



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**PETITION NO. 16 OF 2013**

**IN THE MATTER OF ARTICLES 1,2,3,10, 19,20,21,22,23,26,28,40,43,47,48,73,159,165(3)(A), 258  
AND 259 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF VIOLATION OF THE RIGHT TO PROPERTY, DIGNITY AND PROTECTION OF  
FREEDOM AND SECURITY OF PERSON**

**BETWEEN**

**KOKWO MULTIPURPOSE**

**CO-OPERATIVE SOCIETY ..... PETITIONER**

**AND**

**PRINCIPAL SECRETARY,**

**MINISTRY OF LANDS HOUSING**

**AND URBAN DEVELOPMENT .....1ST RESPONDENT**

**COMMISSIONER FOR LANDS ..... 2ND RESPONDENT**

**KENYA FOREST SERVICE ..... 3RD RESPONDENT**

**ATTORNEY GENERAL..... 4TH RESPONDENT**

**J U D G M E N T**

**INTRODUCTION**

1. The petitioner is a Co-operative Society registered under the Co-operative Societies Act Cap 490 Laws of Kenya (Petitioner). The petitioner brought this petition against the respondents

claiming the following reliefs:-

(a) A declaration that the Government action of taking money from the applicant, razing down houses of the applicant's members, issuing short quit notice, and refusing to refund the applicant's money violates the right to property, right to dignity, equality and the security of person and therefore unconstitutional.

(b) An order that the first and fourth respondents do pay each of the applicant's 913 members general damages for violation of their rights to property, right to dignity, equality and security of person and compensation for the property destroyed.

(c) An order of mandamus compelling the first and fourth respondents to refund **Kshs.10,988,644/=** with interest at **14% per annum** from the year 2006 to the applicant within a period of 30 days from the date of judgment failure of which they be committed to jail for 6 months for contempt of court.

(d) A declaration that the respondents and the Government of Kenya are escapists and have abdicated their role to protect the citizens of Kenya.

(e) A declaration that the first, second and third respondents have flagrantly abrogated the constitution and hence unfit to hold public office.

(f) The petitioner be paid costs of this petition.

2. The first, second and fourth respondents entered appearance on 23/9/2013 but never filed any response to the petitioner's petition despite the court indulging them on a number of occasions. It is only the third respondent who filed a replying affidavit to the petitioner's petition.

### **PETITIONER'S CASE**

3. The petitioner has **913 members**. On diverse dates between **23/8/1995** and **3/9/1999** the petitioner was allocated four parcels of land for which it paid the second respondent. On 23/8/1995, the petitioner was allocated **LR. No. 7404**. It paid **Kshs.1,518,763/=** to the second respondent. On 24/9/1996, it was allocated **LR. No. 6992/2**. It paid **Kshs.1,351,294/=** to the second respondent. On 9/2/1999, the petitioner was allocated **LR. No.6950/3**. It paid **Kshs.5,155,900/=** to the second respondent. The second respondent later allocated **LR. No. 9433** to the petitioner in replacement of **LR. No. 7404** which was said to have been given to different persons. The petitioner was too allocated **LR. No. 6469** for which it paid **Kshs.789,540/=**.

4. The petitioner then settled its members on the parcels allocated to them which they developed. The second respondent was thereafter accused of wrongly issuing allotment letters to the petitioner. The District Environment Committee of Trans-Nzoia met on 3/5/2006 whereby it was resolved that the allocations be reversed. On the following day that is on 4/5/2006, the third respondent issued a 24 days notice to the petitioner's members to move out of the land which had been allocated to them, branding its members illegal squatters.

5. The petitioner moved to Kitale High Court where it filed an application seeking to stop their eviction from the allocated parcels. The High Court granted stay orders but that notwithstanding, the third respondent proceeded to evict the petitioner's members. The petitioner's members houses were razed down. Other houses were destroyed which rendered them homeless. The petitioner's members were

never refunded their **Kshs.10,988,644/=** which they had paid to the second respondent. The petitioner therefore contends that the constitutional rights of its members were violated and that is why they are seeking the reliefs which have been enumerated hereinabove.

### **THIRD RESPONDENT'S CASE**

6. The third respondent contends that the petitioner's petition is misconceived and that it does not raise any constitutional issues which will require the intervention of this court. The third respondent further contends that the parcels of land which the petitioner purported to buy were Gazetted Public Forests which were not available for allocation. The third respondent further contends that the petitioner was formed by certain individuals for purposes of grabbing public land. Part of the land which the petitioner purported to buy belonged to the late Major Kipsaita who owned land next to Mount Elgon Forest Reserve. Major Kipsaita was given alternative land at Kitalale. He surrendered his plot at Mt. Elgon which was taken over and gazetted as part of Mount Elgon Forest. The allocation of the same land by the second respondent was therefore illegal as neither the President of the Republic of Kenya, Government entity nor the courts can alienate Government Forest without following the due process of law.

7. The third respondent therefore contends that there can be no compensation where the transaction involved allocation of forest land which was illegal in itself. The third respondent contends that forests have to be conserved for the present and future generations and that has been the policy of the third respondent. The third respondent states that there can only be refund of money paid in certain instances but not compensation because the petitioner was engaged in an illegal deal.

### **ANALYSIS OF EVIDENCE**

8. The petitioner is alleging that its right to property as enshrined in **Article 40** of the Constitution has been violated. **Article 40(1)** provides as follows:-

**“Subject to Article 65, every person has the right, either individually or in association with others to acquire and own property:**

**(a) of any description; and**

**(b) in any part of Kenya”.**

There is no dispute that the petitioner was allocated parcels of land by the second respondent. On 19/2/1999 the petitioner was allocated **LR. No. 6950/3**. It paid **Kshs.3,100,000/=** for the parcel on 10/7/2000. A further payment of **Kshs.2,055,900/=** was made on 26/7/2000 for the same parcel. This is according to a copy of letter of allotment and copies of receipts annexed to the supporting affidavit of the petition. A grant was subsequently issued to the petitioner.

9. On 24/9/1996, the petitioner was allocated **LR. No. 6992/2**. It paid a bankers cheque of **Kshs.400,000/=** on 29/1/2001 and a further payment of **Kshs.1,351,294/=** on 5/3/2001. On 23/8/1995 the petitioner was allocated **LR. No. 7404**. It paid **Kshs.200,000/=** for the land on 13/2/2001. This plot was however exchanged with **Plot No. 9433**. The petitioner did not provide a copy of allotment letter for **Plot No. 6469** but there is a copy of receipt which shows that it paid **Kshs.789,450/=** for this plot on 1/3/2001. The total amount paid for all these plots was **Kshs.7,896,644/=**. There was neither evidence given to controvert the petitioner's evidence nor any denial that the amount was paid.

**10.** The petitioner's members took possession of the land allocated to them. They settled until they were asked to move out of the parcels in 2006. The third respondent is contending that the parcels in issue were not available for allocation and the allocation of the same by the second respondent to the petitioner was unlawful. **LR. No. 6950/3** had been declared to be part of Mount Elgon Forest vide **Gazette Notice No. 359** of **19/12/1986**. This was therefore public land which could not be alienated unless otherwise through lawful means which would have included degazettment before the same is available for allocation. The petitioner was allocated this parcel on 19/2/1999. This was thirteen years after the same land had been declared to be a Government Forest. The allocation of this land by the second respondent was therefore unlawful as the procedure for allocation of Government forest was not followed. This was the same case with other parcels which were Government forests. The petitioner is not denying that any of the parcels given to them were Government Gazetted Forests.

**11. Article 40 (6)** of the Constitution provides that rights under **Article 40** do not extend to any property that has been found to have been unlawfully acquired. In the present case, it is clear that the petitioner was allocated Government forest land. The petitioner, cannot therefore claim that any of its rights under **Article 40** of the Constitution has been violated.

**12.** The petitioner is alleging that its members right under **Article 28** were violated. **Article 28** deals with human dignity. The petitioners advocate referred to a case from the Supreme Court of India in the case of **Francis Colarie Mullin -vs- Administrator Union Territory for Delhi [1981] SCR (2) 516** where it was held that the right to live with human dignity and all that goes with it, namely the bare necessities of life such as adequate nutrition, clothing and shelter over the head, facilities for reading and writing, expressing oneself in diverse forms and freely moving about and mixing and mingling with fellow human beings is the pillar of all the other rights.

**13.** In the case cited above, the Supreme Court Judges were stating what goes with human dignity. The petitioner says that it has 913 members. In a constitutional petition a petitioner is expected to state in what manner his constitutional right has been violated. The violation must be explained with specificity. In the instant case the petitioner claims in general terms that its members were evicted in an inhuman manner. Their houses were razed down and others demolished. It is not clear whose house or houses were demolished. There are 913 members of the petitioners. There was only one photograph of some partly demolished house which was exhibited. The deponent of the further affidavit to the petitioner's petition alleges that he was tortured. He annexed a photograph showing freshly scarred buttocks. He states that he was tortured and as a result, he was hospitalized. There was no single medical document produced to confirm that he was indeed tortured or that he is the one appearing in the photograph. The photograph showing the scarred buttocks does not show the face of the victim. It is therefore impossible to connect it with the alleged victim. If indeed the victim was tortured as he claims, nothing would have been easier than availing medical reports to confirm the allegation.

**14.** The petitioner's members were given notice to vacate the forest land. This notice was general and included all squatters who were occupying Government forests. There is no evidence that following the expiry of the notice there was any eviction which was conducted in an inhuman and degrading manner. There is only one photograph of a partly demolished permanent house. There is no evidence that the photograph was taken from a house which lay on any of the properties. The rest of the photographs show temporary structures in the process of construction. In the absence of any evidence of any mistreatment or demolitions, I do not find that any of the petitioner's members constitutional right to dignity was violated. Even if notice to quit the forest land was short, there is no evidence that the petitioner's members had invested in the properties such that they could not move out within the required period. There is no allegation that the 913 petitioner's members did not have any alternative place to go to so as to call for the Government to give them alternative place to settle once they were out of the

forest land. Documents by the petitioner show that the petitioner's members were well off and were even contemplating going into business of saw milling. The petitioner had other parcels of land which were in the process of subdivision.

**15. Article 43** of the Constitution deals with Economic and Social Rights. This Article binds the state to provide appropriate social security to persons who are unable to support themselves and their dependants. As I have said hereinabove, the petitioner's members are not persons who are not able to support themselves. There is no allegation that any member of the petitioner has been denied emergency treatment or denied any of the rights enumerated under the said Article. I do not therefore see any right of the petitioner's members which has been violated because there is absolutely no evidence of the same. The petitioner's members were able people and that is why they raised over seven million to purchase land which land regrettably belonged to the Government being a Government Gazetted Forest.

**16.** The petitioner asked the court to declare that the respondents and the Government of Kenya are escapists and have abdicated their role to protect the citizens of Kenya and that the first, second and third respondents have fragrantly abrogated the Constitution and hence unfit to hold public office. The petitioner is alleging that the respondents and the Government have abdicated their role of protecting their citizens. The petitioner has not demonstrated how the respondents or the Government has abdicated its duty of protecting its citizens. It is clear that the properties in issue were unlawfully given to the petitioner. It was agreed during the meeting of Environment held in Kitale that the Commissioner of Lands (second respondent) was wrong in allocating Government Forest. The third respondent issued a notice to quit from the said parcels. The petitioner's members were given time to vacate the forest land. The Government which is being blamed for being escapist was not expected to protect members of a company who had unlawfully been given forest land. The mistake of allocating Government forest land may have been committed by the Commissioner of Lands and once this mistake was discovered, it was found prudent to ask those who were in the forest land to vacate. As I have said hereinabove, there is no evidence that the petitioner's members were removed from the land in any degrading and inhuman manner. There is therefore no basis for blaming the Government or any of the respondents.

**17.** The petitioner is seeking to have the first, second and third respondents declared unfit to hold public office. The first and second respondents are titles created for their office holders. The third respondent is tasked with management of public forests. At any given time, there are particular individuals holding the offices of the first and second respondents. If there was any wrong doing by the office holders, this is something which should be taken against the particular individual personally and in accordance with established law or on evidence adduced touching on specific individuals and their alleged non compliance or failure to meet the constitutional threshold required of them. The alleged violation is said to have occurred in 2006. There were individuals holding the two offices then. A court cannot declare that a current office holder is unfit to hold public office when he/she is not guilty of what is alleged to have been committed. I do not find any merit in the said reliefs which are hereby declined.

**18.** The last issue to be addressed in this petition is whether the petitioner's members are entitled to compensation. I do not think that the petitioner's members are entitled to any compensation in damages. There is no evidence of any violation of their constitutional right as to call for compensation. The petitioner's members have failed to prove the allegation of torture or destruction of their houses or properties. The only person who alleges to have been tortured is **Francis Kotii**. He claims to have been severely tortured and hospitalized. He did not provide any single medical document to confirm his allegations. He did not even bother to explain why he could not avail any medical document. A photograph of a scarred buttock is not enough proof of torture. He should have at least provided medical treatment records from the hospital where he went for treatment. Each of the 913 members of the

petitioner are asking for compensation. None of them has proved that they suffered any violation of their rights. A court cannot give compensation based on generalized allegations which are not substantiated. Compensation can only follow if there is proof of violation of a right as for instance in torture. The court is enjoined to interpret the constitution in a manner that promotes the rule of law. The rule of law requires that actions must be done in accordance with the law of the land. The allocation of the land to the petitioner did not follow the law and was therefore unlawful. This action is clearly excluded from the rights protected under **Article 40** of the Constitution. The rule of law also requires that a party be afforded opportunity to present his/her case. The petitioner has been given that opportunity but it has failed to prove that any of its members suffered what they allege. It therefore follows that their claims must fail to that extent.

**19.** Though the petitioner unlawfully acquired the properties in question, it is clear that they paid some money to the second respondent. This fact is not denied. According to the documents annexed to the petitioner's supporting affidavit, the petitioner has proved that it paid a total of **Kshs.7,896,644/=** made up as follows:-

**Kshs. 3,100,000.00 - paid on 10/7/2000**

**Kshs. 2,055,900.00 - paid on 26/7/2000**

**Kshs. 400,000.00 - paid on 29/1/2001**

**Kshs. 1,351,294.00 - paid on 5/3/2001**

**Kshs. 200,000.00 - paid on 13/2/2001**

**Kshs. 789,450.00 - paid on 1/3/2001**

**Total - Kshs. 7,896,644.00**

The petitioner is entitled to a refund of **Kshs.7,896,644/=**. The petitioner did not prove that it paid **Kshs.10,988,644/=**, as alleged in the petition.

### **DETERMINATION**

**18.** I do find that the petitioner's petition has only succeeded to the extent of refund of the monies which they paid to the second respondent. I therefore order that the **first and fourth respondents** do refund **Kshs.7,896,644/=** to the petitioner with interest at **14% per annum** with effect from **May, 2006**. The petitioner has substantially lost its petition. I do not award any costs in the circumstances.

Dated, signed and delivered at Kitale on this **1st** day of **October, 2015**.

**E. OBAGA**

**JUDGE**



While the design, structure and metadata of the Case Search database are licensed by [Kenya Law](#) under a [Creative Commons Attribution-ShareAlike 4.0 International](#), the texts of the judicial opinions contained in it are in the [public domain](#) and are free from any copyright restrictions. Read our [Privacy Policy](#) | [Disclaimer](#)