



**Kogo v Kenyan Urban Roads Authority & another (Environment & Land
Petition 19 of 2020) [2023] KEELC 16891 (KLR) (19 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16891 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND PETITION 19 OF 2020**

**EO OBAGA, J
APRIL 19, 2023**

BETWEEN

SAMMY BOIT ARAP KOGO PETITIONER

AND

KENYAN URBAN ROADS AUTHORITY 1ST RESPONDENT

NATIONAL LANDS COMMISSION 2ND RESPONDENT

JUDGMENT

Introduction

1. The Petitioner is the registered owner of LR No Eldoret Municipality/Block 15/1823 measuring 1.00 hectare which is about 2.471 acres. On November 27, 2020, the Petitioner filed this constitutional petition in which he sought the following reliefs:-
 1. A declaration that the 1st Respondent and the 2nd Respondent are in breach of sections 22(4), (5) and 23(1) and 29 of the *Kenya Roads Act* No 2 of 2007, section 6 & 8 of Land Acquisition Act Cap 295 and contravened the provisions of Article 40(3)(i) of the *Constitution* thereby violating the Petitioner's rights there under.
 2. A declaration that the Petitioner is entitled to prompt and just payment in full by the Respondents for the acquisition therein.
 3. An order directing the 1st Respondent to pay the Petitioner Twenty-Three Million Eight Hundred Thousand shillings (Kshs 23, 800,000/= being the current value of the land.
 4. An order that the Respondents pay general damages as the court may deem just being compensation for the acquisition of the Petitioner's land.
 5. That the costs consequent upon the petition be borne by the 1st Respondent.



6. All such other order that this Honorable court shall deem just.
2. The 1st Respondent is a state Corporation established under the [Kenya Roads Act](#) 2007 which is mandated to among other things under section 9 of the Act to manage, develop, rehabilitate, construct and maintain urban roads in the cities and municipalities in the Country.
3. The second Respondent is a Commission established under Article 60 of the [Constitution](#) and specifically under the [National Land Commission Act](#) 2012 with the mandate to manage public Land on behalf of the National Government and County Governments, Initiate investigations into present or historical injustices and have oversight responsibilities over land use planning throughout the country.
4. The 1st Respondent under section 10 of the Act is mandated to carry out various functions including, management, development, rehabilitation and maintainance of all urban roads.
5. Section 10(2)(a) gives the Authority the right for purposes of discharging its responsibilities as described herein, to construct, upgrade, rehabilitate and maintain roads under its control.
6. In the exercise of its mandate, the 1st Respondent in or around April, 2020 moved into the Petitioner's land and unlawfully proceeded to construct a road which traversed the petitioner's land.
7. Under section 22(4) and (5) of the Act the 1st Respondent has power to construct roads on private land only with the agreement of the owner of the land. The 1st Respondent is required under section 23(1)(a) to negotiate with the owner of the land and enter into such agreement with the owner of the land for the acquisition of the land for purposes of constructing the road and further that in the event that an agreement is not reached, the 1st Respondent is to give notice to the minister for public lands to the effect that the land in question is required for purposes of the Authority and the Minister will proceed to acquire the land as provided for under the provisions of section 3,4, and 6 of the Land Acquisition Act.

The Petitioner's contention

8. The Petitioner contends that the 1st Respondent failed to seek his consent and or enter into an agreement with him or initiate the process of compulsory acquisition as provided under the law. As a consequence of this failure, the Petitioner contends that his constitutional rights to protection of property under Article 40(1) have been breached.
9. The Petitioner further contends the action of the 1st Respondent contravened the provisions of Article 40(3) which requires prompt compensation in case a property is required for public purposes. The Petitioner was not informed in writing of the intention by the 1st Respondent to construct a road through his property.
10. The Petitioner was in full control and possession of his land, had developed it and it had appreciated in value as a result of the developments thereon. The construction of the road which traverses his property has rendered the land economically unenviable as he cannot constructively develop anything on the land and make use of the land.
11. The Petitioner had written to the Respondents to compensate him but they have declined rendering this petition necessary. The Petitioner has been forced by the inaction by the Respondents to value the property for purposes of compensation.



1st Respondents contention

12. The 1st Respondent opposed the Petitioners Petition based on a replying affidavit sworn on September 24, 2021. The 1st Respondent contends that the petition herein offends the provisions of Section 24, 29 and 67 of the [Kenya Roads Act](#), 2007. The 1st Respondent therefore argues that in view of the non-compliance by the Petitioner with the provision of Sections 24, 29 and 67 of the Roads Act, this court does not have jurisdiction to entertain this petition.
13. The 1st Respondent contends that the Petitioner's averments are meant to hoodwink the court into granting the reliefs sought. The 1st Respondent contends that according to available records, the road in question was initially constructed by the Ministry of Local Government's Urban Department as a low volume road way back in 1995. This road was eventually taken over by the County Government of Uasin Gishu upon the promulgation of the new Constitution 2010.
14. While the 1st Respondent acknowledges that it upgraded the road which passes through the Petitioner's land, it denies that it encroached on to the Petitioner's land or at all. The 1st Respondent contends that when the road in question was handed over to it for upgrading by the County Government of Uasin Gishu, it was already in use and was of gravel standards, having been inherited from the former Ministry of Local Government.
15. The 1st Respondent blames the petitioner for having a road through his land for 26 years before complaining when the same was upgraded. The 1st Respondent states that by the Petitioner keeping silent while the road was being constructed, he is estopped from complaining after the road has been constructed. The 1st Respondent further argues that the Petitioner relinquished his rights over the portion of land taken by the road and he is therefore estopped from claiming infringement of his rights over the portion of land.
16. The 1st Respondent further contends that the Petitioner is guilty of laches for having kept quiet for 26 years without raising any objection. His claim is therefore an afterthought.
17. The 1st Respondent further argues that the petition has not satisfied the threshold of what constitutes a constitutional petition as per the principles set out in the [Anarita Karimi Njeru v Republic \[1979\] eKLR](#) which principles were later restated in the case of [Mumo Matemo v Trusted Society of Human Rights Alliance & 5 others \[2013\] eKLR](#).
18. The 1st Respondent states that the Petitioner is not specific on the portion of his property which was affected and the extent to which it was rendered absolute.
19. The 1st Respondent further states that the petitioner's claim is purely a civil matter and that this petition is brought purposely to circumvent the provisions of the Road Act of 2007 and has no constitutional issues to be addressed.
20. The 1st Respondent accuses the Petitioner of selectively picking out the sections of the Roads Act which favour him while ignoring the bigger picture particularly the provisions which touch on the dispute at hand. The 1st Respondent further argues that the Petitioner should have sought to resolve the dispute under the provisions of the [Kenya Roads Act](#) No 2 of 2007 which is self-executing instead of invoking the jurisdiction of this court. The 1st Respondent further argues that this is matter which ought to be sent back to the 2nd Respondent for further investigation in accordance with the provisions of the [Kenya Roads Act](#) No 2 of 2007.



Analysis and determination;

21. The parties were directed to file written submissions. The petitioner filed his submissions on October 27, 2022. The 1st Respondent filed their submissions on February 18, 2022. I have carefully considered the petition as well as the opposition to the same by the 1st Respondent. I have also considered the submission by the parties herein. The main issue for determination in this petition is whether the property rights of the Petitioner under Article 40(3) of the Constitution were violated. The other issue is whether the petitioner is entitled to the reliefs in the petition. The last issue is on which order is to be made on costs.
22. In discharging its mandate, the 1st Respondent is bound to proceed as provided under the Kenya Roads Act. Under Section 22(4) and 5 of the Act, the 1st Respondent has power to construct a road on private land only with the agreement of the owner of the land. section 23(1) (a) mandates the 1st Respondent to negotiate with the land owner with a view to acquisition of the land for purposes of constructing a road. In the event that an agreement is not reached, the 1st Respondent is supposed to give notice to the minister for public lands to the effect that the land is required for purposes of the Authority and the Minister is then to proceed to acquire the land under sections 3, 4 and 6 of the Land Acquisition Act.
23. The 1st Respondent did not approach the petitioner for any negotiations as provided for under the provisions of the Kenya Roads Act 2007. The 1st Respondent instead moved into the Petitioner's land where it constructed a road which traversed the Petitioner's property.
24. Article 40(1) gives the Petitioner rights to acquire and own property of any description and in any part of the country. The Article further stipulates that no property of an individual should be taken away from him unless it is required for public purposes and in that event, prompt compensation should be given.
25. In the instant case, the 1st Respondent did not put in place the mechanisms which are clearly spelt out in the Kenya Roads Act. The 1st Respondent arbitrarily moved on to the Petitioner's land and hived off a portion measuring 0.226 hectares. This portion ran across the 1.00 hectare property which rendered the remainder not to be economically viable for the intended purpose.
26. Despite the Petitioner writing to both the 1st Respondent and the 2nd Respondent, nothing happened. This forced the Petitioner to have his property valued with a view to moving the court for compensation. The 1st Respondent argued that there was an existing road which was established in 1995. This they said was according to available records. There were no documents provided to show that indeed there was a road passing through the Petitioner's land and that the same had been built by the defunct Ministry of Local Government which was later handed over to the County Government of Uasin Gishu before being handed over to the 1st Respondent for upgrade.
27. The 1st Respondent argued that the Petitioner's petition did not satisfy the threshold set out by the case of *Anarita Karimi Njeru v Republic* (1979) eKLR which stated that a Petitioner ought to state what provision of the Constitution has been violated and state in which manner the said provision was violated with specificity. Though this position was re-stated in the case of *Mumo Matemo v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR, it is important to note that the *Anarita Karim* case was decided before the 2010 Constitution. Under the 2010 Constitution and rules which have been promulgated for the enforcement of the bill of rights, a petitioner can even move to court wielding a piece of paper in which he or she alleges that a certain right is being threatened and the judge or judicial officer is bound to reduce that in writing and proceed to hear that person.



28. In the instant case, the Petitioner has elaborately stated on how his Constitutional rights under Article 40(3) were violated. There is a valuation report which the petitioner filed which clearly stated that the Petitioner's land was not in the Ndungu report on illegally acquired land. The Petitioner went on to state how the 1st Respondent did not comply with the provision of the [Kenya Roads Act](#) 2007 and Article 40 of the [Constitution](#).
29. The 1st Respondent has conceded that the provisions of the [Kenya Roads Act](#) 2007 were never followed and that it is seeking the court to refer the matter back for consideration by the 2nd Respondent in accordance with the provisions of the [Kenya Roads Act](#) 2007. This is a belated request which is being made when the horse has already bolted out. The 1st Respondent had opportunity to follow the Act and if the Petitioner could not agree, then they would have put in place the mechanisms of compulsory acquisition.
30. The 1st Respondent contended that this petition offends the provisos of sections 24, 29 and 67 of the [Kenya Roads Act](#) 2007. Section 24 (1) and (2) of the [Kenya Roads Act](#) 2007 provides as follows: -
1. 'Any authorized employee of an Authority may, for the purposes of the Authority, enter upon any land and survey such land or any portion thereof.
 2. Where any damage to land is caused by reason of the exercise of the powers conferred by this section, the owner or occupier of the land shall be entitled to compensation thereof in accordance with the act.'
31. Section 29 provides as follows: -
- ' In exercising the powers conferred by sections 23, 24, 25 and 26, an authority shall do as little damage as possible, and where any person suffers damage, no action or suit shall lie against the authority, but he shall be entitled to such compensation thereof as may be agreed between him and the concerned authority, or in default of agreement, as may be determined by an arbitrator appointed by the Chief justice.'
32. Constitutional petitions are guided by the Rules which were promulgated pursuant to the powers donated to the Chief Justice under Article 22(3). Pursuant to this Article, The [Constitution](#) of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 were promulgated and gazetted. Rule 3 of the Rules provides that the rules shall apply to all proceedings under Article 22 of the [Constitution](#).
33. Article 22(1) of the [Constitution](#) provides as follows: -
- ' Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.'
34. Rule 4(1) of the rules provides that: -
- ' Where any right or fundamental freedom provided for in the [Constitution](#) is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules'.



35. Rule 10(1) of the Rules provides as follows: -

' An application under Rule 4 shall be made by way of a petition as set out in Form A in the schedule with such alterations as may be necessary.'

36. It is therefore clear that the rules governing the proceedings of Constitutional Petitions are the rules which were gazetted in 2013 which are commonly referred to as the Mutunga Rules. In the case of *Anthony Ngili Munguti & 12 others v Kenya National Highways Authority and another* [2017] eKLR, the court faced with similar contentions on requirement of notice, stated as follows: -

' A fundamental right guaranteed by the Constitution cannot be taken away on the basis that demand notice stating intention to sue was not issued. It is the finding of this court that such a right is so supremely protected, that even a verbal notice such as for example, 'Hey, this is our home, do not demolish it' is valid enough to stop the Respondent on its track. Such a right cannot be defeated by statutory provision. It is the finding of the court that a constitutional provision on access to justice supersedes any statutory powers limiting enforcement of constitutional rights.'

37. In the case of *Benson Ruiyi Njane v Kenya Rural Roads Authority & 36 others* [2016] eKLR the court was dealing with a preliminary objection grounded under section 67 of the Kenya Roads Act. The court stated as follows:-

' The limitation set out in Section 67 of the Roads Act requiring notice of thirty days to the Authority before instituting suit only applies to ordinary civil claims. It does not apply to cases (Petitions/Applications) alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or threatened. The Respondents' claim to the contrary is not borne out by the Constitution, and that leg of defence therefore fails.'

38. The 1st Respondent cited the case of *Michael Otieno Nyaguthi & 5 others v Kenya National Highways Authority & 5 others* [2015] eKLR where a preliminary objection premised on section 67 of the Roads Act was upheld. The matter went to the Court of Appeal which upheld the same. This authority is distinguishable from the present case. In the instant case, the petitioner has exhibited letters to both the 1st Respondent and the 2nd Respondent in which notices were given before filing of this petition.

39. The letter to the 2nd Respondent is dated October 8, 2020. The one to the 1st Respondent is dated September 15, 2020 though it was wrongly addressed to Kenya Rural Roads Authority. This was a mistake as the Physical address of the 1st Respondent is the same. A reminder was also sent to the 1st Respondent on November 20, 2020 before the petition was filed on November 27, 2020. There was therefore 30 days' notice given unlike in the Michael Otieno Nyaguthi (case Supra) who had sent a notice via email but failed to exhibit the notice which led to the court finding that there was no 30-day notice given before institution of the petition.

40. Sections 24 and 29 of the Roads Act 2007 deal with preliminary issues leading to the process of acquisition. In the instant case, the 1st Respondent were not acting in their preliminary stages of entry to the Petitioner's land. They had already entered the land and completed the construction of the Road. There was therefore nothing which would have again called for the invocation of Section 24 and 29 of the Kenya Roads Act, 2007. The doctrine of exhaustion does not therefore arise in the circumstances of this case, I find that the Constitutional rights of the petitioner were violated under Article 40(3) of the Constitution.



41. Having found that the Petitioners Constitutional rights to property were violated, there is need for him to be fully compensated. The 1st Respondent argued that there is no basis upon which the court can grant damages as the petitioner has not shown the extent of the encroachment and the extent to which his land was rendered obsolete. Contrary to the 1st Respondent's allegation, the Petitioner has tabled before court a report of valuation carried out by Premium Valuers Limited dated November 19, 2020. The report clearly states that the road which traverses the Petitioner's property took away 0.226 hectares of the Petitioner's 1.00 hectare land.
42. As the road passed through the middle of the property, the remainder was rendered uneconomical for use for the intended purposes. The petitioner had intended to subdivide the land into small portions and sell the same. The property is about 2.5 Kilometers from the Central Business District of Eldoret Town. This is no doubt a prime property in a prime area full of residential houses. I therefore have no doubt about the value put on the property which was acquired without following the law.
43. The Petitioner prayed for general damages. The law is clear that no general damages can be awarded in addition to quantified damages. I therefore decline to grant general damages.

Disposition

44. In the final analysis, I find that the Petitioner has proved that his rights under Article 40(3) of the Constitution were violated. The petition is well founded in law. I proceed to allow the petitioner's petition in terms of prayers 1, 2, 3, and 5 of the petition dated November 25, 2020.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 19TH DAY OF APRIL, 2023.

E. O. OBAGA

JUDGE

In the virtual presence of;

Ms. Ligunya for Petitioner

Mr. Odongo for 1st Respondent

Ms. Obino for Ms. Akello for 2nd Respondent.

Court Assistant –Laban

E. O. OBAGA

JUDGE

19th APRIL, 2023

