



**Ogoti v County Government of Nyamira & another (Environment and Land Constitutional Petition E001 of 2022) [2023] KEELC 21319 (KLR) (18 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21319 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA  
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E001 OF 2022**

**JM KAMAU, J**

**OCTOBER 18, 2023**

**IN THE MATTER OF ARTICLES 2,3,10,19,20,21,22 (1),23 (1), (3),  
27 (2), AND 92), 28,29 (D) AND (F), 31(B), 39(3), 40, (1) AND (2)  
(3), 42, 47, 48, 69, 70, 159, (1) (2) (A) (B) AND (E), 165 (3) (A),  
(B) AND 258 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND  
FREEDOMS UNDER ARTICLES 20,21,22 (1), 26, 27 (10 AND (2), 28,29  
(S), 31 (B), 39 (3), 40 (1), (2) AND (3), 47, AND 48, OF THE  
CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**CHRISTOPHER ONTIRI OGOTI ..... PETITIONER**

**AND**

**THE COUNTY GOVERNMENT OF NYAMIRA ..... 1<sup>ST</sup> RESPONDENT**

**THE CHIEF OFFICER ROADS, TRANSPORT AND PUBLIC WORKS,  
COURNTY GOVERNMENT OF NYAMIRA ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. In this Petition dated the 24/08/2021, the Petitioner claims that he is the absolute proprietor of the property known as LR. West Mugirango/Siamani/6952 and that the Respondents forcefully constructed an access road measuring 12 metres without Notice and that the same was excavated, murramed, compacted and upgraded into a major feeder road for public use. The road cuts across the Petitioner's property. There was no Notice of compulsory acquisition and the Petitioner was greatly



injured. He also adds that the process was carried out without public participation. The project was carried out contrary to the Constitutional rights of the Petitioner, mainly Article 40 of the Constitution of Kenya, 2010 i.e. violation of property rights. Accordingly, the Petitioner prays for the following orders: -

1. A declaration that the Petitioner's right to acquire and own property without arbitrarily being deprived of the same as guaranteed by Article 40 of the Constitution have been contrasted and/or violated.
  2. A declaration that the Respondent's acts are in violation of the Petitioner's rights to equality before the law and the right to equal benefit and protection of the law as enshrined in the Article 27 of the Constitution.
  3. An order for prompt payment in full of just compensation for the unlawful deprivation of property to the Petitioner pursuant to the express provisions of Article 40 of the Constitution.
  4. An order for general damages.
  5. Costs of this Petition.
  6. Any other relief the Honorable court may deem fit and just to grant.
2. In response, the Respondents filed a Replying Affidavit on 25/10/2012 sworn by the 2<sup>nd</sup> Respondent where he deponed that the 1<sup>st</sup> Respondent has never set aside funds for the construction of access road through the suit land i.e. LR. No. West Mugirango/Siamani/6952 and that no road was ever constructed past the suit property and that therefore the suit is not sustainable, frivolous and otherwise an abuse of the process of the court and the same ought to be dismissed with costs.
3. On her part, the 1<sup>st</sup> Respondent filed her Replying Affidavit through the County Surveyor, Robert Torori which was filed on 29/03/2023 where he attached his Report explaining that West Mugirango/Siamani/6952 is a resultant sub division of West Mugirango/Siamani/4270. West Mugirango/Siamani/ 6952 is approximately 6.024 Hectares which is accessible through an unscaled road and that it borders West Mugirango/Siamani/4271. West Mugirango/ Siamani/4270 is bordered by West Mugirango/Siamani/4271 and 2 roads and that there are inconsistencies in the 2 primary documents which are apparent and untenable.
4. On 08/12/2022, the Petitioner filed a Supplementary Affidavit and insinuated that the Respondents were in charge of the construction of the impugned feeder road and that it is the 1<sup>st</sup> Respondent's mandate and responsibility to construct, maintain and rehabilitate feeder roads in the County as provided for under part 2 (5) of the 4<sup>th</sup> Schedule of the Constitution of Kenya, 2010.
5. On 29/09/2022, I allowed the parties to file written Submissions in support of their rival positions which I have considered.
6. In *Re Application by Bahadur* [1986] LRC [Const], the Court expressed itself as follows: -
- “The Courts have said time and again that where infringement of rights are alleged which can be founded in a claim under substantive law, the proper course is to bring the claim under such law and not the Constitution. This case highlights the un-wisdom of ignoring that advice .....



7. In *Aliela v Kenton College Trust & another* (Employment and Labour Relations Petition E084 of 2022) [2023] KEELRC 226 (KLR)(26 January 2023) (Judgment) Justice Ocharo Kebira held as follows:

“.....The common thread across all the decisions cited above is that the constitutional litigation path is one that is narrow, only to be travelled in exceptional and very necessary situations. Not every grievance or dispute shall be litigated under the *Constitution*. Where a dispute can be litigated under common law or statute, the best course is to have it litigated thereunder. It matters not that alternatively it can be litigated under the *Constitution*.....

Considering the premises hereinabove.....The suit ought to have been pursued in the ordinary manner under statute.....”

8. Having observed as I have hereinabove I must point out that the shortcut used by the Petitioner herein does not augur well for his case. The case is highly contentious and required adducing of Evidence and not to be heard by way of Affidavit Evidence which makes it difficult to get to the root of the matter and I therefore dismiss the same. Each party to bear its own costs.

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

**MUGO KAMAU**

**JUDGE**

In the presence of: -

Court Assistant: Brenda

Petitioner: N/A

Respondents: Mr. Nyangarama

