



**Mureka v Kenya Rural Roads Authority & 3 others (Environment & Land Petition E001 of 2022) [2023] KEELC 21195 (KLR) (18 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21195 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA**

**ENVIRONMENT & LAND PETITION E001 OF 2022**

**EC CHERONO, J**

**OCTOBER 18, 2023**

**IN THE MATTER OF ARTICLES 1,2,19,20,21,22,23,27(1) (2),35,40,47(1), 50(1), 159,165 (3) (B), 258 OF THE CONSTITUTION OF KENYA 2010.**

**IN THE MATTER OF: SECTION 4 OF THE FAIR ADMINISTRATIVE ACTION ACT,2015.**

**IN THE MATTER OF: THE CONTRAVENTION OF SECTIONS 3,6,5,6A,7,8,9,10,12,13,17,18,25 AND 26 OF THE LAND ACQUISITION ACT CAP 295 LAWS OF KENYA.**

**IN THE MATTER OF: THE CONTRAVENTION OF SECTIONS 107,108,111,112,113,114,115 OF THE LAND ACT NO. 6 OF 2012.**

**IN THE MATTER OF: THE CONTRAVENTION OF ARTICLES 35(1)(A) & (3), 40 OF THE CONSTITUTION OF KENYA, 2010.**

**IN THE MATTER OF: THE UPGRADING TO BITUMEN STANDARD AND BASED ROUTINE OF MUSIKOMA-BUYOFU-MUNGATSI MYANGA-MATEKA ROAD ROAD PROJECT.**

**BETWEEN**

**EDWARD MUREKA ..... PETITIONER**

**AND**

**THE KENYA RURAL ROADS AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**RESIDENT ENGINEER MUSIKOMA-MUNGATSI MATEKA ROAD .... 2<sup>ND</sup> RESPONDENT**

**THE CABINET SECRETARY IN CHARGE OF THE MINISTRY OF TRANSPORT ..... 3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**



## JUDGMENT

1. The Petitioner, Edward Mureka lodged this petition on 1<sup>st</sup> December, 2021 alleging that there was a real threat for contravention of his fundamental rights and freedoms under article 40 of the [constitution](#) of Kenya.
2. In the said Petition, the Petitioner states that he is the registered owner of all that land known as E. Bukusu/S.Kanduyi measuring approximately 0.71 Ha (hereinafter referred to as the suit land) which he has been in possession, use and enjoyment of having constructed his home, fenced and planted trees thereon. He has sued the Respondents for trespass into the suit land by illegally and unprocedurally putting up a culvert while expanding a public road crossing his land, hence directing water into his homestead. As a consequence, the petitioner averred that during the rainy seasons, the storm water from the culvert floods into his compound, farm and surroundings.
3. As a result, the Petitioner averred that he has been subjected to untold suffering as he has been unable to enjoy his bill of rights as to protection of the right to own property or any interest or right over the property as envisaged in Articles 40 & 47 of the [constitution](#) as read together with Part VIII of the [Land Act](#).
4. The Petitioner sought for the court to grant orders declaring him the rightful owner of the suit property, declaring the Respondents actions unfair; unlawful and unconstitutional and in breach of his economic and social rights; a permanent injunction restraining the Respondents from dealing with the suit property without following the legal procedures of compulsory acquisition, general damages for trespass, compensation for unlawful acquisition of land, order of mandamus directing the Respondents to compensate the Petitioner for the land allegedly acquired or to reinstate it to its initial state.
5. Alongside the petition, the Petitioner filed a supporting affidavit sworn on the even date by Edward Mureka in which he annexed a copy of his title deed, photographs showing the damage and various correspondences between the Petitioner and representatives of the Respondents.
6. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents filed grounds of opposition stating that the Petitioner has not disclosed any cause of action against the Respondents and that the expansion of the road was within the mandate of the Respondents and within the law. The Respondents argued that the works were publicized and have been in the public domain since 14<sup>th</sup> October, 2014. They faulted the Petitioner for failure to upraise himself of the encumbrances, easements, restrictive covenants, benefits and physical state of the suit property before acquiring title on 26<sup>th</sup> April, 2017. They argued that had the Respondent done this, he would have noted that the area is prone to floods as a natural phenomenon which is beyond human control that requires remedial measures.
7. The Respondents further contend that the construction of the cross culvert at KM 1+088 was necessary because the area was on a sag and after all, there was an existing cross culvert and all they did was replace it. It was further their argument that no acquisition had been done thus the petition was premature and further that the proposed remedial measures were pending the Petitioner's consent which is yet to be issued and as such, the Petitioner has contributed to the delay in salvaging the situation. It was the Respondent's contention that they do not intend to curtail, undermine or deprive the Petitioner of his right to property and the allegations of trespass are fictitious and pre-emptory.



8. It was stated by the Respondents that if at all damages had been caused, the Respondents have not refused to compensate the Petitioner as prescribed by the law. Further, the Respondents state that the Petitioners had not demonstrated with precision how his rights and freedoms under the *constitution* have been violated or threatened and that there is no substantial material before the court to prove the alleged violation contrary to the principles espoused in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance* (2013) eKLR and *Annarita Karimi Njeri* (1979) KLR 154. Lastly the Respondents contended that the Petitioner has not satisfactorily demonstrated that he is worth the orders sought.
9. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents entered appearance through the firm of J.M. Rapando but did not file a response to the petition. When the matter came up for directions, the parties agreed to canvass the petition by written submissions.
10. The Petitioner through his counsel filed his submissions dated 28<sup>th</sup> March 2022 on 20<sup>th</sup> April, 2022. It was his submission that the Respondents contravened the provisions of Article 40 of the *constitution* and did not bring themselves within the requirements of Section 6, 8, 9 and 10 of the Land Acquisition Act when they intended to acquire his land. He placed reliance on the case of *Nightsbade Properties Ltd v National Land Commission & 3 others* (2021) eKLR while quoting the case of *Patrick Musinba v National Land Commission & 4 others* (2016) eKLR.
11. It was the Petitioner's submission that the Respondents acquired part of the Petitioner's land without his consent in the first instance and trespassed therein cutting down trees, destroying the perimeter barbed wire fence and depositing concrete culverts on his property unlawfully encroaching his land and breaching his fundamental rights. He argued that despite the Respondents agreeing to compensate him, they have since neglected and/or refused to honour its commitment to him and undertake the remedial measures as promised. He placed reliance on various cases amongst them *Attorney General v Zinj Limited* (Petition 1 of 2020) (2021) KESC 23 (KLR (Civ) (3 December 2021)), and *James Shikwati Shikuku v County Government Kakamega & 3 others*.
12. In support of his claim for special damages, the Petitioner submitted that the Respondents descended on his land and begun cutting down trees, destroying his perimeter barbed wire fence and depositing concrete culverts on his property and constructing a culvert across his gate to empty all running water from the Musikoma-Mateka Road into his home and farm causing flooding making his compound inhabitable forcing him to build another house and severally repair his car which was damaged by the impassable road. Counsel quoted the case of *Belgo Holding Limited v Kenya Urban Roads Authority & Another* (2020) eKLR. The Petitioner urged the Honourable Court to award him Kshs. 50,000,000/= as general damages and a colossal sum of Kshs. 20,000,000/= being aggravated and exemplary damages. Reliance was placed in the case of *Mike Maina Kamau v Attorney General* (2017) eKLR.
13. The issues that commend for the court's determination are:
  - i. Whether the petition raises a constitutional controversy and has met the constitutional threshold.
  - ii. Whether the Petitioner has proved breach of his constitutional rights as set out in the petition against the Respondents jointly and severally.
  - iii. What reliefs, if any, is the Petitioner entitled to under the circumstances.
14. A party seeking constitutional reliefs based on infringement of constitutional rights and freedoms is supposed to comply with the procedure under the *Constitution* of Kenya [Protection of Rights and Fundamental Freedoms] Practice and Procedure Rules 2013, by setting out his capacity, name



- and address, facts relied upon, rights or freedoms violated, nature of injury caused, details of pending proceedings, signature and the reliefs sought.
15. The cases of *Anarita Karimi Njeru v. Republic* (1979) KLR, *Mumo Matemu v Trusted Society Of Human Rights Alliance & 5 others* (2013) eKLR, *Stanley Munga Githunguri v. Republic* (1985) eKLR informed the promulgation of the Rules in line with Article 22 (3) of the constitution.
  16. In the petition before court, the Petitioner has set out the description of the parties, the legal foundation of the petition under the law, facts relied upon, injury and damages caused, grounds upon which the violation is alleged and the reliefs sought. My finding therefore is that the petition is brought in line with the law.
  17. The second issue for determination is whether the petition raises a constitutional controversy for the court's determination. The complaint by the Petitioner is that the 1<sup>st</sup> Respondent through the 2<sup>nd</sup> Respondent and in the process of undertaking upgrading a bitumen road i.e Musikoma-Buyofu-Mungatsi myanga Mateka Road trespassed into his land Parcel No LR E.Bukusu/S. Kanduyi and without his consent or prompt compensation, erected a culvert across his gate, the result whereof storm flood waters were directed to the farm hence making both the farm and the homestead impassable, inaccessible, flooded and inhabitable.
  18. Before I proceed further, it is imperative to note that the burden of proof (the quality and sufficiency of evidence) in a constitutional petition rests with the Petitioner. In *Leonard Otieno vs Airtel (K) Ltd* (2015) eKLR, the court held a party has to present clear evidence in support of an alleged violation. The evidence must be credible, admissible, cumulative, and corroborative, so as to persuade a court to reach a decision favourable to the Petitioner.
  19. In the instant case, the Petitioner alleged that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents unlawfully alienated the Petitioners' lawful property without any lawful justification and that their actions were in utter breach of the right to property and also to fair administrative action under Article 40 and 47 of the Constitution, 2010. The Petitioner also stated that the Respondents did not publicize the upgrading project and even after constructing the culvert, they did not undertake any remedial measures to salvage the damage that was being caused by the storm water emptying into his land. The Petitioner therefore pleaded he was entitled to move to this court for constitutional protection.
  20. In the case of *Multiple Hauliers East Africa Limited v Attorney General & Others* [2013]eKLR, H.C at Nairobi, Petition No. 88 of 2010 Mumbi Ngugi J. at page 12 reiterated the provisions of Article 47(1) and held that the High Court on several occasions emphasized the need for administrative actions to be carried out procedurally and that where a public authority's actions are likely to deprive individuals of their fundamental rights and freedoms, it is crucial that such actions be carried out due process and in respect to the rules of natural justice.
  21. A constitutional question is one whose solution is derived from the constitutional interpretation, the determination of the constitutional role of state organs, the legality of a legislation and the interplay between governments' departments.
  22. In *Jane Wagathuitu Githinji & 2 others v Sokanmi Soja nmi Springfields Ltd & 2 others* (2019)eKLR, the court was dealing with water which raged downhill resulting to damage to the Respondents parcel of land alleged to have been caused by a natural channel but not through upstream spills out of the bursting of the dam. There was an argument as in the instant case that the water would naturally drain downwards hence the Respondent was not liable for the damage. The court held that once the channel was formed, water found a path and the continuous flow of water led to the formation of the gully leading to the 1<sup>st</sup> plaintiffs land hence there was a direct connection to the bursting of the dam. The



- court found it was not the natural flow of the water from upstream as alleged hence it could not be the natural drainage system.
23. The court held that the direct cause and the effect between the bursting of the dam and the increased volume and the continuous flow flooded the plaintiff's farms. Therefore, the court made a finding that it was not the natural flow but an intervening human activity which exacerbated the incident. The court applied the case law of *Ryland v Fletcher* (1861-73) ALL ER 1 hence found the defendants liable.
  24. It is my considered view that the 1<sup>st</sup> Respondent undertook the project leading to the diversion of the storm water without a report from any expert seeing that none has been presented before the Court. It would be assumed that at the least before embarking on the project the 1<sup>st</sup> and 2<sup>nd</sup> Respondents knew the topography of the area and therefore if at all the natural cause of the drainage would lead to the Petitioner's land, then clearly it was the 1<sup>st</sup> and 2<sup>nd</sup> Respondents who directly influenced the water course and led it to the Petitioner's land.
  25. Further to the foregoing and as noted in the various correspondences between the Petitioner and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the respondents state that the culvert was placed at a sagging area, it is therefore obvious that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's knew and foresaw that the Petitioner would be directly affected by any diversion of the water and as they were replacing the existing culvert which seems to have been working. It is my considered view that they ought to have taken into consideration the engineering dynamics and proceeded to construct one that would serve the intended purpose.
  26. In this petition, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent threw caution to the wind and failed to exercise any precaution as it embarked on the road construction and specifically the erection of the culvert.
  27. It is not in doubt that the culvert has been in existence since 6<sup>th</sup> January, 2017. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have not taken any remedial action to mitigate the loss and or regularize the project despite the various correspondences and the apparent threat of damage to the environment. The Petitioner continues to suffer due to a project undertaken in total disregard of the law and whose attention to the 2<sup>nd</sup> Respondent has not elicited any rectification. The argument that they were awaiting the consent of the Petitioner is neither here nor there noting that the 1<sup>st</sup> Respondent has all the mandate under the law to safeguard the rights of the Petitioner and given that they started works without consulting with the Petitioner.
  28. Therefore, given the foregoing admissions on the issue of general damages, the law is that the same are discretionary. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the court noted that the same must be a reminder to the Respondents that constitutional pronouncements are not mere words but have implications. Therefore, based on comparative jurisprudence I hereby award a sum of Kenya shillings two million five hundred thousand (Kshs. 2,500,000/=) as general damages for trespass.
  29. On the issue of compulsory acquisition of his land by the respondents, I find from the material placed before me that the same does not arise. I say this because it has not been demonstrated by either party that the replaced culvert is placed within the Petitioner's property. I note that the Petitioner stated that the same was placed outside his gate, moreover the Petitioner has not specifically stated what portion of his land has been affected by the road expansion and that he alleges ought to be compensated for having been taken up by the construction. The Petitioner's claim to this end therefore fails.
  30. As to the orders of restitution, the road and the culvert serves not only the Petitioner but also to the members of public. Instead of removing it to resort to uncertainty, the best course of action is to direct the 1<sup>st</sup> Respondent in conjunction with the 2<sup>nd</sup> Respondent to redesign and re-do the culvert taking into consideration the rights and interests of the Petitioner within 3 months from the date hereof.



31. The upshot of the above is that this court finds that the Petitioners have proved their case on the required standard and are therefore entitled to the orders sought. Consequently, I enter judgment for the petitioner against the Respondents in the following terms;

- i. A declaration that the Petitioner is the lawful proprietor of all that parcel of land known as L.R E. Bukusu/S. Kanduyi/21287.
- ii. A declaration that the Respondent's actions in seeking to curtail, undermine and/or deprive the Petitioner of their rights to their properties known as L.R E. Bukusu/S. Kanduyi/21287 and the developments therein, without just cause and prompt and adequate compensation is unfair, unlawful and unconstitutional.
- iii. General damages for trespass in the sum of Kshs.2,500,000/=.
- iv. Costs to the Petitioner to be borne by the 1<sup>st</sup> Respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 18<sup>TH</sup> DAY OF OCTOBER, 2023.**

**HON.E.C CHERONO**

**ELC JUDGE**

In the presence of

1. Mr Masiga for Petitioner
2. Respondents/advocate-absent
3. M/S Joy C/A-present

