



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

CONSTITUTIONAL PETITION NO.2 OF 2011

**IN THE MATTER OF: ARTICLES 2(6), 22(2) (a), (3)(d), 23(1), (3) & 165 (3) (a), (b), (d)
(I), (II) OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 26(1), (3), 27(1), (2), 28, 29 (c), (d), (f), 35, 40(1) (a), (b),
(3), (4), 43 (1) (b), (c), (f), 45(1), 47 (1), (2), 50(1), 53 (C) (d), (2) & 57 (b) and (c) OF THE
CONSTITUTION OF KENYA**

BETWEEN

IBRAHIM SANGOR OSMAN.....PETITIONER

**(ON HIS OWN BEHALF AND ON BEHALF OF 1, 122 EVICTEES OF
MEDINA LOCATION, MUNICIPAL COUNCIL OF GARISSA)**

~VS~

- 1. THE HON MINISTER OF STATE FOR PROVINCIAL ADMINISTRATION &
INTERNAL SECURITY.....1ST RESPONDENT**
- 2. THE MUNICIPAL COUNCIL OF GARISSA.....2ND RESPONDENT**
- 3. THE HON. MINISTER FOR LANDS.....3RD RESPONDENT**
- 4. THE HON. ATTORNEY GENERAL.....4TH RESPONDENT**

AND

**GLOBAL INITIATIVE FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS
SOCIO-ECONOMIC RIGHTS INSTITUTE COMMUNITY LAW CENTRE**

**CENTRE FOR ECONOMIC AND SOCIAL RIGHTS CENTRE FOR EQUALITY
RIGHTS IN ACCOMODATION SOCIAL RIGHTS ADVOCACY CENTRE**

MALCOLM LANGFORD.....INTERVENING AS *AMICI CURIA*

JUDGMENT

This Petition was filed on 23/2/2011 by the Petitioner on his behalf and on behalf of 1,122 persons (all hereinafter referred to as (“the Petitioners”)) who were evicted from Bularika, Bulamedina, Sagarui, Naima, Bulanagali and Gesto (commonly known as “Medina location”) on 24th, 30th and 31st December 2010 by the officers of 1st and 2nd Respondents. Those evicted included children, women and the elderly. Some of the children were school-going. The Petitioners were evicted from unalienated public land in respect of which title deeds have not been issued. The land is within the jurisdiction of the 2nd Respondent. It had been occupied by the Petitioners since 1940s, initially as grazing land but in the 1980s they put up permanent and semi-permanent dwellings in which they were living prior to eviction.

Sometimes in December 2010 word started going round that the local provincial administration and the 2nd Respondent were planning to evict the Petitioners. On 3/12/2010 the District Commissioner, Garissa by name Samson Macharia came to the location in a GK Land-rover. He came along with a bulldozer and four saloon cars. In the vehicles were administration police officers and a group of unidentified youths. The District Commissioner informed the Petitioners that he had come to prepare the ground for the construction of a ring-road and warned that any homestead that fell along the road would be deemed to be on Government land and would be demolished. The team proceeded to mark the area where the purported road would pass, and left thereafter. There was no further communication. The Petitioners made numerous attempts to have audience with the District Commissioner and the officers of the 2nd Respondent but were not successful.

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On 24/12/2010 a group of armed administration police officers in riot gear and unidentified youths arrived under the command of the District Officer, Garissa Central and, without warning, begun to demolish the houses and structures of the Petitioners which they claimed to be on Government land. This left the Petitioners homeless. On 30th and 31st December 2010 police officers came with the Deputy Mayor of the 2nd Respondent by name Ismael Yusuf and continued with the exercise. On 31st December, 2010 the Petitioners had become so agitated that they were now resisting the demolitions. The police officers used tear gas and physical violence to evict and eject them.

No written notice had been served on the Petitioners. The Respondents had no court order, and they did not engage the Petitioners in any consultation or explanation. In all, 149 houses and structures were demolished. The Petitioners were forced to live and sleep in the open or in make-shift temporary structures and were exposed to the elements and vagaries of nature, health risks, insecurity and lack of the basic human necessities such as food, water and sanitation. Several children had to drop out of school as their parents had to seek alternative accommodation elsewhere. Others had to move from the nearby Tumaini Primary School and go to other schools that included Yathrib Primary School. 26 of the Petitioners were over 60 years in age and had to endure unbearable conditions in the open without basic human facilities.

On 12/1/2011 the Petitioners wrote to the 3rd Respondent about the evictions and the conditions under which they were living. He promised to investigate but nothing has been done since. On 11/2/2011 the District Commissioner Garissa came with a squad of administration officers and threatened to demolish the temporary structures that the Petitioners had put up. It is at that point that the Petitioners filed this petition under articles 22(1), (2) and (3), 23 (1) and (3), 165 (1) and (3) and others, of the Constitution of Kenya 2010 and Rules 20 and 21 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules 2006 and obtained an interim order of injunction to restrain the Respondents, and all those acting under them, from evicting them or demolishing their houses and structures without a court order and provision of suitable alternative accommodation. They further obtained an interim mandatory injunction compelling the Respondents to provide them with alternative housing, shelter/accommodation, food, clean

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and safe drinking water, sanitary facilities and health care. They have since been allowed to return where their homes were demolished.

The petition was served on the Respondents who did not file any response. It follows that the matters in the foregoing that were sworn to in the supporting affidavit of Ibrahim Sangor Osman were not controverted and should be accepted.

The petition sought the following orders and declarations:

- a) that the forcible, violent and brutal eviction through demolition of homes of the Petitioners without according them alternative shelter and/or accommodation leaving them to live in the open exposed to the elements and vagaries of nature is a violation of their fundamental right to life guaranteed by article 26 (1) and (3) of the constitution of Kenya, 2010 and Article 11 of the ICESCR;
- b) that the forcible, violent and brutal eviction through demolition of homes of the Petitioners without any warning, court orders, any or reasonable notice in writing or availing them information regarding the evictions and without according them alternative shelter and/or accommodation and leaving them to live in the open exposed to the elements and vagaries of nature is a violation of their fundamental rights to inherent human dignity and the security of the person guaranteed by articles 28 and 29 (c), (d) and (f) of the Constitution of Kenya, 2010;
- c) that the forcible, violent and brutal eviction through demolition of homes of the Petitioners without warning, any or reasonable notice in writing or availing them information regarding the evictions is a violation of their fundamental right of access to information guaranteed by article 35(1) of the Constitution of Kenya, 2010;

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- d) that the forcible, violent and brutal eviction through demolition of homes of the Petitioners and the destruction of the building materials and their household goods in the process, without court order/s and without according them an opportunity to salvage any of their belongings is a violation of their fundamental right to protection of property guaranteed by article 40 (1), (3) and (4) as read with article 21 (3) of the Constitution of Kenya;

- e) that the forcible, violent and brutal eviction through demolition of homes of the Petitioners without according them alternative shelter and or accommodation and leaving them to live in the open exposed to the elements and vagaries of nature is a violation of their fundamental rights to accessible and adequate housing, reasonable standards of sanitation, health care services, freedom from hunger and the right to clean and safe water in adequate quantities guaranteed by article 43 (1) read with articles 20 (5) and 21 (1), (2) and (3) of the Constitution of Kenya 2010;

- f) that the violent and brutal eviction through demolition of homes of the Petitioners without any court order/s, warning, any or reasonable notice in writing or availing them information and reasons regarding the demolitions and evictions is a violation of their fundamental right to fair administrative action guaranteed by article 47 of the Constitution of Kenya 2010;

- g) that the forcible, violent and brutal eviction through demolition of homes of the Petitioners without according them alternative shelter and/or accommodation and leaving to live in the open exposed to the elements and vagaries of nature is a violation of their fundamental rights to physical and mental health, and the fundamental right to physical and moral health of the family under articles 16 and 18 of the ACHPR read with article 2 (6) of the Constitution of Kenya 2010;

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- h) that the forcible, violent and brutal eviction through demolition of homes of the Petitioners without according their children alternative shelter and/or accommodation and leaving the children to live in the open exposed to the elements and vagaries of nature is a violation of the fundamental rights of children to basic nutrition, shelter and healthcare and protection from abuse, neglect and all forms of violence and inhuman treatment and to basic education guaranteed by article 53 (1) (b), (c), (d) and (2) read together with article 21 (3) of the Constitution of Kenya 2010 and article 28 of the ACHPR read with article 2 (6) of the Constitution of Kenya 2010;
- i) that the forcible, violent and brutal eviction through demolition of homes of the elderly persons among the Petitioners without according them alternative shelter and/or accommodation rendering them to live in the open exposed to the elements and vagaries of nature is a violation of the fundamental rights of the elderly persons to the pursuit or personal development, to live in dignity, respect and freedom from abuse and to receive reasonable care and assistance from the State guaranteed by article 57 (b), (c) and (d) as read with article 21 (3) of the Constitution of Kenya 2010;
- j) an order of permanent injunction restraining the Respondents, their officers, agents and/or servants from evicting the Petitioners appearing on annexures “ISO1” and “ISO2” and from carrying out any more demolitions of homes in the areas called Bularik, Bula Medina, Sagarai, Naima, Bulla Nasal and Gesto within the Municipal Council of Garissa without provision of alternative shelter/accommodation and/or housing mutually agreed upon with the Petitioners;
- k) an order of mandatory injunction compelling the Respondents to provide the Petitioner and the 1,122 co-evictees appearing on annexures “ISO1”

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and “ISO2” with suitable and permanent alternative land, shelter and/or accommodation;

- i) that the Petitioners are entitled to general, aggravated, exemplary and punitive damages against the Respondents jointly and/or severally;
- j) such general, aggravated, exemplary and punitive damages as may be assessed by the Honourable court; and
- k) costs of this petition.

The Petitioners were represented by Mr. Mbugua Mureithi. The *Amici Curia* were represented by Mr. Odindo Opiata. Counsel filed written submissions which I found quiet relevant and useful. I am grateful to them for the authorities cited and the international instruments that they referred to. These international instruments are important because under article 2(5) and (6), the general rules of international law and any treaty or convention ratified by Kenya form part of the laws of Kenya.

The Constitution of Kenya entrenches both civil and political rights and also social and economic rights, and makes both justiciable. It is an acknowledgment of the fundamental interdependence of these rights. The interdependence is out of the realization that people living without the basic necessities of life are deprived of human dignity, freedom and equality. Democracy itself is enhanced when citizens have access to the basic necessities of life. Article 19 (2) indicates that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to build a society which is based on social justice and in which the potential of each person is freed.

Article 20 provides that the Bill of Rights of the Constitution applies to all law and binds all State organs and all persons, and by article 21 (1), it is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights. Under article 21 (3), all State organs and all public officers have the duty to

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address the needs of vulnerable groups within the society. These groups include women, older members of society and children. Under article 28 every person has inherent dignity and to have that dignity respected and protected. Article 29 provides that every person has the right to freedom and security of a person, and that includes the right not to be subjected to any form of violence from either public or private sources.

The Petitioners were evicted from unalienated public land which they had occupied since the 1940s and on which they had their residences. The eviction was violent and forceful as the police and the youths were using bulldozers, came in riot gear and used tear gas when the Petitioners sought to resist these actions. The Petitioners were left without any alternative place to reside. They were left in the open without any shelter, food, water, sanitary facilities or health care. The Petitioners were not accorded any opportunity to salvage any of their property, building materials and household goods before and after the demolitions. The Petitioners included women, children and the elderly. The education of the children was interrupted.

Under article 43, the Petitioners were entitled to the fundamental rights to accessible and adequate housing, and to reasonable standards of sanitation, health care, clean and safe water in adequate quantities and education. Under article 47 the Petitioners were entitled to be given written reasons regarding these evictions. What this means is that, prior to these evictions the Petitioners had to be consulted and provided with adequate and reasonable notice. Adequate information on the reasons of the proposed evictions and the alternative purposeful the land was to be used had to be indicated. This information was to be given in obedience of article 35 which guarantees the right to information. The evictions were then supposed to be carried out in the manner that respected human dignity, right to life and the security of the affected.

Kenya ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) on 3/1/1976 and consequently became bound to respect, protect and enforce the rights therein, including the right to adequate housing and the related prohibition of forced evictions as guaranteed by article 11 of the Covenant and the right to education as guaranteed under article 13. The UN Committee on Economic Social and Cultural Rights (CESCR), mandated with

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monitoring compliance with the ICESCR, provides a detailed analysis of the prohibition on forced eviction under international law. Forced eviction is defined by the Committee as:

“The permanent or temporary removal against their will of the individuals, families and/or communities from the home and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.”

The ICESCR has gone on to clarify that:

“Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment or other threats. State Parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups.”

For the evictions to be justified under the ICESCR, they must be carried out in the most exceptional circumstances after all feasible alternatives to eviction are explored in consultation with the affected community and after due process protections are afforded to the individual, group or community.

The ICESCR imposes an additional obligation upon governments that no form of discrimination is involved in any eviction nor should any eviction render persons homeless or vulnerable to other human rights violations 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.

Kenya ratified the International Covenant on Civil and Political Rights (ICCPR) on 23/3/1976. By its article 17, forced evictions are prohibited. The Human Rights Committee, which monitors compliance of the Covenant, addressed forced evictions in Kenya in 2005 and found that forced evictions:

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“arbitrarily interferes with the Covenant rights of the victims of such evictions, especially the rights under article 17 of the Covenant.”

It went on to say that the Government should:

“develop transparent policies and procedures for dealing with evictions and ensure that evictions from settlements do not occur unless those affected have been consulted and appropriate arrangements have been made.”

Article 8 of the Universal Declaration of Human Rights and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted by the United Nations General Assembly (Resolution 60/147 of 21/3/2005) state that a proper remedy for forced evictions is to return the victims as close as possible to the *status quo ante*. They state that:

“restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law..... occurred.”

The Supreme Court of the Republic of South Africa provides persuasive authority in this regard. In the case of **Tswelopele Non-Profit Organization & Others v City of Tshwane Metropolitan Municipality, 2007 SCA 70 (RSA)**, the court considered forced eviction as a violation of the right to have access to adequate housing as enshrined in article 26 (1) of the Constitution of the Republic of South Africa. In doing so, the court held that the proper remedy was the resolution of the *status quo ante* and ordered that the occupiers must get their shelters back and that the Respondents should, jointly and severally, be ordered to reconstruct them.

I have considered the facts of this case against the provisions of the Constitution of Kenya 2010, the international instruments that Kenya has ratified and the persuasive authorities that counsel cited to me during this application. I find that the Petitioners were not given a written notice to tell them that they were going to be evicted. The Respondents came on 3/12/2010 to say that

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they wanted this land for a road and returned on 24/12/2010 to begin the evictions. 21 days' notice for people who had lived on this land since the 1940s and had put up permanent and other dwellings thereon was both insufficient and unreasonable. In any case, this was not a written notice and they were not given adequate information about the need to develop the road in the area. There was no discussion with them about the usefulness of this road *vis-a-vis* their occupation of the land. There was no indication that they would be moved to some alternative settlement. (**Joe Slovo Community, Western Cape v Thubelisa and Others [2009] ZACC 16.**) No such settlement was eventually provided. The Petitioners were merely thrown out, as it were, without care about where they were going. The eviction threw them into an open, hostile and shelter-less environment where there was no single basic necessity of life.

Among the Petitioners were children, women and the elderly. There was no special, or any, consideration for them. The education of the children was completely disrupted. When the Petitioners sought to discuss what was awaiting them with a view to finding a solution, the Respondents were not available. The Petitioners were entitled to information from their Government regarding this whole exercise but were snubbed.

I consider that this forced eviction was a violation of the fundamental right of the Petitioners to accessible and adequate housing as enshrined in article 43(1) (b) of the Constitution of Kenya 2010. More important, the eviction rendered the Petitioners vulnerable to other human rights violations. They were rendered unable to provide for themselves. The eviction grossly undermined their right to be treated with dignity and respect. The Petitioners were thrown into a crisis situation that threatened their very existence.

I find that the Petitioners are entitled to the declarations in (a), (b), (c), (d), (e), (f), (g) and (i). Further, by order of mandatory injunction, the Respondents are compelled to return the Petitioners to the land from which they were evicted. The Respondents are further commanded to reconstruct reasonable residences and/or alternative accommodation and/or housing for the Petitioners. Such residences, accommodation and/or housing should have all the amenities, facilities and schools that were subsisting on the land at the time of the evictions and demolitions, or should be mutually agreed upon. There will be a permanent injunction to restrain

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the Respondents from any such future evictions and/or demolitions unless and until the law is followed.

The Petitioners asked for general, aggravated, exemplary and punitive damages against the Respondents jointly and severally. I note that the orders above will to some extent restore the Petitioners to their previous situation. I consider that the Petitioners did not provide information regarding the value of what was lost in the evictions, or what they have spent so far in terms of seeking to survive under their present circumstances. These, however, should not minimize the gravity of the matter and the violations of the fundamental rights of the Petitioners by the Respondents. The petition was not defended. And yet, the court cannot assume that the Respondents have a limitless purse. It is in these circumstances that I have decided that each of the 1,123 Petitioners shall get a global figure of Ksh.200,000/= in damages from the Respondents, jointly and severally. The Respondents shall then pay the costs of the petition.

Dated and signed at Bungoma on this 3rd day of November, 2011.

A.O. MUCHELULE

JUDGE

Signed and delivered at Embu on this 16th day of November, 2011.

JUDGE