



**Wambua & another (Suing as joint administrators of the Estate of the Late Josiah Muli Wambua) v Kenya Urban Roads Authority & 6 others (Environment and Land Constitutional Petition 188 of 2018) [2023] KEELC 17066 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 17066 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 188 OF 2018**

**CA OCHIENG, J**

**APRIL 27, 2023**

**IN THE MATTER OF UNLAWFUL TRESPASS ON PRIVATE LAND  
BY KENYA URBAN ROADS AUTHORITY AND KENYA RURAL  
ROADS AUTHORITY**

**AND**

**IN THE MATTER OF ARTICLE 22, 23, 27, 64 AND 258 OF THE  
CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT  
OR THREAT TO FUNDAMENTAL RIGHTS AND FREEDOMS  
UNDER ARTICLE 19, 20, 27, 40, 47, 50, 60 & 64 OF THE  
CONSTITUTION OF KENYA AND CONTRAVENTION OR THREAT  
OF CONTRAVENTION OF ARTICLES 3, 10 AND 73 OF THE  
CONSTITUTION OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**BETWEEN**

**MARY WAENI WAMBUA ..... 1<sup>ST</sup> PETITIONER  
HAPPY KOKI WAMBUA ..... 2<sup>ND</sup> PETITIONER  
SUING AS JOINT ADMINISTRATORS OF THE ESTATE OF THE LATE JOSIAH  
MULI WAMBUA**

**AND**



KENYA URBAN ROADS AUTHORITY .....	1 <sup>ST</sup> RESPONDENT
KENYA RURAL ROADS AUTHORITY .....	2 <sup>ND</sup> RESPONDENT
PRINCIPAL SECRETARY, MINISTRY OF TRANSPORT, INFRASTRUCTURE, HOUSING, & URBAN DEVELOPMENT .....	3 <sup>RD</sup> RESPONDENT
PRINCIPAL SECRETARY, MINISTRY OF LANDS AND PHYSICAL PLANNING .....	4 <sup>TH</sup> RESPONDENT
CHIEF LAND REGISTRAR .....	5 <sup>TH</sup> RESPONDENT
NATIONAL LAND COMMISSION .....	6 <sup>TH</sup> RESPONDENT
ATTORNEY GENERAL .....	7 <sup>TH</sup> RESPONDENT

## JUDGMENT

1. Through a Petition dated the May 4, 2018, the Petitioners sought for the following orders against the Respondents:-
  1. That a declaration be and is hereby issued that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have contravened the Petitioners' right to property under Article 40(1) and (3) of the Constitution.
  2. That a declaration be and is hereby issued that the road works already commenced, and proposed to be carried out on the approximately 6.385 acres of LR 6989 (IR No 20000), situated off Mombasa Road, as unconstitutional and illegal, in the absence of the due process of compulsory acquisition.
  3. That this Honourable Court be pleased to issue an order restraining the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Respondents, their Directors, employees, servants, agents, contractors and consultants or any of them from using commencing and or continuing, with the illegal trespass on the suit property, L R No 6989 (I R No 20000), under the guise of upgrading a non-existent road to Daystar University, Athi River Campus; or  
In the Alternative to Prayer 3 above
  4. That this Honourable Court be pleased to order the 1<sup>st</sup>, 2<sup>nd</sup>, & 3<sup>rd</sup> Respondents, to comply with the law on compulsory acquisition, and legally pay to the Estate of Josiah Muli Wambua Kshs 76,475,000, being the current market value and just compensation for the acquisition of approximately 6.385 acres of L R No 6989 (I R No 20000).
  5. That this Honourable Court be pleased to order the 2<sup>nd</sup> & 3<sup>rd</sup> Respondent to pay full and just compensation in General Damages.
  6. Interest and costs on prayers 4 and 5 above.
  7. Any other relief this Honourable Court may deem just and equitable.
2. The Petition was supported by the Affidavit of Mary Waeni Wambua, the 1<sup>st</sup> Petitioner herein with authority of the 2<sup>nd</sup> Petitioner. She deposed that she is a co-administratrix of the Estate of the late Josiah Muli Wambua who was and still is the registered proprietor of L R No 6989 IR 20000 situated off Mombasa road, hereinafter referred to as the 'suit property'. She did attach a copy of the Grant of Letters of Administration and a copy of the title to the suit property. She stated that the said parcel



of land measures 501 acres which is valued at Kshs 10 million per acre on the level portion, Kshs. 5 million on the rocky and sloppy portion, and improvement valued at Kshs 14,415,000. She contended that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents illegally accessed the property rather than set in motion the process to lawfully compulsorily acquire the approximately 6.385 acres from LR No 6989 1R 20000. She insisted that to date, no Notice of Compulsory Acquisition, or Gazette Notice has been published regarding the approximately 6.835 acres of land. She explained that by a letter dated the August 25, 2017, they had enquired from the Director General, Kenya Rural Roads Authority (KERRA) regarding the unauthorised entry onto the suit property which letter, KERRA is yet to respond to. Further, that they are in receipt of correspondence and meetings with the same 2<sup>nd</sup> Respondent held in an attempt to amicably resolve the trespass but there has been no positive steps taken by the said 2<sup>nd</sup> Respondent to either stop the trespass, or to initiate the process of compulsory acquisition of the land necessary to construct the road. She reaffirmed that a Licensed Land Surveyor, Mr Gacanja Kagu of Ardhi Surveys Consultants Ltd advised her that the Cadastral Plan Reference No CR 247/6/15 was the plan KERRA relied on to guide their project. Further, Mr Gachanga Kagu confirmed that there was consensus between him and Ms. Ndambiri, the site surveyor for the said project and officer of the 2<sup>nd</sup> Respondent, that there was an un-surveyed, track, indicated on the Cadastral Plans by way of a dotted line which did not pass through or in any way occupy the suit property. She reiterates that currently there is a contractor on the purported site and they are apprehensive that in the event that conservatory orders are not granted, the 2<sup>nd</sup> Respondent will continue with the trespass, proceed with the illegal road construction as well as violate the property rights of the beneficiaries of the Estate of the late Josiah Muli Wambua. It is her further explanation that the subject property is 501 acres with several developments, mains water and drainage into septic tanks. Further, a borehole and four wells are within the property to supplement mains water supply, which would be affected in the event that the compulsory acquisition is illegally affected and the road built. She reaffirms that the portion of the property proposed to be utilised for the road construction is approximately 6.385 acres which will be illegally acquired for construction of Lukenya Daystar Road. Further, based on the valuation carried out by messrs Highlands Valuers Ltd, it is valued at approximately Kshs 76,475,000. She was advised by their Licensed Land Surveyor, that the Cadastral Plan Reference No CR 247/6/15 shows that the Daystar University/Lukenya track, that is proposed for upgrading into bitumen standard road, borders the property to the west and is situated or crosses through LR 8786, and not LR No 6989. Further, that since August 2017 when the 2<sup>nd</sup> Respondent commenced works on the suit property, the 6<sup>th</sup> Respondent has neither published a Notice of Compulsory Acquisition, in the Kenya Gazette nor delivered a copy of such notice to the Chief Lands Registrar and the Estate Administrators who are persons whom are interested in the land, as provided under Part VIII of the *Land Act*. She further stated that the purported road upgrade will completely destroy the borehole on their land whose estimated replacement cost will be over Kshs 1,397,568 as per the quotation by messrs Aqua Drillers dated January 15, 2018, and valuation report by Highlands Valuers Ltd dated February 22, 2018.

3. The 2<sup>nd</sup> Respondent opposed the Petition by filing a Replying Affidavit sworn by one Abdulkadir Ibrahim Jatani, its Deputy Director of Surveys where he explains that vide a project to improve low density roads countrywide, one of the roads identified traversed through the suit property and four other parcels, being LR No 12648/67, LR No 12648/68, LR No 8857/72 and LR No 8857/1. He avers that before subdivision of the parcel of land LR Nos 12648/67 and LR No 12648/68, the Petitioners had no access to Mombasa road but after the subdivision, the Petitioners were now able to access Mombasa road via the road provided for, by the proprietor of the said subdivided parcels. He claims that the surrendered road had since been improved and accorded the Petitioners' access to Mombasa road but the objection herein has barred all other proprietors the shorter access to the main Mombasa road. He contends that they had tried to engage the Petitioners for an out of court



settlement in a bid to benefit all and improve the value of the land but the same has not been fruitful. They did attach a copy of a map showing clear road as designated on the ground. In a Further Affidavit dated the October 18, 2021, he states that the claim for compensation was not valid as the road works would have the effect of enhancing the value of the suit property when the estate will be divided among the beneficiaries upon receipt of probate. He claims that the failure to reach an amicable settlement with the Petitioners had led to the exclusion of the suit property from the works. He insists that the Petitioners were yet to obtain Grant for the Estate of the late Josiah Muli and that prior to the commencement of this suit, the Respondent had attempted to engage some members of the family whom they believed to have authority, which members had accepted to surrender the portion of the land upon issuance of a Grant.

4. The Petition was canvassed by way of written submissions.

## Submissions

### Petitioners' submissions

5. The Petitioners in their submissions reiterated their claim and contended that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents contravened their Constitutional rights as guaranteed under Chapter 4 of the *Constitution*. They argued that the 2<sup>nd</sup> Respondent had without authority entered into LR No 6989 (the suit property) and began works, purporting to upgrade a non-existent road, without issuing requisite notices and compensation as stipulated under Sections 107 to 133 of the Land Action No 6 of 2012. They submitted that the works carried out on LR No 6989 were unconstitutional and illegal in the absence of due process of compulsory acquisition and relied on Sections 107, 110 and 112 of the *Land Act* which mandates the 7<sup>th</sup> Respondent to compulsorily acquire such land, publish by gazette and compensation to interested persons respectively. They argued that due process was not adhered to, as the Respondents had arbitrarily taken possession of the suit property. They insisted that they were entitled to the orders against the 1<sup>st</sup> to 3<sup>rd</sup> Respondents, directing them to legally compensate the Estate of Josiah Muli Wambua Kshs 76,475,000 as it deprived them compensation for about 6.385 acres of LR No 6989. To support their claim, they relied on the following decisions: *Vekariya Investments Limited vs Kenya Airports Authority & 2 Others* [2014] eKLR; *Multiple Hauliers East Africa Limited vs Attorney General & Others* [2013] eKLR; *Re Estate of Thomas Kipkosgei Yator & another (Deceased) and Lwanga vs Centenary Rural Development Bank* [1999] 1 EA 175.

### Submissions by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

6. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that the Petition had been overtaken by events. They insisted and that the Respondents had not violated the Petitioners right to property as enshrined under Article 40 of the *Constitution*. They explained that they identified a road which had been in use for more than 30 years and did not enter the suit property forcefully. Further, that the Petitioners had refused to allow the existing road to be improved, hence they stopped developing the contested area and only improved the uncontested area. They further submitted that the uncontested area has since been tarmacked while the Petitioners' land has remained intact. They insisted that the Petitioners' land was not compulsorily acquired. Further, that the survey report produced was incorrect since they did not interfere with or demolish any infrastructure alleged to be contained in the survey. They reiterated that this being a special damages claim ought to be supported by evidence/exhibits which the Petitioners did not produce to prove existence of any boreholes alleged to have been destroyed. They reaffirmed that the Petition had been overtaken by events since the Respondents had vacated the suit property. To buttress their averments, they relied on the following decisions: *Anita Chelagat O'donovan & 2*



### Analysis and Determination

7. Upon consideration of the Petition, respective Affidavits, annexures and rivaling submissions, the following are the issues for determination: Whether the Respondents violated the Petitioners' Constitutional rights; Whether the Petitioners are entitled to the Compensation as sought. Who bears the costs of the Petition?
8. As to Whether the Respondents violated the Petitioners' Constitutional rights.
9. The Petitioners claim the Respondents violated their rights to Article 40 of the *Constitution* as they trespassed on their land and commenced putting up a road without following the due process on compulsory acquisition. They insisted that the portion taken over by the Respondents was around 6.385 acres. The Respondents on the other hand explained that vide a project to improve low density roads countrywide, one of the roads identified traversed through the Petitioners' land and four other parcels, being LR No 12648/67, LR No 12648/68, LR No 8857/72 and LR No 8857/1. The Respondents argued that prior to subdivision of LR No 12648/67 and LR No 12648/68, the Petitioners had no access to Mombasa road but after the subdivision, they were able to do so via the road provided for, by the proprietor of the said subdivided parcels. They explained that they had tried to engage the Petitioners for an out of court settlement in a bid to benefit all members of the community as the road would improve the value of the land but the same had not been fruitful. I wish to reproduce an excerpt from a letter dated the November 28, 2018 which was authored by the 1<sup>st</sup> Respondent addressed to the Petitioners in respect to the dispute herein:

"On setting out the road it was realised that a section of your land is within the existing road measuring approximately 2.010 Ha. Enclosed herein please find the Minutes of the stakeholders meeting held on November 21, 2018 and the drawing showing the existing road and how it affects your property for your perusal. The purpose of this letter therefore, is to appraise you on the progress of ongoing works and seek concurrence for the surrender of the said 2.010 Ha of land. This will not only benefit the public at large but will specifically increase the value of your property by allowing adequate access to your parcel (s) of land."

10. From this excerpt alone, it is evident that there was already an existing road and the 2<sup>nd</sup> Respondent requested the Petitioners to surrender a portion of their land to cater for the road improvement, which the Petitioners failed to. The 2<sup>nd</sup> Respondent explained that as a result of the failure of the Petitioners to surrender a portion of their land, they were forced to abandon the contested area which was the Petitioners land and only upgraded to bitumen standards the uncontested area. The Petitioners have sought for the Respondents to compulsorily acquire the land if they intend to improve the road. The Petitioners claim the Respondents interfered with their land but did not tender any evidence to support this claim. In the case of *Anarita Karimi Njeru VS Republic* (1979) eKLR, the Court held inter alia:

"If a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

11. In this instance, the Petitioners claim the Respondents have violated their rights but in the explanation granted in the Supporting Affidavit to the Petition including the evidence provided, it seems to me that once they sighted the board advertising the improvement of the road, they started anticipating the



alleged violations, in the event the said road was upgraded. I note the Petitioners have cited decisions in support of their claim mainly touching on compulsory acquisition of land which was not the case in this instance. Based on the facts before me while associating myself with the decision I have cited, I opine that since the Respondents abandoned the project without undertaking any development on the contested area which was the Petitioners' land, there was no violation on the Petitioners' constitutional rights as claimed. It is my considered view that the prayers sought in Petition herein are not justiciable as Article 40 of the Constitution was not violated since the Petitioners' land was not taken over by the Respondents but remained intact.

12. As to whether the Petitioners are entitled to the Compensation as sought.
13. The Petitioners have sought for orders to restrain the Respondents from the suit property and in the alternative to be compensated Kshs 76,475,000 for the 6.385 acres acquired from the said suit property. The Respondents insist they only intended to improve an already existing road and from perusal of the annexures given, I note some of the owners of the neighbouring parcels of land to the suit property had already surrendered their land for the road to be improved. Further, I note the Respondents confirmed they did not intend to compulsorily acquire the suit property but simply upgrade an already existing road. It is interesting to note that the Petitioners have not denied benefitting from a road of access curved from two adjoining parcels of land which were subdivided. The Respondents have further argued that the suit property had a road of access that was being used by the residents and the Petitioners have not evicted them, nor blocked or barred them from using it for the past 30 years. It insists that the claim for compensation is not well founded as the road works had the effect of enhancing the value of the suit property. I note as per the Valuation Report dated the October 5, 2017, by Highlands Valuers Ltd, which was produced by the Petitioners, it indicated at page 4 that the suit property fronts Daystar/Lukenya Road that is in the process of being updated into Bitumen Standards. Further, as per the 2<sup>nd</sup> Valuation Report dated the 31<sup>st</sup> January, 2018 which I note was done for purposes of compulsory acquisition of the land, it does not indicate if the said land had been taken over by the government. From the Petition, the Petitioners have explained that in August 2017, KERRA erected a board indicating as follows: 'Contract RWC 151A upgrading of road to Daystar University, Athi River, Campus'. Except for the said notice board, the Petitioners have not demonstrated in the two aforementioned valuation reports which they have produced on how the Respondents entered into their land and violated their rights to property.
14. In the case of Emmanuel Chengo Kenga v Kenya Ports Authority & 2 others; Catherine Mturi-Wairi & another (Interested Parties) [2018] eKLR, Justice E K Ogola held that:

An arguability of a Petition will also depend on the prayers sought. Where the prayers sought do not make legal sense, or where the prayers sought, even if granted, will not achieve anything, the court cannot proceed with the petition for its own sake."
15. Based on the facts as presented while associating myself with the decision I have cited above, I find that the prayers the Petitioners sought did not make legal sense since their property had not been compulsorily acquired and the alleged rights only emanated from the construction of a notice board to announce the improvement of an already existing road. Further, their prayer for compensation cannot stand since their land was left intact. I hence find that the Petitioners are not entitled to compensation as sought.
16. It is against the foregoing that I find the Petition unmerited and will dismiss it.

Each party do bear their own costs.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 27<sup>TH</sup> DAY OF APRIL,  
2023**

**CHRISTINE OCHIENG**

**JUDGE**

