



REPUBLIC OF KENYA



**Munguti & 12 others v Kenya National Highways Authority & another (Environment & Land Petition 2 of 2022) [2023] KEELC 16457 (KLR) (15 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16457 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND PETITION 2 OF 2022**

**A NYUKURI, J  
MARCH 15, 2023**

**BETWEEN**

**ANTHONY NGILI MUNGUTI ..... 1<sup>ST</sup> PETITIONER  
NICHOLAS MUTHINI MUTISO ..... 2<sup>ND</sup> PETITIONER  
JOSHUA KASINGIU INGOOTI ..... 3<sup>RD</sup> PETITIONER  
MUNANIE MWANZIA ..... 4<sup>TH</sup> PETITIONER  
DOMINICK MUTIE KATOO ..... 5<sup>TH</sup> PETITIONER  
ALICE KYEE KILUNGU ..... 6<sup>TH</sup> PETITIONER  
ALI-HAJI ISA MAWEU MWANZA ..... 7<sup>TH</sup> PETITIONER  
JOHN MUSAU KILONZO ..... 8<sup>TH</sup> PETITIONER  
SYLVESTER MWINZI MWANZA ..... 9<sup>TH</sup> PETITIONER  
MWENDE NDUVA ..... 10<sup>TH</sup> PETITIONER  
ZAINAB SAID ..... 11<sup>TH</sup> PETITIONER  
MONICA NTHAMBI MUSAU ..... 12<sup>TH</sup> PETITIONER  
JACKSON MAKAU MUTUNE ..... 13<sup>TH</sup> PETITIONER**

**AND**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... 1<sup>ST</sup> RESPONDENT  
THE HON. ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**



## JUDGMENT

1. By a Petition dated September 9, 2016, the petitioner sought against the respondents the following orders;
  - a. A declaration that the Petitioners rights under articles 27, 28, 29, 35, 40, 43, 47 and 50 of the Constitution have been violated by the respondents.
  - b. A declaration that the letters dated April 28, 2015, from the 1<sup>st</sup> respondent which were dropped at the Petitioners properties are unlawful and in violation of the Constitution .
  - c. An order for the respondents to provide the Petitioners with reports on all the survey work undertaken in Kangonde – Embu Road in respect of the reserve.
  - d. An order that the respondents undertake compensation to the petitioners for any acquisition, removal or demolition of the properties of the petitioners.
  - e. An order of permanent injunction to restrain the respondents from acquiring, evicting, demolishing or removing any of the Petitioners’ properties along the Kangonde – Embu Road.
  - f. Costs of the Petition.
2. The Petitioners averred that they were businessmen, businesswomen and peasant farmers who had either constructed businesses, residential premises or were registered proprietors of undeveloped land in various shopping centres along Kangonde – Embu Road in Machakos County. They further stated that they were the registered proprietors of different parcels of land situated along Kangonde –Embu Road on a stretch of 15 kilometres on the following markets namely Kaewa, Kwa Mundu Wa Miti, Kyaani, Mbondeni and Kivaa.
3. They stated further that in 1985, the Respondents upgraded Kangonde–Embu Road to Class B Road and began construction of a tarmac road, whereof they surveyed the road and placed beacons thereon demarcating the road reserves. They therefore maintained that according to these beacons, the Petitioners’ buildings were within the required distance from the road.
4. It was further their averment that in 2009, the Respondents placed fresh beacons on the road in issue and earmarked some of the Petitioners’ properties for compulsory acquisition and promised to put in place mechanisms for compensation but that there have never been any follow up on the issue concerning compensation.
5. They further averred that on June 8, 2015, the 1<sup>st</sup> Respondent dropped letters on the Petitioners’ premises, giving a notice of demolition of their marked premises at the expiry of 30 days.
6. The Petitioners contended that they hold titles to their respective properties, which titles were lawfully acquired long before the construction of the tarmac road, and maintained that it was unlawful for their properties to be taken away or demolished without compensation.
7. It was their position that the developments on their various properties were undertaken upon several approvals by relevant Government agencies.
8. They contended that the respondents intend to upgrade the disputed road for Class B to Class A, which requires more land yet they are not willing to compensate the Petitioners. They complained that



- the respondents have failed to appropriately communicate to them despite receiving correspondence from the Petitioners.
9. They took the position that the Respondents' actions were draconian, unjust, unfair and do not amount to fair administrative action as there was no public participation in the exercise.
  10. They further averred that it was in bad faith for the Respondents to unilaterally shift the beacons to the premises occupied and developed by the Petitioners who relied on the same for their livelihoods.
  11. The Petitioners further stated that their rights to equal protection of the law, the right to access to information, right to fair administrative action, right to property, right to accessible and adequate housing and right to dignity had been violated.
  12. The Petition was opposed. The first Respondent filed a replying affidavit sworn on 10<sup>th</sup> September 2018 by Engineer Kibet Terigin, a Senior Engineer working with the 1<sup>st</sup> Respondent. It was the 1<sup>st</sup> Respondent's case that the road corridor for Kangonde – Embu Road was 60 meters wide, and demonstrated this by providing Preliminary Index Diagrams (P.I.Ds) from the Survey of Kenya. Their position was that their mandate was to manage, develop, rehabilitate and maintain roads classified under part A of the first schedule of the *Kenya Roads Act* No. 2 of 2007 and in that regard, attached copies of contracts for periodic maintenance of the disputed road.
  13. They further stated that the road in question was Kangonde – Embu Road in Machakos which is managed by the 1<sup>st</sup> Respondent. Further that the 1<sup>st</sup> Respondent is tasked with routine maintenance of the existing road surface and does not interfere with properties outside the road reserve. They maintained that the disputed road was not earmarked for expansion as alleged by the Petitioners or at all, and stated that the Petitioners had encroached on the road, which is a public road.
  14. In faulting the Petitioners' evidence of ownership of the disputed parcels, the Respondents stated that the Petitioners claims are based on handwritten extracts having the Petitioners' names and purported plot numbers arbitrarily assigned which cannot be evidence of property ownership.
  15. They insisted that they marked the Petitioners' properties for demolition due to the encroachment by the Petitioners on the 60 meter road, which size has always been the same since construction of that road. They denied any fresh survey having been conducted and stated that the Petitioners allegation that the road was being expanded was based on a misconception.
  16. The 1<sup>st</sup> Respondent maintained that they issued 30 days notice to the Petitioners pursuant to section 49 of the *Kenya Roads Act* 2007, in regard to the encroachment and asserted that the issue of compulsory acquisition did not arise as there was no proof of ownership and that the developments were on a public land.
  17. They held the position that the Petitioners' claim could only be proved by production of Registry Index Maps to show the location of the Petitioners properties, which evidence was not availed.
  18. They averred that the Petition did not meet the threshold of a Constitutional Petition and that there was no proof that they had violated the Petitioners Constitutional rights as stated in the Petition or at all.
  19. The 2<sup>nd</sup> Respondent filed grounds of opposition dated 18<sup>th</sup> January 2018 in response to the Petition. The 2<sup>nd</sup> Respondent stated that the Petition was an abuse of the court process, misconceived and unfounded. It was their position that the Applicants lacked recognizable legal interest in the property in question. They averred that the Petitioners failed to demonstrate the basis of ownership of the properties in question and therefore no right can accrue in relation thereto under articles 27, 28, 29, 35,



40, 43, 47 and 50. According to them, letters of allotment which was the basis of the Petitioners claims did not give rise to any proprietary interest in land to the Petitioners under article 40 of the Constitution. Reliance was placed on the case of Wreck Motors Enterprises v The Commissioner of Lands and 3 others Nairobi Civil Appeal No. 71 of 1997 (unreported) and Joseph Arap Ng'ok v Justice Moiwo Ole Keiwua Nairobi Civil Application No. 60 of 1997.

20. It was further contended for the 2<sup>nd</sup> respondent that by dint of section 144 of Government Lands Act (now repealed) which was applicable at the time of allocation of the suit land, section 91 of the Traffic Act and Section 49 (1), of the Roads Act, the 1<sup>st</sup> Respondent is under statutory duty to remove anything erected on a road reserve at the cost of the obstructing person.
21. The Petition was disposed by way of written submissions. On record are the Petitioners' submissions dated February 18, 2021 and the 1<sup>st</sup> respondent's submissions dated November 6, 2022.

### **Petitioners' Submissions**

22. Counsel for the Petitioners submitted that the Petitioners had established their right to the suit properties as they had exhibited titles and adjudication certificates/extracts and that all the Petitioners were in occupation of their properties since 1969. They contended that the handwritten extracts were evidence of demarcation and adjudication process and that the Petitioners have legitimate expectations that title will issue in their favour. Counsel maintained that this was a different process from the process of allotment letters as there is a guarantee for issuance of title in the adjudication process.
23. On whether the Petitioners' properties were erected on a road reserve, counsel submitted that as the Petitioners hold title to their respective properties, then the same are not and have never been on a road reserve. It was maintained for the Petitioners that if their properties were on public land or on a road reserve, that claim ought to have been addressed during demarcation and adjudication process. Counsel argued that since 2009, the Respondents were desirous of compensating the Petitioners following compulsory acquisition of their said properties for road expansion and that in 1985, the road was upgraded to Class B yet the Petitioners' properties were not affected by the expansion; and argued that therefore, a routine maintenance in 2015 should not affect the Petitioners' properties unless there is an intention to expand the road and arbitrarily take over the Petitioners' properties without compensation.
24. Counsel faulted the evidence produced by the Respondents showing encroachment by the Petitioners and argued that the sketches done by the Respondents were not sufficient, and that they ought to have produced detailed survey reports from 1985 to date.
25. On whether the Petitioners' properties ought to be demolished, counsel contended that as the Petitioners proved ownership and occupation of the suit properties and therefore as the Respondents failed to prove the contrary, it is only proper that their properties are not demolished.
26. On whether the Petitioners' Constitutional rights had been violated or were likely to be violated by the acts of the Respondents, counsel argued that if the Respondents' actions of demanding that the Petitioners demolish their properties are not stopped, the Petitioners will arbitrarily lose their lawfully acquired properties; will be rendered homeless and destitute; that they will not have been given a fair hearing or subjected to a fair administrative hearing; they will lose their dignity and they will have been treated in an inhuman and degrading manner and there would have been no equality in the full and equal enjoyment of all their rights. Counsel maintained that the Respondents can only acquire the Petitioners' properties lawfully by way of the process of compulsory acquisition and by adequately compensating the Petitioners.



## 1st Respondent's Submissions

27. Counsel for the 1<sup>st</sup> Respondent submitted that the weight of the Petitioners' claims were handwritten extracts with the Petitioners names and plot numbers arbitrarily assigned and therefore that that was not evidence of ownership of property as evidence of ownership is a title, as provided in section 26 of the [Land Registration Act](#).
28. It was contended for the 1<sup>st</sup> Respondent that property rights in land can only come into existence after issuance of a letter of allotment, whereof the allotment must meet the conditions therein and a certificate is issued pursuant thereto. Counsel maintained that a road reserve was not available for allocation as it belongs to the public and therefore a title in respect of a road reserve cannot grant ownership to a private individual.
29. Counsel argued that to protect the general public, the 1<sup>st</sup> respondent legally and justifiably marked structures for demolition that were upon the road reserve to allow maintenance of the Kangonde – Embu Road.
30. Counsel contended that the Petitioners failed to correctly ascertain the location of their properties. That this ought to have been proved by way of a deed plan or registry map, which the Petitioners failed to produce. Counsel maintained that there is no truth in the petitioners allegation that a fresh survey was done in 2009 and beacons were moved. Counsel argued that the road reserve has been constant since the road was constructed.
31. Counsel faulted the Petitioners allegations that the road in issue was being expanded and upgraded, needing more land, terming those allegations a misconception and emphasizing that the 1<sup>st</sup> Respondent was only undertaking periodic maintenance of the existing road and that the marked structures encroached on the road reserve of 60 meters corridor and ought to be demolished.
32. It was submitted for the 1<sup>st</sup> Respondent that the 1<sup>st</sup> Respondent issued a 30 days notice for removal of the illegal structures in compliance with Section 49 of the Roads Act, 2007 and that section 91 of the [Traffic Act](#) cap 403 Laws of Kenya forbids encroachment on roads.
33. Reliance was placed on the case of [Stephen Njuguna Kiragu & another v Kenya National Highways Authority](#) [2018] eKLR, for the proposition that where a person encroaches on a road, it shall be lawful for the 1<sup>st</sup> Respondent to remove any property that encroaches on the road as provided for in Section 91 (2) of the [Traffic Act](#).
34. Counsel argued that the issue of compulsory acquisition cannot arise as the Petitioners' developments on the road reserve are unlawful and that no genuine title can emanate from a flawed process. Counsel was of the view that it would be against public policy to enforce compensation on irregularly acquired title.
35. On whether the Petitioners' Constitutional rights had been contravened, counsel relied on the case of [Anarita Karimi Njeru v Republic](#) [1979] eKLR and submitted that the Petition does not meet the threshold for Constitutional Petitions. Counsel held the view that the Petitioners did not plead with particularity and reasonable precision, the provisions breached and the nature or manner of the alleged breach. It was further contended for the 1<sup>st</sup> Respondent that the alleged breaches were not absolute but are limited pursuant to articles 24 and 25 of the [Constitution](#) .
36. As regards the question of breach of article 40 of the [Constitution](#) , counsel submitted that the protection under article 40 does not extend to illegally acquired land. Further, counsel contended that they complied with Article 47 (1) and (2) of the [Constitution](#) by issuing a notice of more than 30 days



to the Petitioners requiring them to remove their properties on the road as per Section 49 of the Roads Act 2007.

37. Counsel contended that marking of illegal structures did not amount to discrimination under article 27 of the Constitution. In that regard, counsel argued that the Petitioners were not to be treated preferentially at the expense of the public as the continuous existence of structures on the road reserve compromises road safety of the public users.
38. It was further pointed out by counsel that demolition of illegal structures was well within the 1<sup>st</sup> Respondent's mandate by law and cannot amount to depriving the Petitioners the right to accessible and adequate housing under Article 43 of the Constitution. Counsel further took the position that the 1<sup>st</sup> Respondent did not contravene the Petitioners right to dignity under Article 28 of the Constitution and that the Petition did not meet the evidentiary standard of proof as the evidence adduced by annexures was not done by way of supporting affidavit and therefore the same remain mere allegations.

### **Analysis and Determination**

39. I have carefully considered the Petition and the attached annexures as well as the replying affidavit filed by the 1<sup>st</sup> Respondent together with the parties' submissions. The issues that arises for determination are whether the Petition meets the threshold of a Constitutional Petition and whether the Petitioners' rights were violated and or are under a threat of violation by the acts of the 1<sup>st</sup> Respondent.
40. In the case of Anarita Karimi v Republic [1979] eKLR, the court held that any Petitioner complaining of infringement of their Constitutional rights must set out with a reasonable degree of precision, his complaint, the provisions said to be infringed and the manner they have been infringed. In this matter, the Petitioners allege that the 1<sup>st</sup> Respondent issued them notice to remove their properties on an alleged road reserve, when they had not encroached on the road and therefore breached their property rights under article 40; breached their right to a fair administrative action under article 47; and that the threat of loosing their homes and sources of livelihoods will expose them to homelessness denying them the right to adequate housing under article 43 and they will be stripped of their dignity provided in article 28 of the Constitution. Having stated with precision the provisions of the Constitution that have been allegedly infringed and those threatened with infringements, it is my finding that the Petitioners have set out their case which meets the threshold of a Constitutional Petition.
41. On whether the Petitioners' Constitutional rights were violated and or are under threat of violation, the Petitioners' case turns on whether or not the Petitioners' properties are on the road reserve along Kangonde–Embu Road. The Petitioners contended that they were served with notices to demolish their properties. On whether the Petitioners' properties are on the road reserve, the Petitioners argued that they hold the titles and adjudication certificates in respect of their respective parcels.
42. The Petitioners attached a bundle marked "A1" as evidence of ownership of the suit properties. I have examined the bundle marked A1. There is no title document therein. There are handwritten notes with names of the Petitioners' plot numbers, indications of alleged dates of construction, distances from centre line to the building and from centre line to the red mark. The author of the handwritten notes is not disclosed. There are also receipts for payments of various levies paid to Masaku County Council and handwritten notes purportedly written by different demarcation officers in respect of different Adjudication Sections. The Petitioners also attached approved building plans, letters by the area chief and County Land Adjudication and Settlement Officers on the legal ownership of some of the plots in issues.
43. I have gathered from the evidence presented by the Petitioners regarding ownership of the disputed plots, that it is apparent that in so far as those parcels are concerned, the process of adjudication is



still ongoing and the Petitioners are yet to be issued with titles to confirm ownership. Under the [Land Adjudication Act](#) cap 284 Laws of Kenya, the process of land adjudication is for purposes of ascertainment and recording of rights and interests in community land, which is a quasi-judicial process where decisions are made and disputes escalated from the Survey officer, demarcation officer, recording officer, adjudication committee, arbitration board, adjudication officer and the Minister whose decision is final. Therefore, until that process is concluded, ownership of land subject to the said process cannot be ascertained. In the premises, it is my considered view therefore that the handwritten notes attached to the Petition and letters from the Land Adjudication officer, and the chief is not sufficient evidence of ownership of the disputed land by the Petitioners.

44. As regards the Petitioners' complaint that they were unlawfully issued with a 30 days notice to demolish their properties which they allege are not on the disputed road, the burden of proof of that claim lay on the Petitioners. Section 107 of the [Evidence Act](#) provides as follows;
1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
45. Therefore, the legal burden of proof in a civil suit is always static and rests on the claimant throughout the trial. It is until they have discharged that burden that the evidentiary burden shifts to the Defendant to rebut the claim. In the instant case, the 1<sup>st</sup> Defendant stated that from the time the disputed road was constructed, its width was and has always been 60 metres and at no point have they sought to expand the road. I have considered the Petition and the assertion that the road's width is 60 metres has not been denied or challenged by the Petitioners. They have not given any other measurements for the road. Their only contention is that they have evidence of ownership of their alleged respective plots and that therefore they have not encroached on the disputed road.
46. There is no doubt that the dispute herein turns on whether the properties alleged to be owned by the Petitioners are located on the disputed road. It is therefore a question of location, which goes beyond ownership. Location of land in the circumstances of this case requires proof by Registry Index Maps (R.I.M). No such maps were produced by the Petitioners to counter the 1<sup>st</sup> Respondent's contention that the developments earmarked for demolition were an encroachment on the road.
47. I take the above position because the 1<sup>st</sup> Respondent produced Preliminary Index Diagrams (P.I.Ds) from the Survey of Kenya showing the width of the road and the extent of the encroachments thereon. The Petitioners did not dispute that the source of the PIDs were from the Survey of Kenya, which means that the same are official Government records. The said documents clearly demonstrate the extent of encroachment on the disputed road by persons having interests or rights in the neighbouring properties. In the face of this evidence, as the basis of the 1<sup>st</sup> Respondent's 30 days notice for demolition of the encroaching properties, the Petitioners were legally obligated and burdened to demonstrate that their properties did not encroach on the disputed road. They ought to have done this by availing Survey Maps and or Registry Index Maps to show that their properties were not on the disputed road. Having failed to produce such evidence, it is my finding that they failed to discharge their burden of proof as expected of them under section 107 of the [Evidence Act](#).
48. As to whether the 1<sup>st</sup> Defendant's issuance of their 30 day statutory notices for demolition of the alleged encroaching properties was lawful, section 49 (1) of the [Kenya Roads Act](#) No. 2 of 2007 provides as follows;



1. Except as provided in subsection (2), no person or body may do any of the following things without the responsible Authorities written permission or contrary to such permission –
    - a. Erect, construct or lay, or establish any structure or other thing, on or over or below the surface of a road reserve or land in a building restricted area;
    - b. Make any structural alteration or addition to a structure or that other thing situated on or over, or below the surface of a road or road reserve or land in a building restriction area; or
    - c. Give permission for erecting, constructing, laying or establishing any structure or that other thing on or over, or below the surface of a road or road reserve or land in a building restriction area, or for any structural alteration or addition to any structure or other thing so situated.
  2. An authority may, in its discretion, give or refuse to give permission under this section.
  3. When giving permission, the Authority may prescribe –
    - a. The specifications with which the structure, other thing, alteration or addition for which permission is requested must comply;
    - b. The manner and circumstances in which, the place where, the conditions on which the structure, other thing, alteration or addition may be erected, constructed, laid, established or made; and
    - c. The obligations to be fulfilled by the owner in respect of the land in which the structure, other thing, alteration or addition is to be erected, constructed, laid, established or made.
  4. Where a person, without the permission required by the subsection (1) or contrary to any permission given thereunder, erects, constructs, lays or establishes a structure or other thing, or makes a structural alteration or addition to a structure or other thing, an Authority may by notice in writing direct that person to remove the unauthorized structure, other thing, alteration or addition within a reasonable period which shall be stated in the notice but which may not be shorter than thirty days calculated from the date of the notice.
  5. If the person to whom a notice has been issued in terms of subsection (4) fails to remove the structure, other thing, alteration, or addition mentioned in the notice, within the period stated therein, such item may be removed by the Authority itself which may recover the cost of the removal from that person.
  6. A person who contravenes any of the provisions of subsection (1) commits an offence and is liable on conviction to a term of imprisonment not exceeding one year or to a fine not exceeding one hundred thousand shillings, or to both.
49. Therefore, no one is allowed to construct on a road reserve without the written permission of the Kenya National Highways Authority. And where there are unauthorised constructions on a road, the Authority has power to direct the removal of such constructions upon issuance of a notice of at least 30 days. In default of removal by the person encroaching on a road reserve, it is lawful for the Authority to proceed and remove such unauthorized constructions on the road reserve.
50. Besides, section 91 of the *Traffic Acts* makes it an offence, the act of encroaching on a road or road reserve and empowers the Highways Authority to remove any item which encroaches on a road reserve.



51. Therefore, as the Petitioners' constructions on the disputed road as demonstrated by the P.I.Ds from Survey of Kenya, was done without permission of the 1<sup>st</sup> Respondent, and the 1<sup>st</sup> Respondent having issued a 30 days notice to the Petitioners as required in law, it follows that the actions taken by the 1<sup>st</sup> Respondent were lawful. Therefore, the Petitioners claim for compensation under compulsorily acquisition process is baseless because the land they claim to be theirs is public land and part of the Kangonde – Embu Road, and therefore they cannot be compensated for that which does not belong to them.
52. On whether the Petitioners' rights under articles 27, 28, 29, 35, 40, 43, 47 and 50 of the Constitution of Kenya were violated, I note that the 1<sup>st</sup> Respondent's actions were lawful and within the ambit of section 49 of the Kenya Roads Act and section 91 of the Traffic Act, and the same cannot be termed as discriminatory because they were served with notices on account of their unlawful constructions on a road reserve.
53. Besides, there is no proof of ownership of the disputed road by the Petitioners and the land upon which the disputed constructions were done is public land as defined under article 62 (h) of the Constitution of Kenya and therefore, the Petitioners had no proprietary rights over the same, capable of being protected under article 40 of the Constitution .
54. In so far as the Petitioners' rights to a fair administrative action under article 47 of the Constitution is concerned, it is not disputed that the 1<sup>st</sup> Respondent served the Petitioners with a 30 days notice requiring them to remove the unauthorised encroachments on the road reserve. In that letter, the reason for the intended demolition was given to the effect that the Petitioners had constructed on a road reserve in contravention of Section 49 (1) (a) of the Kenya Roads Act and section 91 (1) of the Traffic Act. In my view therefore, the Petitioners were accorded a fair administrative action by being given sufficient and reasonable notice and the reasons for the intended demolition of their structures.
55. There was no evidence from the material placed before court by the Petitioners of breach of articles 28, 29 and 43 of the Constitution . The Petitioners have not demonstrated that all their land will be taken up by the Respondents so as to render them homeless and their dignity violated. The Respondents' actions are only limited to the extent of the encroachments and nothing more. As the encroachment is unlawful, no constitutional protection can be accorded to the same.
56. The Petitioners sought to be provided with reports on all survey work undertaken on Kangonde – Embu Road in respect of the road reserve. The 1<sup>st</sup> Respondent's mandate in respect of the dispute is to maintain the disputed road. Survey plans are a preserve of the Director of Surveys. In any event, there is no evidence that the Petitioners sought for the said documents from the Respondents before filing this Petition, pursuant to their right to access to information protected under article 35 of the Constitution . In any event in their response, the 1<sup>st</sup> Respondent filed Preliminary Index Diagrams which they obtained from the Survey of Kenya and therefore any other Survey Plans required by the Petitioners should have been sought from the Survey Department which is the Government department having custodian of all registered Survey Plans.
57. The upshot is that the petitioners have failed to prove their claim to the required standard and therefore the court finds the petition as unmeritorious and the same is hereby dismissed with costs to the respondents.
58. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 15TH DAY OF MARCH, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**



**A. NYUKURI**

**JUDGE**

**In the Presence of;**

Mr. Osoro for Petitioners

Mr. Muyuri for 1<sup>st</sup> Respondent and holding brief for Mr. Ogari for 1<sup>st</sup> Respondent

No appearance for Attorney General

Ms Josephine – Court Assistant

