



Gathara v Athi Water Works Development Agency & 2 others (Petition 3 'A' of 2022) [2022] KEELC 12633 (KLR) (22 September 2022) (Judgment)

Neutral citation: [2022] KEELC 12633 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
PETITION 3 'A' OF 2022
JG KEMEI, J
SEPTEMBER 22, 2022**

BETWEEN

ONESMUS MAINA GATHARA PETITIONER

AND

ATHI WATER WORKS DEVELOPMENT AGENCY 1ST RESPONDENT

**CHINA HENAN INTERNATIONAL CO-OPERATION GROUP CO.
LIMITED 2ND RESPONDENT**

COUNTY GOVERNMENT OF KIAMBU 3RD RESPONDENT

JUDGMENT

Introduction

1. Onesmus Maina Gathara sued the respondents vide the petition filed on December 18, 2020 for orders as follows;
 - a. A declaration that the actions of the respondents, whether by themselves, their employees, financiers, servants, agents, assigns and/or other person whatsoever acting under their instructions, mandate, authority and/or on their behalf being the entry into and use of the land by digging trenches thereon are unConstitutional and unlawful as they violate the petitioner's Constitutional rights under articles 27, 28, 40 and 47 of the *Constitution of Kenya, 2010*.
 - b. A declaration that it is the duty of the respondents to ensure that land acquisition for the construction of the Kiambu and Ruaka Water and Sewerage Project ("the Project") is conducted in accordance with the provisions of the *Land Act, 2012*.
 - c. A declaration that it is the duty of the respondents to prepare and implement resettlement action plans for components of the project interfering with private assets and sources of livelihood.



- d. An order of prohibition restraining the respondents whether by themselves, their employees, financiers, servants, agents, assigns and/or any other person whatsoever acting under their instructions, mandate, authority and/or on their behalf from entering into and entering, trespassing on, taking possession of, excavating, constructing upon, interfering with, disposing of, alienating or otherwise dealing in any manner whatsoever howsoever with the land.
 - e. An order that the petitioner is at liberty to restore the land to its original state preceding the invasion by the 2nd respondent and remove the trenches and other fixtures and fittings or any construction material and debris created or placed upon the land by the 1st and 2nd respondents whether by themselves, their employees, financiers, servants, agents, assigns and/or any other person whatsoever acting under their instructions, mandate, authority and/or on their behalf, at his own cost, which costs shall be recoverable from the 1st respondent as part of the costs of this petition or as the court may direct.
 - f. Costs of the petition.
 - g. Any other relief that this honourable court deems fit to grant in the interest of justice.
2. The petitioner's case is comprised in the main petition and the supporting affidavit of the petitioner sworn on even date.
 3. The 1st respondent is a water agency established under section 65 of the [Water Act, 2016](#) charged with the responsibility of interalia development maintenance and management of public water works within Nairobi, Muranga and Kiambu counties.
 4. The 2nd respondent has been commissioned by the 1st respondent to construct the Kiambu Ruaka Water Sewerage Project (the project).
 5. The 3rd respondent is the County Government of Kiambu established under article 176 of the [Constitution of Kenya, 2010](#).

The petitioner's case

6. The petitioner avers that he is the registered owner of land parcel No Ndumberi/Riabai/4774 (suit land). That in 2019 the 1st respondent commissioned the project and contracted the 2nd respondent to carry out the works.
7. That without the consent or authority of the petitioner having been sought and obtained prior, 20 employees or agents of the 2nd respondent in or around November 25, 2020 entered and trespassed the suit land and started excavating massive trenches of about 7 feet deep all over the land for purposes of laying tributary sewer pipes for the project leaving debris all over the land.
8. That in its EISIA report, the 1st respondent being the project proponent undertook as part of its environmental and social management and monitoring plan to ensure that land acquisition for the project is done within the provisions of the [Land Act](#) 2012. Under the said plan the respondents are obligated to prepare and implement a resettlement action plan to take care of the interference of private land and livelihoods of those affected by their actions.
9. It was his view that the respondents have invaded his land without following the due process of the law; that is under section 39(1) of the [Water Act](#) which requires them to acquire easements over the land before commencing the project; article 40 (3) of the [Constitution](#) which requires compulsory acquisition of land to accord with the provisions of the [Land Act](#) and the need to pay prompt just fair and adequate compensation; the damage on the land constitute breach to right to property and clean



- and healthy environment under article 40 and 42 of the Constitution; the entry into and arbitrary use of the land without notice violates his right to fair administrative action and access to justice under article 47 and 48 of the Constitution of Kenya and section 4 of the FAA, 2015; his exclusion from the process of acquisition and failing to factor in his ownership and occupation of the suit land in the relevant resettlement action plan for the project discriminated against him from other owners hence violating his right not to be discriminated under article 27 and 28 of the Constitution of Kenya; finally that the actions of the respondents are improper illegal arbitrary and manifestly unjust irregular and oppressive.
10. Relying on the case of Cyber Access Limited v National Land Commission & 3 others (2018) eKLR the petitioner submitted that he was not informed of the respondents' decision to enter into the land dig trenches and lay pipes nor give written reasons for the same, he has been denied justice in form of review, and or appeal or otherwise challenge such a decision.
 11. On the violation of his rights to property, the petitioner submitted that the actions of the respondents constitute a deprivation of property with no regard to the law as set out in article 40(3) and the Land Act on compulsory acquisition. That the National Land Commission has not been brought on board to effect the compulsory acquisition as mandated in law.
 12. Further whilst quoting section 39 (1) of the Water Act 2016, the petitioner submitted that the 1st respondent failed to acquire an easement from the petitioner permitting the works being conducted by the 2nd respondent at its behest.
 13. On breach of the petitioners right to equality and freedom from discrimination, the petitioner relied on article 27 which provides that every person is equal before the law and has the right to equal protection and equal benefit of the land. That equality includes the full and equal enjoyment of all the rights and fundamental freedoms and prohibits the state from direct and indirect discrimination against any person or on any ground. He contended that his rights to land were not acknowledged like the several private land owners whose rights were so acknowledged and this amounts to discrimination.
 14. The petitioner submitted that the respondent's actions as regards the violation of his land rights have violated article 10 of the Constitution by failing to abide by the law, acted without transparency and accountability disregarded the petitioners human right to own property and grossly discriminated against him.
 15. Finally, the petitioner urged the court to grant the orders sought in exercise of its jurisdiction bestowed upon it under article 22 and 23 of the Constitution which gives the court power to uphold and enforce the bill of rights, land rights included.
 16. I have read and considered the supplementary written submissions filed by the petitioner dated the June 14, 2021

The 1st respondents' case

17. The petitioners case is denied by the 1st respondent vide a replying affidavit sworn by Engineer Joseph Kamau who is the Chief Manager, Water & Sanitation services of the 1st respondent. He averred that the project along Kiu River in Kiambu County started in September 2020. The 1st respondent is the project manager responsible for among other things, designs access to construction space interalia. That the trunk sewers measuring 54 km long were to be constructed along the river riparian marked by the Water Resources Authority (WRA). A copy of the WRA report was annexed and marked JK1.
18. The 1st respondent made a commitment that a corridor of 8 meter crop /structures compensation would be paid along the riparian area whereas any corridor required outside the riparian as guided by



the existing gravity flow level as would be compensated for a 3 meter land corridor. In addition, he deposed that 1st respondent obtained an 8 meter long construction space where the sewer line would be installed and this 8 meter long space was part of the petitioner's land that was marked as a riparian. He avowed that the 1st respondent carried out sensitization meetings on the February 26, 2019 where one Ruel Njuguna Kamande was in attendance. The said Kamande was a tenant of the petitioner for 5 years from March 1, 2015 with an option of renewal on expiry. That secondly the Assistant Chief of the area confirmed that Ruel Njuguna Kamande was the rightful beneficiary for the property and not the petitioner. That during the public awareness meeting the petitioners tenant alongside other attendees were informed of the project particulars. He averred that the minutes of the said meeting were annexed. That the residents were aware that compensation was in respect to plants and structures along the riparian and not for land and were given the opportunity to remove anything they wanted to recover before construction begun.

19. From the above it was the contention of the 1st respondent that the petitioner cannot be heard to say that he was not aware of the project.
20. In addition he stated that on the August 18, 2020 the petitioner, the tenant and the 1st respondent signed an agreement for the compensation where the 1st respondent agreed to pay the sum of Kshs 116,916/91 as compensation disturbance and damage to the suit land along the established riparian corridor by WRA during the construction of the project. That the compensation was based on the damage to the hardware on the property which belonged to Ruel Njuguna Kamande and in September 2020 excavation begun which involved the digging of trenches and uprooting vegetation around the marked area.
21. He stated that the petitioner has since leased the suit land to another person who has developed a car wash on his plot on a section that was marked by WRA as a riparian land, which section according to him, awaits the construction of a sewer pipe through the KERRA road at Kirigiti Todas area to join with the already constructed sewer pipe within the riparian/road reserve next to the petitioners plot. That the petitioner is not entitled to any more compensation than what was agreed. That as it is the petitioner is committing an illegality by permitting the construction of a car wash on the riparian land.
22. In the end the 1st respondent contended that the claim of trespass is unfounded as the riparian land is public land and does not belong to the Plaintiff. That the petition is brought in bad faith and the petitioner is guilty of material non-disclosure for presenting false evidence to the court.
23. The 1st respondent submissions were filed by Ms Martha Wanjiku, the learned counsel of the 1st respondent and framed 4 issues; Whether the 1st respondent breached the petitioner's right to fair administrative action under article 47 of the *Constitution*?; Whether the petitioner should be granted conservatory orders?; Whether the 1st respondent trespassed the petitioner's land and breached his right to the land under article 40 & 60 of the *Constitution*?; Whether the 1st respondent breached the petitioner's rights to wit; access to justice; equality and freedom from discrimination and human dignity and national values under articles 48, 27, 28 and 10 of the *Constitution* respectively?; Whether the petitioner can benefit from an illegality?
24. On the 1st issue the 1st respondent submitted that it followed the due procedure in identifying the beneficiaries for compensation and consequently paying compensation before the commencement of construction of the truck sewers.
25. Relying on the decision of *Republic v Kenyatta University Ex parte Martha Waibuini Ndungu* (2019) eKLR the 1st respondent submitted that it held a workshop on the February 26, 2019 at the chief's camp at Kirigiti Stadium where all the residents whose parcels would be affected were invited. At



- the workshop the affected residents were given the details of the project including the form of compensation that would be paid as well as time to remove anything they wanted to recover before the construction begun. That the petitioner was paid and never raised any opposition to the project.
26. On whether the petitioner should be granted conservatory orders, the 1st respondent relied on the case of *Martin Nyaga Wambora v Speaker of the County Assembly of Embu & 3 others* (2014) eKLR where the court set down the principles for the grant of conservatory orders as;
- “...[an applicant] must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”
27. Holding that the petitioner has not shown a prima facie case with a likelihood of success, the 1st respondent contended that the petitioner and his lessee had been compensated for the damage to the hardware that was on the land and he stands to suffer no prejudice on account of refusal of the relief. In addition, that public interest outweighs individual rights as granting the conservatory orders as sought will occasion delay in completing the project within the stipulated time and would go against prudence in the use of public funds.
28. As to whether there was trespass on the petitioners land, the 1st respondent submitted that rivers lakes and water bodies are defined as public land under article 62 (1) of the *Constitution of Kenya* and section 2 of the *Water Act* and every water resource is vested in and held by the national Government in trust for the people of Kenya. Consequently the 1st respondent argued that the petitioner did not have property rights over the marked riparian land hence no trespass. Since the riparian land vests in the Government of Kenya (GOK) there was no need for compulsory acquisition.
29. As to whether the 1st respondent breached the petitioners right to wit; access to justice; equality and freedom from discrimination and human dignity and national values under article 48, 27, 28 and 10 of the *Constitution of Kenya*, the 1st respondent submitted that the petitioner has failed to prove any violation of any rights. It relied on the cases of; *Godfrey Paul Okutoyi v Habil Olaka* (2018) eKLR and *Leonard Otieno v Airtel Kenya Limited* (2018) eKLR where the court held that ;
- “It is a principle of law that he who asserts must prove, and in this regard, section 107(1) of the *Evidence Act* (Cap 80) provides that “Whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.”
30. The 1st respondent submitted that in seeking further compensation for the car wash on the riparian land the petitioner is seeking to benefit from an illegality. see the case of *Standard Chartered Bank Kenya Ltd v Intercom Services Limited & 4 others* (2004) eKLR & *Republic v Ministry of Roads & Anor Exparte Vipingo Rodge Limited & Anor* (2016) in support of the proposition that no court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal , if illegality is brought to the notice of the court and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant had pleaded the illegality or whether he has or not. If the evidence Adduced by the plaintiff proves the illegality the court ought not to assist him.

The 2nd respondent’s case

31. The 2nd respondent opposed the petitioners claim vide its replying affidavit filed on the April 19, 2021 in an affidavit sworn by Li GangGang, the site Engineer of the 2nd respondent. He confirmed that they



were contracted by the 2nd respondent to build the project. Before the commencement of the project the 1st respondent carried out an EISIA while WRA marked the riparian and according to the WRA report the petitioners land is located at the flood plain and part of it is marked as a riparian land. That the trunk sewers measuring 54 km are all situate on the riparian land. Further that the 8-meter-long space where the sewer line would be constructed is part of the riparian land, part of which extends for 6 meters on either side of the river bordering the petitioners land which still forms part of the riparian land as marked by WRA.

32. He reiterated the 1st respondents averments that the petitioner through his tenant was aware of the project; attended public awareness meetings; was compensated for the hardware structure on the land; that there is no trespass as the land is a riparian land; that the petitioner has not proven any violation of Constitutional rights to warrant the issuance of the prayers sought in the petition.
33. The submissions of the 2nd respondent were filed by the law firm of Dulo & Company Advocates. They framed 5 issues for the court's determination.
34. As to whether the petitioner should be granted conservatory orders the 2nd respondent as the 1st respondent answered that in the negative and reiterated that the petitioner and his tenant were paid compensation for the damage to the hardware shop that was on the riparian land and for that reason a *prima facie* case in his favour is not founded. Secondly considering public interest outweighs individual rights, the balance of convenience favours declining the orders because the construction of public sewerage is a public project which will benefit members of the public, including, the petitioner. That if the orders are granted it will delay the project leading to costs overruns in the completion of the project.
35. Further the 2nd respondent submitted that the petitioner should not be allowed to benefit from an illegality in that compensation as already paid to him through his tenant in the sum of Kshs 116,916/91. That he cannot be paid twice. That the petitioner has allowed a car wash to be erected on the land marked for the riparian land which is public land where construction is prohibited in law.
36. The 2nd respondent has far and large joined issues with the 1st respondent and there is no need to repeat the submissions.
37. In a supplementary affidavit filed by the petitioner, the petitioner contended that the said Ruel Njuguna Kamande alleged to have been paid compensation was neither in legal nor actual possession of the suit land at the time as his lease over the land had expired on the Marc 5, 2020. In addition, he deposed that he was not entitled or authorized to receive compensation for the use of the land which belongs ton him. That the 1st and 2nd respondents have not shown any notice issued to him as the land owner with respect to the project and in accordance with the law. That he did not append his signature on the sensitization minutes as well as the compensation document.
38. In addition, the petitioner averred that he was not notified when the alleged riparian marking was done by WRA and that if the allegation be true then it was in contravention of section 60 of the [Water Act](#) which prohibits the WRA from entering on to the land without giving a reasonable notice to the land owner. To the extent that the marking affected his property the same violated the provisions of section 4(3) of the [Fair Administration Act, 2015](#) which section clearly mandates the decision maker to give any person whose rights or fundamental freedoms are likely to be affected by an administrative action prior and adequate notice and an opportunity to be heard and notice of a right to a review or internal appeal. That the WRA report has not been given to him nor had explained to the meaning of the report and how it affects his rights. In addition, he refuted the 1st respondents averments that it lawfully obtained any 8, 3 or 12 meters long construction space on the land as alleged.



39. The petitioner was emphatic that the 1st respondent has never acquired any easement or wayleave enabling it to utilize any part of his land for the project and the actions of the respondents therefore are contrary to section 39 of the *Water Act*. He denied signing any agreement with the 1st respondent on the 18/8/2020 with respect to compensation for its dealings on the suit land and avers that he has never received any compensation and that the alleged annexure is a forgery and has never seen it prior to being served by the 1st respondent.
40. The deponent was categorical that his property is not public land and that there is no flood plain situate on or under it. That he is not guilty of any material non-disclosure or malafides as regards the proceedings in court and instead faulted the respondents for false information contained in the chief's letter and the alleged compensation agreement.
41. The 3rd respondent did not file any response to the petition.
42. Having read and considered the pleadings the rival affidavit evidence the written submissions and all the material placed before me I find the issues for determination as follows;
- a. Whether the suit meets the threshold of a Constitutional petition?
 - b. Costs of the petition
43. It is trite that he who alleges must prove. The threshold for proving breach of Constitutional rights as in the instant case was set out in *Anarita Karimi Njeru v Republic* (1976-1980) KLR where it was held that;
- “We would however again stress that 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 reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.” [Emphasis added]
44. That principle was affirmed by the Court of Appeal in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR where the Learned Judges emphasized that;
- “(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the Constitutional provisions alleged to have been violated....”
45. The Court of Appeal further added;
- “(43) The petition before the High Court referred to articles 1, 2, 3, 4, 10, 19, 20 and 73 of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the



respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars.

(44) We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to.”

46. I understand the case of the petitioner to be that the respondents without his authority and consent trespassed onto his land and carried out the construction of the Kiambu and Ruaka Water and Sewerage Project (“the Project”) works. The issue of trespass in my considered view is a matter for evidence and cannot be determined on affidavit evidence. The party alleging trespass must lead evidence to demonstrate that the encroacher indeed entered the land without the consent and permission of the land owner.

47. The petitioner laments that the respondents should have acquired the lands under the *Land Act* and accordingly pay the appropriate compensation. Both parties agree that compensation was made for the developments on the land being a hardware structure. The position taken by the respondents is that the land having been marked as riparian, is public land for which compensation was not available. Instead what was compensated were structures and crops and that in the case of the petitioner, his previous tenant was compensated. The issue of compensation, the nature, the quantum and who was compensated and why are issues to be tried in a civil suit.

48. The respondents on the other hand contend that the land upon which they have constructed the works is riparian lands as set out by WRA and that being the case the same is public land. It was the case of the petitioner that the portion of his land that was encroached by the respondents is not public land. That he was not consulted when the said WRA declared the land as such. This raises the issue of the basis and the factors upon which WRA considered when marking the land as a riparian land. These are issues that require an inquiry by a Civil Court in ordinary cases to determine whether or not the land is riparian and if riparian what are the rights of the land owner.

49. In the case of *Re Application by Babadur* [1986] LRC (Cost) 297 at 298, the court held as follows;

“The Constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can found a claim under substantive law, the proper course is to bring the claim under that law and not under the Constitution.”

50. In addition in the case of *Minister of Home Affairs v Bickle & others* (1985) LRC Cost 755, held as follows;

“It is an established practice that where a matter can be disposed off without recourse to the Constitution, the Constitution should not be involved at all. The Court will pronounce on the Constitutionality of a statute only when it is necessary for the decision of the case to do so (Wahid Munwar Khan v The State AIR (1956) Hyd22). The judge went on to add that: “Courts will not normally consider a Constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative



provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition a breach of the declaration of rights.”

51. It is trite that where the law provides for a mechanism to determine a dispute it is not necessary to resort to the Constitution. The Constitution should be left for Constitutional disputes. Not every case should be Constitutionalized even in the face of clear statutory provisions as to how it should be determined. In this case a claim of trespass and compensation are in the realm of private law and not the Constitution.
52. Going by the decision of the court above and having made the finding that the claims are such as are in the realm of private law, which may be determined in a civil manner, I find that the petition as drafted does not meet the threshold of a Constitutional petition.
53. It is therefore struck out with no orders as to costs.
54. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 22ND DAY OF SEPTEMBER 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

petitioner / Applicant - Absent

Ms. Muchai HB Wanjiku for 1st respondent

2nd and 3rd respondents - Absent

Court Assistant – Phyllis Mwangi

