



Sirikwa Squatters Group (On its Own Behalf and on Behalf of Its Membership) v Odero & 5 others (Petition E007 of 2023) [2024] KEHC 6256 (KLR) (31 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6256 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PETITION E007 OF 2023**

JRA WANANDA, J

MAY 31, 2024

IN THE MATTER OF ARTICLES 2(1), 2(2), 3(1), 10, 10(2) (B) AND (C), ARTICLES 19, 20(1), 20(2), 20(3), 20(4), 21(1), 22(1), 23(1) AND (3), 24(1), 25(C), ARTICLES 27(1), (2) 27(4) 28, 29(A), (B), (C), (D), (F), 31, 40(3), 47, 48, 50, 73, 165 3(A) AND 165 3(B), 232, 244 AND 258(1) AND (2) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE RESPONDENTS VIOLATION AND/OR INFINGEMENT OF THE PETITIONERS CONSTITUTIONAL RIGHTS AND FREEDOMS AND OTHER VIOLATION OF THE CONSTITUTION OF KENYA UNDER ARTICLES 2(1), 2(2), 3(1), 10, 10(2) (B) AND (C), 19, 20(1), 20(2), 20(3), 20(4), 21(1), 22(1), 23(1) AND (3), 24(1), 25(C), 27, 27(4), 28, 29(A), (B), (C), (D), (F), 31, 40(3), 47, 48, 50, 73, 165 3(A) AND 165 3(B), 232, 244 AND 258(1) AND (2) OF THE CONSTITUTION OF KENYA, 2010.

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO.4 OF 2015

AND

IN THE MATTER OF THE NATIONAL POLICE SERVICE ACT: (CAP. 84) LAWS OF KENYA

AND

IN THE MATTER OF THE UN BASIC PRINCIPLES AND GUIDELINES ON DEVELOPMENT BASED EVICTION AND DISPLACEMENT (2007)

BETWEEN

SIRIKWA SQUATTERS GROUP (ON ITS OWN BEHALF AND ON BEHALF OF ITS MEMBERSHIP) PETITIONER

AND

RIFT VALLEY POLICE COMMANDANT MR. TOM ODERO 1ST RESPONDENT



**UASIN GISHU POLICE COMMANDANT MR. AYUB GITONGA 2ND
RESPONDENT**

OCS LANGAS POLICE MESHACK MWANGANGI 3RD RESPONDENT

OCS KIAMBAA POLICE MR. SWALEH MSCHIDZUKA 4TH RESPONDENT

COUNTY COMMISSIONER UASIN GISHU DR. EDDYSON

NYALE 5TH RESPONDENT

OCPD LANGAS POLICE MR. JOHN ODHIAMBO 6TH RESPONDENT

JUDGMENT

1. The Petition herein is dated 15/06/2023. The Petitioner describes itself as a duly registered Self Help Group with the Ministry of Gender, Sports, Culture and Social Services under Registration Number UG/SS/REG/10943/2006 in the Republic of Kenya suing on its own behalf and on behalf of its membership.
2. There are two Affidavits of Service on record filed on 23/10/2023 and 7/11/2023, respectively, indicating that the Respondents were on several occasions served with the Pleadings filed and Court Orders issued herein. However, none of the Respondents has filed any response or participated in these proceedings.
3. In the Petition, the orders sought are as follows:
 - a. A declaration that the respondents' acts above had violated and/or infringed the petitioners' constitutional rights and freedoms and other Articles of *the Constitution* of Kenya under Articles 2(1), 2(2), 3(1), 10, 10(2) (b) and (c), 19, 20(1), 20(2), 20(3), 20(4), 21(1), 22(1), 23(1) & (3), 24(1), 25(c), 27(1), (2) 27(4) 28, 29(a), (b), (c), (d), (f), 31, 40(3), 47, 48, 50, 73, 232 and 244 and in particular the violation and/or infringement of the petitioners and its membership right to protection of their private properties and livestock set out in paragraph 12 of the petition from arbitrary deprivation and without following the due process of the law and without following the constitutional dictates above and accordingly the whole process above amounted to violation and/or an infringement of the petitioners' rights and was therefore illegal, unconstitutional, unreasonable, null and void and the petitioners deserves protection over the same.
 - b. A declaration that the acts of the respondents of the night of the 25th November, 2022 at about 10pm to mid night of entering the properties at night with over 20 police motor vehicles and about 350 police men under the command of the Rift Valley Police Commandant Mr. Tom Odero, the then Uasin Gishu County Police Commandant a Mr. Ayub Gitonga, OCS Langas Police Meshack Mwangangi, OCS Kiambaa Police Mr. Swaleh Mschidzuka, County Commissioner Uasin Gishu Dr. Eddyson Nyale and OCPD Langas Police Mr. John Odhiambo and of descending on the said Land References Numbers 9606, 9607, 9608, 745, 742/2, 7739/7R, 12398, 10793, 10794 and 11481 LR NOs. PIONEER/NGERIA BLOCK1 (EATEC) 7070, 7068, 3395, 5903, 2454, 476, 1860, 475, 5497, 5494, 5492, 5489, 5486, 1384, 1383, 5484, 474, 472, 5485, 5487, 5490, 5488, 5491, 5493, 1861, 5496, 1862, 5491, 473, 477, 471, 1353, 1375, 1374, 1379, 1378, 1380, 1381, 1382, 1852, 1386, 1385, 85, 5495, 5902 and its sub-divisions and of evicting from therein the petitioners' membership and their families, flattening the building/settlement to the ground and carting away the petitioners'



private properties and livestock listed at paragraph 12 of the petition amounted to a forceful eviction and had violated the petitioners' rights under *the Constitution* of Kenya and under the International Human Rights principles namely the UN Basic Principles and Guidelines on Development based eviction and Displacement(2007), done at night and without Notice or warning and was therefore accordingly unreasonable, unconstitutional and of questionable characteristics, null and void ab initio.

- c. A declaration that in view of the unconstitutionality, the ruthlessness and unprocedural eviction carried out at night against the Sirikwa Squatters Group members and their families without due process and without following the law then the actions of the respondents jointly and severally were outside the law, were outside *the Constitution* and the UN Principles and Guidelines on Development based eviction and Displacement (2007), then the above acts were not acts of good faith and accordingly the respondents individually and collectively were personally liable for the acts above and ought to and must compensate the petitioners for the losses and suffering suffered as a result of acts of bad faith above.
 - d. An order that the respondents jointly and severally are liable to compensate the petitioners for the losses set out in paragraphs 12 and 15 of the petition to the sum of Kenya Shillings Four Million, Six Hundred and Thirty One Thousand, Five Hundred (Kshs. 4,631,500.00).
 - e. An order for compensation to the petitioners by the respondents to alleviate the petitioners' loss, suffering and damage as a consequent of the respondents unconstitutional and illegal acts above in such amount or amounts or damages as the court may assess and/or determine and payable to the petitioners.
 - f. General and exemplary damages as against the respondents for flagrant violations, oppression and contravention of the fundamental rights and freedoms of the petitioners provided for above under *the Constitution* of Kenya.
 - g. That the petitioners be awarded the costs of the petition and interest thereon.
 - h. Any other or further order that the Honourable court may deem it fit and necessary to grant.
4. The Petition is supported by the Affidavit sworn by one Benjamin Chen'gotie Ronoh who described himself as the Chairman of the Petitioner.
 5. Regarding facts giving rise to the Petition, it was stated that it is a fundamental duty of the state and every state organ to "observe, respect, protect, promote and fulfil the fundamental rights and freedoms in the Bill of Rights" in terms of and in compliance with Article 21(1) of *the Constitution* of the Republic of Kenya, 2010, that Article 258(1) and (2) of *the Constitution* entrenches the right of every person to institute Court proceedings claiming that *the Constitution* has been contravened or is threatened with contravention whether in person or acting in the public interest.
 6. It was stated further that the real and pivotal issues raised in the Petition is that the Petitioners' membership had settled on the properties Land References Numbers 9606, 9607, 9608, 745, 742/2, 7739/7R, 12398, 10793, 10794 and 11481 LR Nos. Pioneer/Ngeria Block1 (EATEC) 7070, 7068, 3395, 5903, 2454, 476, 1860, 475, 5497, 5494, 5492, 5489, 5486, 1384, 1383, 5484, 474, 472, 5485, 5487, 5490, 5488, 5491, 5493, 1861, 5496, 1862, 5491, 473, 477, 471, 1353, 1375, 1374, 1379, 1378, 1380, 1381, 1382, 1852, 1386, 1385, 85, 5495, 5902 and its sub-divisions with their livestock and constructed their houses and/or settlement but all these were destroyed, flattened to the ground and the population (read the petitioners and their families) evicted in one night of 25/11/2022 at around 10:00 pm up to midnight of the same night.



7. Regarding the foundation of the Petition, several provisions of *the Constitution* were cited. Also cited was the United Nations Basic Principles and Guidelines on Development based Eviction and Displacement (2007) which, it was stated, provides guidance to States on measures to adopt in order to ensure that development-based evictions, like the present one, are not undertaken in contravention of existing international human rights standards and violation of human rights and that it also provide measures to ensure that forced evictions do not generally take place and that in the event that they do, then they are undertaken with the need to protect the right to adequate housing for all those threatened with eviction, at all times. It was further stated that the Guidelines go further to lay down the conditions to be undertaken during evictions including that there must be mandatory presence of Governmental officials or their representatives on site during eviction; that neutral observers should be allowed access to ensure compliance with international human rights principles; that evictions should not be carried out in a manner that violates the dignity and human rights to life and security of those affected; and that evictions must not take place at night.
8. On contravention of the Petitioner's constitutional rights and particulars of violations by the Respondents, it was stated that a week after the Petitioners' membership occupation of the land (that is the night of 25/11/2022), about 350 policemen headed by the Respondents descended on the said land between 10 pm and midnight, evicted the Petitioners' membership and their families in the most atrocious way. It was alleged further that the police did not "only throw caution to the wind" but also meted out terror on the Petitioners membership and also demolished the Petitioners' structures, burnt some and took away some of their assets, properties and animals, namely, a tractor, a trailer, 6 motorcycles, 12 cows (not recovered to date), foodstuff, beddings, utensils, 60 complete constructed houses, two bicycles, 300 iron sheets (new, unutilized), 2 power saw and 10 kg nails.
9. It was also alleged that some of these assets are still held at the Langas Police Station, Eldoret while on the other hand just to ensure that the Petitioners' membership do not demand the release of their assets, the Petitioners were "hunted like antelopes" by the Langas Police, Eldoret and threats of arrest issued "here and there" against them hanging over their heads like "a sword of Damocles", a situation that is not only illegal but unconstitutional, that the Petitioners' membership had the right to demand the release of their properties but that this right has been denied, violated and/or infringed, that several trips to the Police station to demand the release of the properties have not yielded any success.
10. The Petitioner then posed questions that; one, are the Petitioners and their membership lesser mortals/ Kenyans compared to their opponent in a land dispute because the rival party would and/or could "arrange" a battalion of about 350 police officers drawn from all over several Counties to come for a night eviction of the petitioners' membership on the night of the 25th November, 2022? and secondly, aren't the police duty bound to protect the Petitioners and their properties and why would the Petitioners and its membership be treated differently and yet the Bill of rights applies to all law and binds all state organs and all persons?
11. It was then alleged that the value of the assets and livestock lost amounted to a sum of Kshs 4,631,500.00. Further, it was stated that as if that was not enough, some of the Petitioner's members (about 6-7) were then arrested and held incommunicado for a number of days allegedly for trespass to land, that the land was already inhabited by men, women, children and the older members of the Petitioner and they ought to be protected from forced eviction., that put differently, at about 10.00pm the night of 25th November,2022 a fleet of well over 20 police motor vehicles ferrying about 350 police men, who were well-kitted in police uniforms and "armed to the teeth" some of them wielding batons, and others carrying guns and tear gas-canisters attacked the petitioners who had entered the property on 19/11/2022 in execution of the Court of Appeal judgment issued on the 18/11/2022 and that this forceful eviction was done without notice or warning.



12. According to the Petitioners, the actions of the Respondents are contrary to the Constitution of Kenya, Article 244 which provides for the objectives and functions of the National Police Service which amongst them is on the paramount need to comply with the Constitutional standards of human rights and freedoms in carrying out their delegated duties, that it is impossible to imagine that such acts of transgression by the Respondents can be as a result of instruction or orders from the Inspector General of Police or any other higher authority due to the unconstitutionality, the ruthlessness and the unprocedural element of the acts of evicting population at night and additionally, because no evidence was adduced to show that it was an operational order. It was therefore stated that these actions can therefore best be described as “frolics of their own” for which each and all the Respondents were individually and collectively responsible and ought to be held responsible, that someone entrusted with the responsibility ought to be held responsible for the excesses, illegality and unconstitutional acts and that this litigation is about one such case.
13. It was stated further Section 66(1) of the National Police Service Act is clear on personal liability on the grounds that a member, agent or employee would only be exempted from personal liability if their acts were in “good faith” to which it would be incredulous to believe so was the case with the Respondents and the inescapable conclusion is that on that night they did not act in “good faith” when they displayed raw letter of the law and untrammelled power over the innocent population whose only crime was to try to enjoy the “fruits of their litigation”. In conclusion, it was stated that the Petitioner’s memberships’ several efforts to get back their private properties including penning the demand letters dated the 28/11/2022 and 17/04/2023 to the Respondents were all stonewalled and/or was not responded to, that the issue was “ducked” forcing the Petitioners to approach the Court of law to seek and to access justice and that this case affords an occasion for the Petitioner to meet “face to face” with the Respondents and address the issue straight without “moving back and forth” over this heinous and grave injustice of enormous ramifications.
14. Pursuant to directions given, the Petitioner also filed written Submissions filed in Court on 6/11/2023.
15. In the Submissions, the Petitioner’s Counsel reiterated the matters already set out above and added that the law on locus standi is well settled under Article 22 and 258 of the Constitution of Kenya and therefore the instant Petition is constitutionally grounded. He cited the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR. He also cited the Uganda case of Tinyefuza V Attorney General constitutional petition No. 1 of 1996(1997 UGCC 3) on the principle that “the entire constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other”. He added that the burden of proving violation or threat of violation is upon the Petitioner as was established in the case of Anarita Karimi Njeru Vs- Republic (1976-80) I KLR 1272 and submitted that the Petition satisfies the above case as it has been set out with reasonable degree of precision, the infringements have been set out and the manner in which the infringement occurred is also well set out. On the functions of the police under Article 244 of the Constitution and the paramount need to comply with the constitutional standards of human rights and freedoms in carrying out their delegated duties, Counsel cited the case of R V Commissioner of Police & 3 Others ex-parte Phylis Temwai Kipteyo HC.MISC.APPL.27 of 2008 (2011) eKLR (Bungoma) and also Section 24 of the National Police Service Act (Act No. 11 of 2011).
16. Regarding the powers of this Court to dispense and grant reliefs to victims whose rights have been infringed, Counsel cited Article 23(3) of the Constitution and also the decision of the South African Constitutional Court in the case of Minister of Health and Others vs. Treatment Action Campaign and Others (2002)5 LRC 216. He submitted further that Section 66(1) of the National Police Service Act is clear on personal liability on the grounds that a member, agent or employee would only be exempted from personal liability if their acts were in “good faith”



17. On whether the Petitioners are entitled to the grant of the prayers for general damages and special damages as pleaded, Counsel cited the cases of *Arnacherry Limited v Attorney General* [2014]eKLR, and submitted that the Petitioners' rights were violated and one of the remedies under Article 23(3) (e) of *the Constitution* is an order for compensation including an award of damages, that apart from declaratory orders, the Petitioners seek the compensation of Kshs 4,631,500.00 for the losses set out in the Petition, that the claim is predicated on the valuation by Premium Valuers Ltd which report is admissible in law.
18. Regarding the claim for general damages, Counsel submitted that the same is awardable under Article 23(3)(e) of *the Constitution* as the Petitioners' rights were violated and therefore the Court is entitled to award a reasonable sum as compensation. He again cited the South African Constitutional Court case of *Minister of Health and Others vs. Treatment Action Campaign and Others* (supra) and submitted that the sum of Kshs 20 Million is reasonable as general damages

Determination

19. The broad issues for determination in this matter, are in my view, the following:
 - a. Whether the eviction alleged herein took place and if so, whether by their acts committed during the eviction, the Respondents violated and/or infringed the Petitioner's and/or its members' constitutional rights and freedoms and in particular, the right to protection of their private properties and livestock.
 - b. Whether therefore the Respondents are individually and collectively personally liable for the acts cited above and ought to personally compensate the Petitioner's and/or its members for the losses and suffering suffered as a result of the said acts.
20. It is trite that *the Constitution* guarantees that human rights and fundamental freedoms are for enjoyment to the greatest extent possible and should not, unless where expressly permitted by law, be curtailed. Indeed, in the Court of Appeal in the case of *Attorney General v Kituo Cha Sheria & 7 others* [2017] eKLR stated as follows:

“Quite beyond argument then, the Bill of Rights in Kenya's constitutional framework is not a minor peripheral or alien thing removed from the definition, essence and character of the nation. Rather, it is said to be integral to the country's democratic state and is the framework of all the policies touching on the populace. It is the foundation on which the nation state is built. There is a duty to recognize, enhance and protect the human rights and fundamental freedoms found in the Bill of Rights with a view to the preservation of the dignity of individuals and communities. The clear message flowing from the constitutional text is that rights have inherent value and utility and their recognition, protection and preservation is not an emanation of state largesse because they are not granted, nor are they grantable, by the State. They attach to persons, all persons, by virtue of their being human and respecting rights is not a favour done by the state or those in authority. They merely follow a constitutional command to obey.

The enumeration of various rights and fundamental freedoms in the Bill of Rights is indicated to be a guide as to the content of rights. It is not meant to be exhaustive, however, so that one cannot be heard to say that unless a right is expressly provided then it does not exist and cannot be claimed. So long as a right exists by recognition or is conferred by law, that right is equally valid and efficacious unless and to the extent only as it may be inconsistent with the Bill of Rights in chapter 4. We take that to mean that if some right



exists independent of the Bill of Rights but has the effect of undermining or compromising the constitutionally declared Bill of Rights, then the constitutional provision prevails. We shall shortly return to this theme when discussing the applicability of international law.

On the application of the Bill of Rights, Article 20 is couched in wide and all-pervasive terms, declaring the Bill of Rights to apply to all law and to bind all state organs and all persons. None is exempt from the dictates and commands of the Bill of Rights and it is not open for anyone to exclude them when dealing with all matters legal. It is the ubiquitous theme unspoken that inspires, colours and weighs all law and action for validity. It is provided for in expansive terms declaring that its rights and fundamental freedoms are to be enjoyed by every person to the greatest extent possible. The theme is maximization and not minimization; expansion, not constriction; when it comes to enjoyment and, concomitantly facilitation and interpretation. What is more, courts, all courts, are required to apply the provisions of the Bill of Rights in a bold and robust manner that speaks to the organic essence of them ever-speaking, ever-growing, invasive, throbbing, thrilling, thriving and disruptive to the end that no aspect of social, economic or political life should be an enclave insulated from the bold sweep of the Bill of Rights. Thus courts are commanded to be creative and proactive so that the Bill of Rights may have the broadest sweep, the deepest reach and highest claims. Hence they are enjoined in their interpretative role to adopt a pro-rights realization and enforcement attitude and mind set calculated to the attainment as opposed to the curtailment of rights and fundamental freedoms. They must aim at promoting through their interpretations of the Bill of Rights the ethos and credo, the values and principles that underlie and therefore mark us out as an open and democratic society whose foundation and basis is human dignity, equality, equity and freedom. It is the duty of every judge, magistrate, member of a tribunal or other body invested with judicial functions to deliberately and unrelentingly pursue, encourage, entrench, protect, jealously guard, educate and propagate Project Freedom and aim to advance openness, democracy, and ensure that liberty rings loud and true in every place and sphere of Kenyan's socio-political life. *The Constitution* demands that everything the Bill of Rights stands for in its text, its purport, its spirit, philosophy and intendment as a charter of liberty must be given full effect in a bold and unflinching manner. Judges must speak the language of rights and fundamental freedoms and do so with neither apology nor embarrassment. To fail to do so or to do otherwise would be to violate the express precepts of *the Constitution*.”

21. Further, in the case of *Davis Mokaya Ondimu v Attorney General & 3 Others* [2021] eKLR, C. Mwita J made the following remarks:

- “ 37. Article 19 of *the Constitution* declares that the Bill of Rights is an integral part of our democratic state and is the framework for economic, social and cultural policies. It emphasizes that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings. The rights and freedoms in the Bill of Rights belong to individuals and are not granted by the state.
38. On the other hand, Article 20(1) provides that the Bill of Rights applies to all law and binds all state organs and persons. Sub Article (2) states that every person is to enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the right and fundamental freedom.



This court, as a state organ is, therefore, bound to enforce and protect the enjoyment of the rights and fundamental freedoms in the Bill of Rights.

22. In the same case, C. Mwita J made the following further statement remarks:

“47. This court as the custodian of *the constitution*, the rule of law and protector of human rights and fundamental freedoms, has not only a duty but also an obligation to ensure that every person acts within the law and respects human rights and fundamental freedoms in the Bill of Rights. The respondents and their juniors are not exempted from observing *the Constitution* and in particular human rights and fundamental freedoms. Indeed, Article 244 of *the Constitution* is clear that one of the objects and functions of the National Police Service in which the respondents serve, is to comply with constitutional standards of human rights and fundamental freedoms.”

23. Regarding the first issue, namely, “whether the eviction alleged herein took place and if so, whether by their acts committed during the eviction, the Respondents violated and/or infringed the Petitioner’s and/or its members’ constitutional rights and freedoms”, the Pleadings have not clearly disclosed the reason for the alleged eviction. However, flipping the material presented, the eviction appears to have been as a continuation of the long-standing battle over ownership of a 25,000-acre parcel of land between the Petitioner and the family of the one-time powerful political operative, one Mark Too (deceased). The battle has been in Court corridors for some time now. It appears that a day (on 19/11/2022) after the Court of Appeal (on 18/11/2022) gave a decision which the Petitioner deemed to be in its favour, the Petitioner’s members in their thousands, descended into the suit land and took over occupation thereof. It appears that the family of the late Mark Too had in the meantime moved to the Supreme Court and obtained a reprieve stopping the Petitioner’s members from entering the land. It is apparently as a result of this order of the Supreme Court that the police were roped in to evict the Petitioner’s members as they did on the night of 24/11/2022 hence the happenings that have given rise to this Petition.

24. Ombwayo J in the case of Ibrahim Sangor Osman v Minister of State for Provincial Administration and Internal Security, Embu Petition No 2 of 2011 [2011] eKLR, made reference to the provisions of the United Nations Office of the High Commissioner for Human Rights in “The Right to Adequate Housing” Article 11.1 on “Forced Evictions”, and which provides as follows:

“Appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions which directly invokes a large number of the rights recognized in both the International Covenants on Human Rights. The Committee considers that the procedural protections which should be applied in relation to forced evictions include: (a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.



16. Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.”
25. It should however be recalled, as was held by the Supreme Court in the case of *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018)* [2021] KESC 34 (KLR) (11 January 2021) (Judgment), that illegal occupation of “private land”, whether by squatters or otherwise, would not create prescriptive rights over that land in favour of the occupants. Even where the landless have occupied “public land” and established homes thereon, they would still not acquire title to the land but only a protectable right to housing over the same against the government.
26. As already stated, in this case, there is evidence on record that the Respondents were duly served with the Petition and were also subsequently served with Court orders issued herein and also Hearing and/or Mention Notices. Despite the existence of evidence of such service, none of the Respondents filed any response to the Petition nor in any way participated in the proceedings. For this reason, the Petition is therefore unopposed and the statements of fact alleged therein remain unchallenged and uncontroverted.
27. As a result of the foregoing, this Court has no reason to doubt that the Petitioner’s allegation that on the night of 25/11/2022, between or about 10 pm to midnight, about 350 policemen headed by the Respondents descended on the parcels of land cited herein, and forcefully evicted the Petitioners’ members and their families in the most atrocious way. I have also no reason to disbelieve the allegation that the police, during the eviction, meted out terror on the Petitioner’s members at night and also demolished the Petitioners’ structures, burnt some and took away some of their assets, properties and animals, as particularized in the Petition.
28. I also have no reason to doubt the allegation that some of these assets are still held at the Langas Police Station, Eldoret, that the Petitioner’s members have the right to demand for the release of the properties but that the right has been denied, violated and/or infringed. Further, I have no reason to disbelieve the Petitioner’s allegation that the value of the assets and livestock lost amounted to a sum of Kshs 4,631,500.00. Further, I have no grounds to doubt the allegation that the people evicted included men, women, children and that the eviction was carried out without prior notice or warning.
29. In the circumstances, this Court accepts the Petitioner’s submission that the actions of the Respondents were contrary to the provisions of Article 244 of *the Constitution*, which lists the objectives and functions of the National Police Service, amongst which is the paramount need to comply with the constitutional standards of human rights and freedoms in carrying out police duties.
30. Accordingly, this Court makes accepts the allegation that the eviction alleged herein took place and that, the Respondents, by their acts committed during the said eviction, violated and/or infringed the Petitioner’s and/or its members’ constitutional rights and freedoms and in particular, the right to protection of their private properties and livestock.
31. I now move to determine the question “whether the Respondents are individually and personally liable for the violations cited above and therefore, whether they should be ordered to personally compensate the Petitioner’s and/or its members for the losses and suffering suffered as a result of the said acts”.



32. According to the Petitioner, it is impossible to imagine that such acts of transgression by the Respondents' can be as a result of instructions or orders from the Inspector General of Police or any other higher authority due to the unconstitutionality, ruthlessness and unprocedural element of the acts of evicting population at night. The Petitioner submitted further that because no evidence was adduced to show that it was an operational order, the Respondents' actions aforesaid can only best be described as "frolics of their own" for which each and all the Respondents were individually and collectively responsible and ought to be held personally responsible.
33. In this case, the Petitioner did not join the Respondents' employer or superior, namely, either the National Police Service or the Inspector General of Police, respectively. The Petitioner has only sued the Respondents in their personal capacity. In other words, the Petition is against the individuals and not against the institutions in which the individuals are employed and are working under and which would, ordinarily, be the entities vicariously liable for the acts of the Respondents. The implication is that a Judgment against the institutions would be payable by the State and thus by extension, taxpayers, but a Judgment against the individuals in their personal capacities would be payable by the individuals personally.
34. In regard to personal liability of a police officer, Section 66(1) of the [National Police Service Act](#) (Act No.11A 2011) provides as follows:
- “66. Protection from personal liability
- (1) No matter or thing done by a member, employee or agent of the Service shall, if the matter or thing is done in good faith for the performance and execution of the functions, powers or duties of the Service, render the officer, employee or agent personally liable to any action, claim or demand whatsoever.
- (2) Subsection (1) shall not preclude a person from bringing legal proceedings against the Inspector-General in respect of an act or omission of the kind referred to in that subsection if the person can satisfy the court that the police officer or other person would, but for that subsection, have incurred liability for the act or omission.”
35. It is therefore the law that no act committed by a police officer shall render such officer personally liable to any action or claim as long as the act “is done in good faith for the performance and execution of the functions, powers or duties of the Service”.
36. That in appropriate circumstances, police officers may be held personally liable is not in doubt. Indeed, C. Mwita J in the case of *Miguna Miguna v Fred Okengo Matiang'i Cabinet Secretary, Ministry of Interior and Coordination of National Government & 6 others*; Kenya National Commission on Human Rights (Interested Party) [2018] eKLR, stated as follows:
- “119. The last point I should address is who should bear the damages awarded. This is because the people of Kenya enacted a constitution that envisioned observance of [the constitution](#) and the law by all. Where overzealous public servants commit wanton violation of [the constitution](#) and the law, any awards arising from such violations should not be vested on the public. They should



be borne by the responsible public officers themselves so that the public is shielded from such unnecessary costs.”

37. However, in my view, even where a Claimant is seeking orders that personal liability should be found against a police officer, it is advisable to still join his employer, in this case, the National Police Service and/or the office of the officer’s overall superior, in this case, the Inspector General of Police, as a party or parties in the suit. Indeed, Section 66(2) of the *National Police Service Act* already cited, stipulates that sub-section (1) aforesaid does not preclude a Claimant from joining the Inspector General of Police in legal proceedings in respect of an act if the Claimant can satisfy the Court that the police officer is personally liable for the act or omission.
38. For a Court to therefore hold a police officer personally liable, it must satisfy itself fully and be clear in its mind that the act or omission violating the Claimant’s rights was not done “in good faith for the performance and execution of the functions, powers or duties of the Service”. In other words, the Court must satisfy itself that the police officer committed the act while acting ultra vires his stipulated duties, otherwise described as “on a frolic of his own”.
39. While omitting the National Police Service and/or the Inspector General of Police from the suit does not at all render the suit fatal for misjoinder or non-joinder, such omission denies the Court the opportunity to hear the full version of the events leading to the eviction including whether the act was an official operation or not. In the circumstances, the absence of the Inspector General or the National Police Service in this case, leaves this Court with no opportunity to hear whether indeed the Respondents were acting under lawful instructions and/or in the course of their duty or whether they were “on a frolic of their own”.
40. In this case, the Petitioner has not produced any communication or evidence from either the National Police Service or the Inspector-General of Police disowning the actions committed herein by the Respondents or stating that the operation was undertaken without its knowledge or sanction. From my reading of the pleadings, it is clear that the Petitioner’s assertion that the Respondents were acting “on a frolic of their own” is based on speculation and mere suspicion. While in the demand letters sent out prior to filing the suit, the Petitioner addressed some of them to the Inspector General and also to the Cabinet Secretary, Ministry of Internal Security, for some reason the Petitioner opted not to join the Inspector General as a party when it came to filing the suit. Curiously, the Petitioner has not offered any explanation for this change of tact.
41. In its own words, the Petitioner states that the operation involved “a battalion of about 350 police officers drawn from all over several Counties” and that “it is unclear how Police Commandants and a County Commissioner, all of who take instructions distinctly and from separate powers and different legal regimes could assemble a cocktail of officers from different counties namely Uasin Gishu, Nakuru, Bungoma etc etc and from several police stations across the above counties for such an operation”
42. The description of the operation as given by the Petitioner, considering its sheer magnitude, meticulous arrangement and the huge resources and number of personnel mobilised, indicates that this was a major operation that transcended a mere county security issue. I doubt that an operation of such magnitude could have been undertaken without the blessings, or at least the blessings and sanction of the country’s topmost security organs. To single out the Respondents alone who are basically junior officers in the country’s general hierarchy of security command and leave out the main institutions that are in law in charge of and answerable for acts of the security apparatus in Kenya, is to me, a blunder committed by the Petitioner.



43. I also note that in none of the authorities and/or case law relied upon by the Petitioners were either the Attorney General or the Inspector General or the National Police Service as institutions, omitted as parties. Prudence dictates that the said institutions should also have been joined herein.
44. Had either or both the Inspector General of Police and/or the National Police Service been joined as parties in this matter, then even if they opted not to file any responses, this Court would have been in a vantage position to determine the issue of personal liability without the risk of being accused of making findings touching on the office of the Inspector General and/or the National Police Service without giving them a hearing. Under those circumstances, this Court could have fairly made a determination on the personal liability or lack thereof, of the Respondents as individual officers. In this case, the Inspector General and/or the National Police Service having not been joined in the suit, I find that it will be unfair to condemn the individual Respondents sued herein in light of the clear provisions of Sections 66(1) and (2) of the National Police Service Act and which in my view, the Petitioner has failed to meet.
45. A similar view was taken in the case of Gilbert Musembi v Joseph Kaloki Kula & another [2021] eKLR. Although not a Constitutional Petition, D. Chepkwony J stated as follows:

“i) Whether the Respondents are Police Officers, and if so can they be sued in their personal capacity

43. The suit before the subordinate court arose from the allegations that the Appellant was allegedly assaulted by the Respondents who he believed were crooks and as such sought for damages for pain and suffering. When the matter was heard before the trial court, it was found that the Respondents were Police Officers who had acted in the course of their duty under the National Police Service Act No. 11A of 2011 and as such ought not to have been sued in their own capacity. The trial court thus dismissed the Appellant’s claim, a result of which the Appellant filed the instant Appeal.
44. The Appellant does not agree with the trial court’s finding and has stated that the Respondents can be sued in their personal capacities. He goes on to aver that the lack of joinder of the National Police Service and the Attorney General was a technicality that could be cured by Article 159(2)(d) of the Constitution as read with Order 1 Rule 9 and Rule 10(2) of the Civil Procedure Rules on joinder and misjoinder of parties.
45. It is clear from the Appellant’s submissions at paragraph one on page 3 that he was aware that the Respondents were Police Officers who he claims battered him by raining fists, slaps and blows on him on an allegation that he had stolen goods. Further, it is clear that the Appellant admits that he was arrested on allegations of stealing and was taken to the Police Station where he was released on a Police Bond. Thus, it is evident that the Respondents acted in their capacity as Police Officers who arrested the Appellant in the course of their duties as affirmed by



Section 45 of the National Police Service Act No.11A of 2011, which provides: -

Officer deemed to be on duty

“A police officer shall for the purposes of this Act, be considered to be always on duty when required and shall perform the duties and exercise the powers granted to him under this Act or any other law at any place in Kenya where he or she may be deployed.”

46. From the evidence on record, it has been established that the Respondents were Police Officers who arrested the Appellant in the line of duty and as such protected from personal liability as provided under Section 66 of the National Police Service Act No.11A of 2011 which states that: -

.....

47. The above Section provides that if a party is to institute legal proceedings against the Police, the same should be brought against the Inspector-General in respect of any act or omission. The question then becomes, who represents the Office of the Inspector-General in legal proceedings.

48. The Office of the Inspector-General is a state office as defined under Article 260 of the Constitution of Kenya which provides: -

“State”, when used as a noun, means the collectivity of offices, organs and other entities comprising the government of the Republic under this Constitution;

“State office” means any of the following offices—

.....

p) Inspector-General, and the Deputy Inspectors-General, of the National Police Service; or

.....

49. Under Article 156 of the Constitution the Government or a State Office is represented in legal proceedings by the Attorney General whose functions are inter-alia;

.....

4) The Attorney-General-

a) is the principal legal adviser to the Government;



- b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and
- c) shall perform any other functions conferred on the office by an Act of Parliament or by the President.”

50. It is now established that Inspector-General’s office is a state office under the Government, and for any civil proceedings to be brought against it, Order 1 Rule 11 of the Civil Procedure Rules provides that parties should be guided by Section 12 of the [Government Proceedings Act](#) which provides: -

“Parties to proceedings

- (1) Subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney-General, as the case may be.”

51. I therefore, do not agree that misjoinder of the Inspector-General of Police and the Attorney General is a technicality that can be cured by Article 159(2)(d) of [the Constitution](#) as read with Order 1 Rule 9 and Rule 10(2) of the Civil Procedure Rules as alluded to by the Appellant. Section 12 of the [Government Proceedings Act](#) makes it mandatory that a state agency be represented by the Attorney-General.

52. As shown herein, it was thus paramount that the Appellant sue the Inspector-General of Police and its legal adviser, the Attorney-General, and hence agree with the trial court that the Respondents herein were not the proper parties in the suit.”

46. Similarly, Mbaru J in the case of *Kizito M. Lubano v Kemri Board of Management & 8 others* [2015] eKLR

50. The other question is whether there is the non-joinder of KEMRI as a crucial party herein. That KEMRI was the employer of the Petitioner but has not been joined herein as a party and thus fatal to the suit. All the Respondent strongly made submissions in this regard noting the constitutive Act for KEMRI, the Science and Technology Act, that KEMRI being a body corporate with perpetual succession has power to sue and be sued in its name. In this regard the Employment and Labour Relations Court (Procedure) Rules (the Rules) define who a Party to any proceedings is;

“Party” means a person, a trade union, an employer, employer’s organization or any corporate body directly involved or affected by an appeal, or claim to which the



Court has taken cognizance or who is a party to a collective agreement referred to Court for registration.

51. I am keen on the part that such a party includes that person or entity directly involved or affected by an appeal, or a claim to which the Court has taken cognizance. Such a party therefore has to be assessed as one to be included in proceedings before this Court to ensure the ends of justice are achieved. The nature of proceedings before this Court are that in labour relations, the Court should not overly rely on technicalities at the expense of substantive justice. Where the Petitioner has sought for orders against the parties before court, such prayers shall be analysed on their merit and where a party that is crucial to the claim but has not been joined herein, no orders can be made against such an entity as they are not a party to the suit in the first instance. However, where the Court finds it necessary and just to direct the enforcement of orders of the Court and that such an enforcement would only be possible where a particular party named or not named as a Respondent is necessary, nothing stops the course of justice to so direct.

52. The above finding is not a departure from the position long held in the Case of Werrot and Company Ltd & others versus Andrew Douglas Gregory & Others, HCCC No. 2363 of 1998, LLR 2828;

For determining the question of who is a necessary party there are two tests; (i) there must be a right to some relief against such a party in respect of the matter involved in the proceeding in question and (ii) it should not be possible to pass an effective decree in the absence of such a party.

53. The question should then be whether the current respondents are properly joined herein and if so whether such presence is necessary in order to enable the Court effectually and completely adjudicate upon and settle all the questions involved in the suit. There must be a demonstration by the Petitioner that there is a direct and real interest in the reliefs sought against the listed respondents and thus necessary parties herein. See Benjamin Kipketer Tai versus Kenya Commercial Bank, HCCC No.87 of 2003 (Kisumu) [2003] LLR 8071. In this regard therefore I wish to refer to Amon –vs- Raphael Tuck and Sons Ltd [1956] 1 ALL E.R. AT Page 273 it was held inter alia that;

“... A party may be joined in a suit, not because there is a cause of action against it, but because that party’s presence is necessary in order to enable the Court effectually and competently adjudicate upon and settle all the questions involved in the cause or matter.”

54. In this case therefore, and noting the decision in Benjamin Kipketer Tai Case and in Amon case, the non-joinder of KEMRI is not fatal to the suit. The Petitioner has set out the orders sought against each Respondent and granted the history of the matter, he has laid a background relating to each Respondent with regard to the Petition herein. The 1st Respondent manages KEMRI which is a state corporation and issued the letter of dismissal; the 2nd Respondent is the chief officer of KEMRI and acted for and on behalf of such body; 3rd Respondent is the parent ministry with regard to KEMRI while the 4th Respondent is the chief officer in charge of the 3rd respondent; the 5th Respondent is a constitutional commission with the mandate of ensuring compliance with chapter six of *the Constitution* with regard to leadership and integrity; the 6th Respondent supervised the petitioner; the 7th Respondent is head of KEMRI human resource function while the 8th Respondent is the legal advisor of the national government; and the



9th Respondent as an independent commission on administration of justice addressed this matter before it was filed in court. Each party herein is clearly assigned a role with regard to the background of the Petition even where there may be no specific payer against such a party. Where KEMRI is not joined and the Court establishes that there is a good case against such a body, there is discretion to order as appropriate. See *Marekere University versus St. Mark Education Institute Ltd & Others*, Kampala High Court Civil Suit No.378 of 1993 [1994] KALR 26.

The fact that the plaintiff chose to file a suit against the two defendants only, implicitly meant that it did not sue anyone else ... it is clear that it has not indicated that it wishes to sue any other party.

55. I hasten to add, where a suit is suitable before court, non-joinder of a party cannot remove responsibility from other parties sued as respondents. An omission of any party as Respondent cannot be a justification by other parties that the suit should not move simply because such other party is not joined. See *Busienci versus Transnational Bank (K) Ltd* [2002] 1 KLR 784. Where the Court is satisfied that there is a case against the respondents before court, such a case must be addressed on its merits. This Court recognises that employment and labour relations operate in an intricate manner and in a majority of cases, an employee will know who their supervisor is and might never know how the entity under which they work under is legally registered, even where the case was the converse and such an employee has all the requisite details, fair labour relations dictates that the Court operate without undue regard to technicalities and ensure substantive justice. That is my reading of the provisions of Article 41 and 159 of *the Constitution* read together with section 20(1) of the *Employment and Labour Relations Court Act*. To allow the respondents escape responsibility where such exists, would be tantamount to rendering fair labour practice and fair industrial relations ineffective.
56. I therefore find the joinder of the respondents herein is necessary as this will enable the Court to effectually and completely adjudicate upon and settle all questions involved in the petition. Where there is an omission to join KEMRI as a right party, such non-joinder does not remove responsibility from the other respondents. Such non-joinder does not render the Petition fatal.
47. I am persuaded with the above views of the Judges and find that where a Claimant is aggrieved by the acts or omissions of an individual police officer and the Claimant wishes that such officer be held personally liable to compensate the Claimant, then the prudent thing to do is to sue and join, as co-Respondents, such officer together with the office of the Inspector General of Police or even the National Police Service. This is because insofar as the question whether to hold the individual officer personally liable is concerned, the latter are parties “directly involved or affected by” and therefore “necessary parties” who should be given a hearing.
48. The Claimant would then be at liberty to adduce evidence demonstrating that the individual officer should be held personally liable to compensate the Claimant. The co-Respondents would then, between them, shed light on whether the officers were on “a frolic of their own” but at the end of the day, it is to be left to the Court to determine whether indeed the officer should be held personally liable. In other words, under Section 66(1) of the *National Police Service Act*, liability for acts committed by a police officer is prima facie against the Inspector General of Police and only where there exists satisfactory reasons would a Court then bypass or excuse the Inspector General and proceed to hold the individual officers personally liable. A Claimant seeking such recourse must therefore convince the Court of the existence of such sufficient grounds to support the attributing of personal liability against the officer. To rule otherwise would be to ignore the logic and spirit behind shielding of public officers



from personal liability for actions committed while in the course of their duty as recognized under Section 66(1) aforesaid.

49. Although therefore I have found that the constitutional rights of the Petitioner and/or that of its members was violated and/or infringed, in the circumstances of this case, I am not satisfied that sufficient grounds have been presented to support the giving of an order that the Respondents be compelled, in their individual capacities, to personally pay damages to the Petitioner.

Final Orders

50. In the premises, the Petition only partially succeeds and I make orders as follows:

- i. A declaration is hereby issued that the ruthless and vicious manner in which the Petitioner and/or its members, including children and the old, were evicted at night by a contingent of police officers without prior Notice or warning, from the parcels of land known as Land Reference Numbers 9606, 9607, 9608, 745, 742/2, 7739/7R, 12398, 10793, 10794 and 11481 LR Nos. PIONEER/NGERIA BLOCK1 (EATEC) 7070, 7068, 3395, 5903, 2454, 476, 1860, 475, 5497, 5494, 5492, 5489, 5486, 1384, 1383, 5484, 474, 472, 5485, 5487, 5490, 5488, 5491, 5493, 1861, 5496, 1862, 5491, 473, 477, 471, 1353, 1375, 1374, 1379, 1378, 1380, 1381, 1382, 1852, 1386, 1385, 85, 5495, 5902 violated and/or infringed the Petitioner's constitutional rights and freedoms as enshrined under, *inter alia*, Articles 10, 19, 20(1), 20(2), 21(1), 24(1), 25(c), 27, 28 (c), (d), (f), 31, 40(3), 47, 73, 232 of *the Constitution* of Kenya and in particular the violated and/or infringed the rights of the Petitioner and/or that of its members, to protection of their private properties and livestock from arbitrary deprivation, the eviction having been done without following the due process of the law and without following the constitutional dictates above.
- ii. This declaration relates only to the events of the said night of 24/11/2024 and has no bearing or effect whatsoever on the question of ownership of the properties referred to above which question is outside the jurisdiction of this Court.
- iii. The Respondents are hereby ordered to surrender back to the Petitioner and/or its members, all property, including livestock, confiscated or seized from the Petitioner or its members during the said eviction.
- iv. It is hereby further ruled that the Petitioner has failed to demonstrate to the required standards, as stipulated under Section 66 (1) and (2) of the *National Police Service Act* that the Respondents should be ordered to personally compensate the Petitioner and/or its members for the said violations and/or infringement of their constitutional rights by personally paying damages to the Petitioner and/or its members. In view thereof and since the Respondent's Principals corporate, namely, the Inspector General of Police or the National Police Service or even the Attorney General have not been joined as parties in this Petition, there is no appropriate Respondent before the Court against whom an order to pay damages or costs of the suit to the Petitioner can be made.
- v. In the circumstances, I also make no order on costs.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 31ST DAY OF MAY 2024

.....

WANANDA J. R. ANURO

JUDGE



Delivered in the Presence of:

Ms. Kiget h/b for Arusei for Petitioner

N/A for Respondents

