



Kimathi & 16 others v Mohamed & 4 others (Environment & Land Petition E004 of 2023) [2023] KEELC 22263 (KLR) (6 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22263 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND PETITION E004 OF 2023
CK NZILI, J
DECEMBER 6, 2023
IN THE MATTER OF ARTICLES 1, 2, 3, 4, 19(1) AND (3), 21 (1)
AND (3) 22 (1), 24, 29(D), 42 AND 47 (1) OF THE CONSTITUTION
OF KENYA 2010
AND
IN THE MATTER OF CONTRAVENTION OR BREACH OF THE
CONSTITUTION
AND
IN THE MATTER OF THE ENVIRONMENT AND LAND CORUT ACT
2011
AND
IN THE MATTER OF THE LAND ACT 2012 (ACT 6 OF 2012)
AND
IN THE MATTER OF THE LAND REGISTRATION ACT 2012 (ACT 3
OF 2012)

BETWEEN

DENNIS KIMATHI 1ST PETITIONER
MAKELINA NKUI 2ND PETITIONER
DAMARIS KINYA 3RD PETITIONER
GEDION KABERIA 4TH PETITIONER
DANCUN MUTWIRI KIREMA 5TH PETITIONER
GEORGE MUGAMBI MURUGI 6TH PETITIONER



JOSEPH KALIUKO	7 TH PETITIONER
MOSES MWENDA	8 TH PETITIONER
DOMENIC MURURU	9 TH PETITIONER
ROSE KATHURE	10 TH PETITIONER
ALEXANDER MICHIBU KUBAI	11 TH PETITIONER
ESTHER MWIMBI	12 TH PETITIONER
LINUS GR ANAMPIU	13 TH PETITIONER
JOHN THUMBU	14 TH PETITIONER
SIMON THIAINE	15 TH PETITIONER
JULIETA BAIBAKU	16 TH PETITIONER
PROTASIO GICHUNGE	17 TH PETITIONER

AND

MARINA NCEECE MOHAMED	1 ST RESPONDENT
COUNTY GOVERNMENT OF MERU	2 ND RESPONDENT
THE LAND REGISTRAR TIGNAIA CENTRAL SUB-COUNTY, MUTHARA	3 RD RESPONDENT
THE HONOURABLE ATTORNEY GENERAL	4 TH RESPONDENT
COUNTY SURVEYOR TIGANIA CENTRAL EAST AND WEST	5 TH RESPONDENT

JUDGMENT

1. Before the court is the amended petition dated 12.7.2023, where the petitioners describe themselves as business owners from Mikinduri Tigania/Antuamburi/3714, 3869, 4614, 4107, 4110, 6697, 1165, 12404, 2149, 8150, 3853, 3868, 6395, 1165, 3759 and 11282 within Mayoe area Anjuki location, Mikinduri ward served by a public road of access, said to be in existence on the ground and on the land adjudication records.
2. Their complaint is against the 1st respondent and the owner of Parcel No. Tigania/Antuamburi/2098 for completely blocking a public access road that serves their homes and businesses, alleging that it was part of her land.
3. As a result of the blockage, the petitioners' averred their rights to property and other public members have been denied, violated, infringed, or threatened contrary to *the Constitution*. The petitioners pray for:
 - a. A declaration that the 1st respondent's closure and blockage of the road of access leading and serving their business in the defined parcels of land is illegal and unlawful.
 - b. An order directing the 1st respondent to unblock and open the road of access, leading and serving their business.



- c. Permanent injunction barring and restraining the 1st respondent, her employees, servants, agents, and assignees from blocking or interfering with the public road of access leading to and serving their businesses.
 - d. An order that the 3rd respondent plot in the registry index maps the public road of access leading to and serving the petitioners' businesses.
4. The petition was supported by an affidavit sworn by Dennis Kimathi on 13.3.2023 for and on behalf of the petitioners under the authority to sign documents dated 13.3.2023. The deponed averred that the petitioners had no access road except the one passing beside and along the 1st respondent land Parcel No. 2098 Antuamburi Adjudication Section. He averred that their parcels of land had become inaccessible due to the unlawful blockage, despite notice not to interfere with the access road from relevant government agencies.
 5. The 1st respondent opposed the petition through her replying affidavit sworn on 13.9.2023. It is averred that the petition was another attempt by Michubu Karugui and Jacob Mutiga in disguise to interfere with her land after losing in Meru ELC 208 of 2016 a copy of the judgment annexed as MNM "1".
 6. The 1st respondent averred that plot No.2149, belonging to Micubu Karugui, was listed in the petition. Therefore, the petition involved the same issues over the same subject matter, and the same persons now disguising themselves as different people to achieve their illegal motive of taking her land unconstitutionally.
 7. The 1st respondent averred that no other person was named as a respondent, and the plan was to mislead the court to make contradictory orders or findings different from ELC No. 208 of 2016. It averred that the area chief and the former defendant had vowed to use all means to threaten her and make her lose her land. The 1st respondent averred all the plots and parcels of land in the area had clear access roads as per the land surveyor report in Meru ELC No. 208 of 2016; otherwise, the land surveyor report made on 8.6.2023 was purposefully made out of influence and was contradictory to the previous one by the same land surveyors since scrutiny of it would show her plot did not border any access road but two main roads.
 8. The 1st respondent averred Plot No.12468 was fully developed with a permanent building, and there was no way her plot was encroaching on it or Plot No.3794, since none borders her land. Therefore, the 1st respondent averred the petitioners had unprocedurally brought a claim of a road of access as a constitutional petition, which is an abuse of the court process for it does not meet the threshold of a constitutional petition since it lacks content, facts, was frivolous and vexatious.
 9. The 3rd – 5th respondents opposed the amended petition through a replying affidavit of Joel Mabugu County Surveyor Tigania. He averred that he visited the locus in quo following a court order dated 16.5.2023, to establish any alleged encroachment on the access road on 25.5.2023 and 7.6.2023; in the presence of the parties, the land registrar Tigania and the county physical planner. He produced the report marked J.M. "2". The 3rd – 5th respondents averred that the access road appeared on Map Sheet No. 108/4/12/7 and was four meters and 37 meters long.
 10. It was averred that Parcels No.20987, 12468, 3794, 4341, and 5841 were measured using a conventional method.
 11. Compared to what was on the ground and the map, the 3rd – 5th respondents averred Parcel No. 3934 was erroneously plotted on the map. It was averred that the access road was lying between Parcel No. 12468 and 3794, but was not bordering Parcel No.2098, which encroached on Parcels No.374, 12468 and part of the access road.



12. With leave of court, parties agreed to canvass the petition through written submissions. The petitioners relied on written submissions dated 4.10.2023. It was submitted that the petitioners were the registered owners of L.R. No. 3714, 3869, 4614, 4107, 4110, 6697, 1165, 12404, 2149, 8150, 3853, 3868, 6395, 1165, 3759, and 11282 which they had extensively developed and were operating as served by an access road beside the 1st respondents land, with clear delineation and boundaries.
13. As to whether the petition meets the constitutional threshold, the petitioners submitted it was anchored on Articles 27 (1) & (2), 40, 47, 48 & 50 of *the Constitution* as pleaded in paragraph 20 (D) (a) & (b) of the amended petition.
14. The petitioners isolated five issues for the court's determination. As to whether they had pleaded and proved violation of their constitutional rights and freedoms, the petitioners submitted the 2nd – 5th respondent had not opposed or controverted their averments in the amended petition and the supporting affidavit as regards Articles 27 (1) & (2) of *the Constitution* since the 1st respondent had been illegally and unprocedural allowed by the 2nd to 5th respondents to violate and encroach out Parcel No. 3794 and 12458 as well as the road of access. Reliance was placed on Patrick Musimba vs National Land Commission & 4 others (2016) eKLR and Republic vs NGO Board Exparte Evans Kidero (2017) eKLR.
15. On whether the 1st respondent had any right over the petitioner's land, the petitioners submitted the 1st respondent's replying affidavit had been controverted by the petitioners, and the 3rd to 5th respondents replying affidavits, so she had no protective right or interest.
16. Regarding the reliefs sought, the petitioners submitted that they should be granted the reliefs sought since they have proved the violation of their constitutional rights. Reliance was placed on Anarita Karimi Njeru vs Republic (1979), Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others, Appeal No. 290 of 2012, Thomas Kahenya Mbugua & another vs Hon. Attorney General & another Mombasa ELC petition No. 2 of 2021, Morris Ngundo vs Lucy Joan Nyaki & another Malindi C.A No. 71 of 2015, Kenya Human Rights Commission & another vs Non-Governmental Organizations Board HC NRB Constitution Petition No. 404 of 2017 and Ann Nyaboke Achachi & 2 others vs Abel Moranga Ongwacho & 3 others (2020) eKLR.
17. The 1st respondent relied on written submissions dated 3.10.2023. On whether the petitioner was res judicata, the 1st respondent relied on Section 7 of the *Civil Procedure Act*, Black's Laws Dictionary 10th Edition, Nyanju vs Wambugu 7, another HCC No. 2340 of 1991, Siri Ram Kaura vs M.J.E Morgan (1961) E.A 462, Republic vs. Attorney General & another exparte James Alfred Koroza (2013) eKLR.
18. The 1st respondent submitted the court in Meru ELC No.208/2016 relied on a scene visit report made on 26.7.2019, that no access road passed through her land as per the registry index map, which the defendant never objected to. The 1st respondent urged the court to be guided by Uhuru Highway Development Limited vs Central Bank of Kenya (supra) and another to find that the earlier decision must be respected since it was final, binding, and conclusive, and since it had not been viewed, set aside, or reviewed, it should not be revisited otherwise the rule of law would be substantially be undermined.
19. On the land surveyor's report dated 8.6.2023, the 1st respondent submitted it contradicted the earlier judgment and, out of delay, her enjoyment of the earlier decree. She urged the court to dismiss it and grant her costs. Reliance was placed on Hussein Jan Mohammed and Sons vs Twentsche Overseas Trading Co. Ltd (1967) E. A 287 and Kennedy Mokua Ongiri vs John Nyasende Musioma and another (2022) eKLR.
20. The issues commending themselves for my determination are:



1. If the petition meets the constitutional threshold.
 2. If the petition raises a constitutional question.
 3. If the petitioners are guilty of the doctrine of exhaustion.
 4. If the petition is res judicata.
 5. If the petitioners have pleaded and proved a breach of their constitutional rights and freedoms.
 6. If the petitioners are entitled to the reliefs sought.
 7. What is the order as to costs?
21. The procedural and substantive laws governing a party seeking constitutional reliefs based on an alleged threat, breach, or infringement of constitutional rights and freedoms are with Articles 22, 23, 258, 259, and 260 of *the Constitution* and *the Constitution* of Kenya Protection of Rights and Fundamental Freedoms Practice and Procedure Rules 2013. Rules 4, 8, 9, and 10 of the (Mutunga Rules) require a petition to disclose the capacity of the petitioner, state the place of filing, name and address of the petitioner, facts relied upon, constitutional provisions violated, nature of injury caused or likely to be caused, details regarding any civil or criminal case related to the matters in issue, signature and the reliefs sought. Rule 11 thereof provides that a petition may be supported by an affidavit annexing the documents relied upon.
 22. In the amended petition before the court, the petition has cited Article 2, 1d, 21, 24, 27, 29, 42, 70, 43, and 47 of *the Constitution* as the foundation of it. In paragraphs 1-7, the parties are set therein. Paragraphs 10-20 set out the facts, while part D sets the alleged contravention solely against the 1st respondent. The nexus between the acts of the 1st respondent and the rest of the respondents was not pleaded with precision and degree of certainty. Any attempts for intervention made to the statutory bodies charged with the mandate of the public access roads was not pleaded.
 23. In paragraph 21 of the amended petitions, the petitioner allege the respondents' actions were manifestly unconstitutional, unlawful, and prejudicial to their livelihoods without giving particulars thereof. The injury loss or damage to the petitioners' businesses and homesteads have not been set with specificity and particularity in the affidavit sworn by the 1st petitioner; all the petitioners do not execute the authority to plead. No annexures were attached to show that the petitioners were owners of the suit parcels of land itemized in paragraph 19 of the amended petition. Nothing was annexed to show the petitioners were business owners or licensed business persons in Mayoe Area Anjuki location.
 24. In Anarita Karimi Njeru (supra), the court said a person seeking redress should set out with a degree of precision that of which he complains, the provisions said to be infringed and how they are alleged to be infringed. In Mumo Matemu (supra), the court said the principle in Anarita Karimi (supra) requires reasonable precision in framing issues in the constitutional petition so that each party knows what the real point to be discussed and decided was to diminish expense and delay as held in Thort vs Holdsworth (1876) 3 Ch D 639. The court said the quoting of Articles No. 1, 2, 3, 4, 10, 17, and 73 of *the Constitution* in the title with little or no particulars as to the allegations and the manner of the alleged infringements were not enough.
 25. In Kenya's Human Rights and Commission and another vs NGO (supra), the court said constitutional rights and freedoms have inherent value and must be enhanced, respected, and protected. Through Article 25 of *the Constitution*, the court has the authority to step in whenever there is an allegation of violation or threats and grant appropriate relief.



26. The purpose of pleadings is to notify the opposite party the issues, the facts and probate evidence to be adduced to avoid trial by ambush. In *Gitobu Imanyara & 2 others vs. Attorney General & another* (2016) eKLR, the court said it had to apply the law based on the evidence presented before a court. In *Mumo Matemu (supra)*, the court said pleadings assists as a tenet of substantive justice by giving notice to the other party.
27. In *Humphrey Mutegi Burini & 9 others vs. Chief of the Kenya Defence Forces and another* (2017) eKLR, the court held that the petition ought to have contained particulars of the alleged violation subjected to each petitioner, the injury, loss or damage suffered; otherwise it was difficult for the court to determine the nature and extent of torture meted to each petitioner to arrive at a fair and reasonable compensation in absence of such clarity and specificity as required under Rule 10 (2) of the Mutunga Rules.
28. In *M'Ithilai vs County Government of Meru & another* (2022) (KL2) 23rd November 2022 (judgment), the court said a constitutional question was the one whose solution is derived from the constitutional interpretation or the determination of the constitutional role of state organs the legality of legislation and the interplay between government departments. Further, the court cited with approval *Geoffrey Muthinja & another vs Samuel Muguna and (1756) others* (2015) eKLR and *William Odhaimbo Ramogi & 3 others vs A.G. and others* (2020) eKLR, that a party should only move to court after exhausting another available statutory mechanism unless they were not capable of adjudicating on the matter. See *NGO's Coordination Board vs E.G & 4 others* (2023) KESC (17) KLR.
29. In this petition, the petitioner's complaint is an alleged blockage of a public access road by the 1st respondent. There is no particular pleading that the petitioners invoked the statutory available mechanism to handle disputes over encroachment on road of access and road reserves or encroachment of private land.
30. In *NARC Kenya vs IEBC 7 others* (2022) KESC 6 (KLR) 17th February 2022 (Judgment), the court said constitutional remedies were sacrosanct and transcendental in importance to be invoked in all conceivable situations. The court said they were reserved only for genuine and verifiable breaches of *the Constitution* and not for correcting errors that could be resolved by alternative means of redress provided in the statute. The court said that where there was an alternative method of dispute resolution established by legislation, the court had to exercise restraint and give deference to the dispute resolution bodies.
31. The court observed Article 159 2 (d) of *the Constitution* was not a cure magic bullet not intended to oust the obligations of parties and litigants to comply with the law or procedural imperatives as they sought justice from the courts.
32. Applying the preceding case law, is the petition before the court raising constitutional issues or questions whose solutions or remedies solely revolve around *the Constitution*? My answer is no. Access roads are governed by the Public Road and Road of Access Act (Cap 399) Laws of Kenya. A public road is defined as any road that the public has a right to use immediately before the commencement of the Act. Section 9 stipulates the elaborate procedure through which a road of access is created and how an owner or occupier of the land may apply to the road board for leave to construct a road of access over any land between his land and the public road railway station or halt. After due process is followed upon application and if meritorious leave is granted to create a road of access under Section 11 of the Act, a notification is sent to the land registrar for registration of an entry against the affected title or titles.



33. Section 9 of the Act stipulates that where exceptional circumstances exist, there may be a provision for creating a second category of roads called roads of access. In this petition, the petitioners have not presented any material on how the access road was created if it was out of resurvey, subdivision or re-parcellation of the parcel abutting it.
34. The legal framework on land planning, land survey, land registration, and roads is governed by several statutes. See *Moses Wamuti Kinuthia vs John Njau Kimani (2020) eKLR*. In *Buruburu Farmers Co. Ltd vs Nairobi City Council & another (KLR) (7th July 2022 (Judgement))*, the court said there was a distinction between a public road set apart and designated as such and a road of access. The latter connotes one of the private usages characterized by a party that has applied to connect or link such a party to utilities. The court cited with approval *Dellian Langata Ltd vs. Symon Thuo Muhia & others (2018) eKLR*, that a public road is set apart for designated use by all members of the public without limitation or restriction.
35. The court said it could not overlook the existing provisions of the law on land. Further, the court said that the plaintiff had failed to demonstrate the undertaking of all the necessary steps in complying with and utilizing the redress mechanism under Sections 8 and 9 of the Public Road and Road of Access Act.
36. In *Wilfred Limiri Mukuchia & 11 others vs County Government of Meru (2019) eKLR*, the court said that under section 14 of the public road and road of access, it was the mandate of the board for a sufficient cause to order the cancellation or alignment of a road of access provided a due notice was given to any person who might be affected by such order. The court cited with approval *Mary Njeri Gatuha and three others vs George Muniu Mungai & others (2017) eKLR* on what a private road was.
37. In *Kipkurui Arap Koskey vs Philomena Kiprigo Tangu & another (2015) eKLR*, at issue was an alleged interference with a registry index map to remove an existing road. The court rejected a sketch plan whose drawer, its drawing date and for what purpose was unclear. The court said boundaries of parcels of land must align with the cadastral maps as per Section 18 of the *Land Registration Act* and that when it comes to public roads of access, the district roads board under Sections 8 & 9 of the Public Road and Road of Access Act (Cap 399) and any person seeking for an access road has to approach the Minister or the board to create such a road. This court is asked to enforce constitutional rights as to the right of road access. These are statutory rights which are governed by the statutes. No constitutional/ questions or issues are raised in the amended petition for this court to answer.
38. The petitioners have not subjected their grievance, if any, to the statutory bodies above cited for redress. There is no documentary evidence on the alleged access road's manner, origins, or statute from the survey department's cadastral map and registry index maps duly published.
39. The sketch map attached to the report dated 8.6.2023 has no logo, publication date, maker's name, date, or authentication. The public road engineer was not called to attest to the status of the road. The report is silent on the beacons fixed boundaries recommendations and action taken against any encroachers. The report lacks scientific and historical basis on how and when the access road was created.
40. The petitioners did not subject themselves to the statutory bodies and failed to exhaust the mechanisms mandated to deal with the issue. There is nothing for this court to address as a constitutional question. The dispute, if any, can be determined ordinarily without camouflaging it as a constitutional dispute. See *May Fair Holdings Ltd vs. Municipal court of Kisumu (2018) eKLR* *Wilfred Keli Ndolo vs Jescah Gatakaa Amboka and another (2019) eKLR*.



41. Regarding res judicata, a constitutional petition must disclose pending or previous civil or criminal proceedings related to the matter before the court. The 1st respondent has pleaded and attached a judgment of this court touching the matter issues and involving similar parties and documents, which was determined to finality. In particular, the 1st respondent averred on oath that the petitioners were proxities of the defendants in the previous suit whose decision had not been appealed against, reviewed, or set aside. Further, the 1st respondent attached the surveyor's report dated 8.6.2023 as a complete departure from the previous report submitted to the court by the same officers dated 26.7.2019, confirming that no access road existed on her Parcel No.2098.
42. One of the issues determined by the court in the former suit was whether a public road of access existed abutting the 1st respondent's land. The land surveyor report and the recommendations were that, per the registry index map, the road was not supposed to pass through the plaintiff's parcel and that structures had been built where the official access road was supposed to pass through. The report marked the area in red ink. The land surveyor recommended demolition of the structures to pave the way for the designated road as per the attached registry index map. The report also indicated that the "illegal" road on the 1st respondent's land was a shortcut cut about 35 meters, as reflected on the index map.
43. The executive officer of the court had also prepared its report. From map sheet no. 108/4/12/7, the tracing map was produced by Mr. Langat, the land adjudication officer of Antuamburi adjudication section. The court rejected it.
44. In the affidavit sworn on 22.3.2023, Dennis Kimathi he attached an annexure marked D.K. 1 (a) & (b) D.K. "2". These were the exhibits that the defendants in the previous suit relied upon, and the court rejected them for lack of authenticity and jurisdiction to determine access roads.
45. In Maina Kiai vs IEBC (2016) eKLR, the court said res judicata exists to bring finality to litigation and afford parties closure and respite from the spectra of being vexed, haunted, and hounded on issues es and previously determined by a competent court to avoid wastage of time, judicial resources in an endless round of litigation hoping to obtain a favorable outcome.
46. In John Florence Maritime Services Ltd & Another vs. C.S Transport and Infrastructure and others (2021) eKLR, the court affirmed that res-judicata was a public policy to prevent multiplicity of cases to clog courts where matters were determined to finality, on merits over the same subject matter and parties or with identical parties subject matter and cause of action.
47. Applying the caselaw cited, I think the issues are the same, over the same subject matter and between identical parties. In Communication Commission of Kenya vs Royal Media Services (2014) eKLR, the Supreme Court of Kenya said issues should not be relitigated once determined on merits by being raised in subsequent proceedings by a party seeking to have a second bite of the cherry; otherwise, it would undermine the integrity of the administration of justice and fairness in settlement of disputes.
48. In my view, the petitioners and the 3rd – 5th respondents are estopped from taking an institutional detour to attack the validity of the previous decree by seeking a different result from a different forum wearing a constitutional petition uniform, rather than the designated appellate route. I find the petition res judicata.
49. It is not enough to allege a breach of constitutional rights and freedoms without cogent and tangible evidence to substantiate them. None of the petitioners produced ownership documents for the listed parcels of land or businesses. None of them particularized the individual rather than the collective



effect of the alleged blockage. None of the petitioners produced evidence of subjecting themselves to the jurisdiction of the 2nd – 5th respondents for redress or investigation of the complaint.

50. There was no single report to challenge the earlier report by the land surveyor and registrar, as well as the decree of this court, which had directed the land registrar and land surveyor to visit the locus quo, implement and re-establish the access road and remove any structures on the access road vide report dated 26.7.2019.
51. Unfortunately, the land surveyor, land registrar, and especially the 3rd respondent in this petition have ignored a valid decree of this court and sworn an affidavit contrary to an earlier report from the same office. There is a presumption of regularity in documents and reports brought to this court by the land surveyor and the land registrar. If they then turn rogue and do not stand by their official documents, one wonders whether such reports are worthy of the paper they are written on.
52. Based on contradictory reports, I find the petition res-judicata, incapable of substantiating the petitioners' allegations of loss, damage, and injury on the alleged breach of their constitutional rights.
53. The upshot is that I find the petition incompetent, lacking merits, res judicata, and an abuse of the court process. The same is dismissed with costs.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU
ON THIS 6TH DAY OF DECEMBER 2023**

In presence of

C.A KANANU

Mugai for Omari for petitioners

Gikundi Anampiu for respondent

Miss Maina for the 3rd & 5th respondents

