our law the right to institute Court proceedings for enforcement of the Bill of Rights and the *Constitution* in general is solely not a personal right exercisable by a person in his own interest. It is also a collective obligation of every person to defend the *Constitution*. It follows that the findings that a right to institute proceedings were not a chose in action and the right to bring proceedings by means of a petition were personal to the deceased Petitioner are both erroneous in law.'
24. To that end, while the 2<sup>nd</sup> Petitioner maybe entitled to pursue public interest litigation in respect of the affected lands under the Project, the 2<sup>nd</sup> Respondent averred and demonstrated that the affected person were duly compensated as envisaged in law. This position was not rebutted at all.
25. Lastly it is not in doubt that the 3<sup>rd</sup> Petitioner wholly withdrew his claim in the Petition as evidenced by the Notice of Withdrawal dated August 2, 2021.
26. Accordingly, it is my finding that the Application dated May 27, 2021 is merited and the same be allowed as prayed.
27. Having so concluded, the determination of the merits of the Petition dated June 12, 2017 now becomes moot as it stands struck out with costs.



DELIVERED, DATED AND SIGNED AT THIKA THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2023 VIA MICROSOFT TEAMS.

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

1<sup>st</sup> Petitioner – Deceased

Ms. Gachugu HB Mr. Ambani for 2<sup>nd</sup> Petitioner

3<sup>rd</sup> Petitioner – Case withdrawn

Ms. Masinde for 1<sup>st</sup> Respondent

Ochieng for 2<sup>nd</sup> Respondent

3<sup>rd</sup> and 4<sup>th</sup> Respondents – Absent

5<sup>th</sup> Respondent - Absent

Court Assistants – Esther / Kevin

