



**Juma & 5 others v Kenya Rural Roads Authority & 5 others (Environment & Land
Petition E006 of 2021) [2022] KEELC 13688 (KLR) (25 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13688 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND PETITION E006 OF 2021
DO OHUNGO, J
OCTOBER 25, 2022**

BETWEEN

**MOHAMMED JUMA 1ST PETITIONER
MANAGER, WESTWOOD PREMIER ACADEMY 2ND PETITIONER
OMAR JUMA 3RD PETITIONER
IDD HAMIS JUMA 4TH PETITIONER
IDD RAJAB JUMA 5TH PETITIONER
SADIQ RAJAB JUMA 6TH PETITIONER**

AND

**KENYA RURAL ROADS AUTHORITY 1ST RESPONDENT
TAI ENTERPRISES LIMITED 2ND RESPONDENT
EK CHESEREK- THE REGIONAL DIRECTOR KERRA 3RD RESPONDENT
K OCHIENG – RESIDENT ENGINEER MUMIAS MUSANDA
ROAD 4TH RESPONDENT
RONALD OKAPOSE – DEPUTY RESIDENT ENGINEER MUMIAS MUSANDA
ROAD 5TH RESPONDENT
FREDRICK OTIENO – PROJECT SURVEYOR MUMIAS MUSANDA
ROAD 6TH RESPONDENT**

JUDGMENT

1. By petition dated August 16, 2021, the first petitioner averred that he is the owner and manager of Westwood Premier Academy on land parcel S/Wanga/Ekero/1589 which land he owns. That he is



also the administrator of the estate of the late Juma Ekaya represented in the petition through the third, fourth, fifth and sixth petitioners who reside on land parcel numbers S/Wanga/Ekero/1587 and S/Wanga/Ekero/1590, parcels of land which border points 0+323M to 0+605M on the Mumias - Musanda Road under construction and upgrade to bitumen standard as at the date of filing of the petition.

2. The petitioners averred that the road reserve is 40 meters wide and measuring 20 meters from the middle on either side of the road. That an initial survey or assessment carried out by the respondents on March 11, 2021 had the road mapped out to extend on both sides of the road in a way that was satisfactory, fair, and created no blind corners or artificial meandering. That after the said initial survey, the project took a turn due to the influence of local administration and that to avoid the road touching Area Chief's land on which there is a 20-meter road reserve, the respondents colluded to spare the Area Chief's land and to have the road constructed almost entirely into the petitioners' property thus creating a new artificial huge curve.
3. The petitioners further averred that on the inception of the Mumias- Musanda Road project, they raised complaints about the section of the road that borders their land as the course of the road as mapped out created a risky blind corner which they felt endangered not only the lives of the young school going children but also the lives of the members of the public in general who use that section of the road. The petitioners averred that the respondents infringed on their rights and violated articles 19 (1) and (3), 24 (1), 28, 40, 43(1) (f), 47 and 73 (2) (b) of the [Constitution of Kenya](#).
4. The petitioners therefore prayed for the following orders:
 - a. A declaration that the petitioners fundamental rights and freedoms as enshrined in the [Constitution of Kenya \(2010\)](#) under articles 1, 2, 3, 10, 19 (1) & (3), 22(1) & (2), 23, 24(1), 27(1), 40, 43(1)(f), 47, 73(2)(b) and 258(1) & (2) have been contravened and infringed upon by the Respondents herein.
 - b. A declaration that the respondents decision to alter/vary the survey/assessment results of the survey/assessment undertaken by the Respondents on 11th March, 2021 to now force a realignment of the Mumias-Musanda Road now under construction from point 0+323M to 0+605M was unconstitutional and in gross violation of the rights and freedoms of the Petitioners as provided for under Articles 1, 2, 3, 10, 19(1) & (3), 22(1) & (2), 23, 24(1), 27(1), 40, 43(1)(f), 47, 73(2)(b) and 258(1) & (2).
 - c. A declaration that a portion of the Petitioners proprietary interests in Land Parcels Registration Nos S Wanga Ekero/1590, S Wanga/Ekero/1587 and S Wanga/Ekero/1588 situate in Mumias within Kakamega County, has been compulsorily acquired by the State beyond the road reserve as surveyed by the Respondents on March 11, 2021.
 - d. An Order of injunction do issue restraining the 1st 2nd 3rd 4th 5th and 6th Respondents, their servants, agents and/or any other person deriving authority from them from proceeding with the construction of that section of the Mumias - Musanda Road from point 0+323M to 0+605M until the complaints raised by the Petitioners are addressed.
 - e. An Order that the construction of that section of the Mumias - Musanda Road from point 0+323M to 0+605M should only be on the road reserve as surveyed by the Respondents on March 11, 2021 and should not encroach onto the Petitioners land without assessment and fair compensation.



- f. An Order that the Respondents cease and desist from use of force in the interference with the Petitioners property and any such use of force the OCS Mumias Police Station be authorized to specifically prevent and protect the Petitioners from these violations.
 - g. Any other Orders and directions that the Honourable Court may deem fit and appropriate for the ends of justice.
5. The petition was supported by an affidavit sworn by the first petitioner Lt Col (Rtd) Mohammed Juma who deposed that he is the owner/proprietor of the parcel of land known as S Wanga/ Ekeru/ 1589 wherein Westwood Premier Academy School is located. That S Wanga/ Ekeru/ 1589 borders the road reserve on which the respondents are constructing the Mumias - Musanda Road, Project Contract No RWC585 and that from the launch of the project the petitioners raised their concerns over the alignment of the Mumias - Musanda Road from point 0+323M to 0+605M which the petitioners believed created a risky and dangerous blind corner that endangered the lives of not only school going children but also the public in general. That across the road, opposite Westwood Premier Academy School, is the home of Leo Wesonga Wanzala, the Lureko area Chief.
6. That on March 11, 2021, a team was sent to the ground to survey and map out the road in the area in preparation for the commencement of the road construction project and on that occasion, the surveyors and engineers used the cadastral map and placed beacons that would dictate the course of the road and the same was done on the reserve side of the first petitioner's side of the road. That when it was due for the opposite side of the road to be constructed, the area chief refused to allow the team on his land and the process was never carried out on the chief's land. The first petitioner further stated that the road reserve was supposed to be 40 metres wide being 20 metres from the middle of the road on either side and that from the initial assessment carried out on 11th March, the road would have been expanded a few metres towards the suit property and a few metres in towards the local area chief's property and as such the road would be straight and not have the artificially meandering risky blind corner heading directly to the school as per the survey carried out on March 11, 2021 which was objective and clearly showed the path the road was to take.
7. The first petitioner further deposed that on April 7, 2021 the parties to this petition were summoned to appear for a meeting before the assistant county commissioner (ACC) to discuss the dispute between the petitioners and KERRA and that on April 8, 2021 they attended the meeting which was surprisingly co-chaired by the Area Chief Leo Wesonga who was appearing as the chief as opposed to appearing as an Interested Party in the road project. That the petitioners protested but the ACC declined to ask the area chief to step down as co-chair which led to the area chief bulldozing his way through out the meeting and the petitioners were unable to raise their concerns on equal footing as they were cut short by the Area Chief as co-chairman of the meeting. That at the close of the meeting, the ACC gave orders that a fresh land survey be carried out within one week under the supervision of the local national government administration and that the petitioners had the option of enlisting their own surveyors in the exercise.
8. The first petitioner added that his request was neither unreasonable nor unheard of since the same adjustment had been done on the Mumias - Musanda Road project from point 0+300M to 2+500M where the respondents resurveyed the road and shifted it to the right side by at least 2 metres away from the Chinese Constructed Water Main pipeline to avoid causing damage to the pipe and that were it not for the influence of the local chief, the same would have happened at point 0+323M to 0+605M and that it was unreasonable and unfair for the Respondents to make adjustments to the road from 0+300 M to 2+500M. The first petitioner further averred that on April 9, 2021 they wrote a complaint to the Regional Manager, KeRRA through a letter detailing their complaints and that on April 19,



- 2021 the Regional Director wrote to the Resident Engineer Mumias - Musanda Road Project asking him to carry out a fresh road mapping of the affected section jointly with the Sub County Surveyor using the cadastral map from the Ministry of Land and that the Regional Director's instructions were completely ignored as road works resumed on the disputed section on April 19, 2021.
9. The first petitioner went on to state that to further show complete disregard of public safety by the local administration in cahoots with the respondents, on April 23, 2021 a convoy of dignitaries among them the Deputy County Commissioner (DCC) and officials from the Ministry of Water visited the site but the local administration leading the tour, including the area chief, were careful to avoid the disputed section at point 0+323M to 0+605M and that being dissatisfied with those events, the first petitioner wrote to the Regional Director KERRA on April 30, 2021 detailing his dissatisfaction with the state of affairs. That on May 19, 2021 the first petitioner was summoned to attend a survey of the disputed portion of land by a team of surveyors led and accompanied by local administration, among them and seemingly in charge, was area chief Leo Wanzala whose opinion seemed to influence the whole survey and the outcome of the same was absolutely predetermined and tainted.
 10. The first petitioner also deposed that on August 9, 2021, the respondents' agents broke ground right outside the school gate causing damage to the Chinese constructed water main pipeline that supplies water to the school and its environs thereby causing a total loss of water in the school and the entire area resulting to the school being closed pending further arrangements as to water provision. That the respondents' agents further destroyed the security barrier at the gate endangering the lives of the children and causing substantial property damage. That the road construction was still ongoing and unless the orders sought are issued, the respondents will continue building the road, causing damage to the applicants while making the damage permanent through the tarmacked road.
 11. In response to the petition, the first, third, fourth, fifth and sixth respondents filed a replying affidavit sworn on October 28, 2021 by the fourth respondent Eng. Kenneth Ochieng who deposed that the affidavit in support of the petition was riddled with falsehoods, misstatements, and statements out of context with a view of misleading the court. That the improvement to the bitumen standards of the Mumias - Musanda road is a project of the National Government being implemented by the first respondent that aims at amongst others, to foster socio-economic development within Kakamega County by enhancing access and mobility. That as the Resident Engineer of the project, his duties include the overall supervision of the project to ensure delivery of the project at the right quality and within the contracted timelines and that he knew from the available records that the Mumias - Musanda road has existed for over 50 years and that the ongoing road works are in respect of upgrading an already existing road to bitumen standards and not the opening up of a new road.
 12. Eng Kenneth Ochieng added that throughout the project he had always attended to all issues raised by all persons including the petitioners to the satisfaction of the persons concerned and that he knew that the section in dispute, Km 00+323 to Km 00+605, is part of the project and the designs had been issued to the contractor before any complaint was raised. That the activities which had been undertaken in the area as at the date of his affidavit included bush clearing, topsoil striping, benching on both sides of the road and that the earth works had been finalized in readiness for tarmacking. That before construction began, a preliminary survey of the area was carried out on March 11, 2021 on the left-hand side (Ekeru Registration Section), subject to a final survey of both sides of the road which was later officially confirmed and finalized by a report issued by stakeholders in the Ministry of Lands, Housing, and Urban Areas & Physical Planning and County Government of Kakamega.
 13. Eng Kenneth Ochieng further deposed that km 00+323 to Km 00+605 was opened after confirmation of the extent of the road corridor and installation of the boundary marker posts. That on April 19, 2021 the fourth respondent received a letter from the third respondent on complaints raised by the



- petitioners requiring him to engage the County Surveyor and to carry out road mapping of the affected area using the cadastral map from the Ministry of Lands to address the complaints. That upon receipt of the letter, he immediately engaged surveyors from the Ministry of Lands, Housing and Urban Areas & Physical Planning and County Government of Kakamega and that the first petitioner and members of the public whose land neighbour 0+323M to 0+605M were informed of the meeting scheduled for May 19, 2021 for road corridor demarcation as requested by the first petitioner. The first petitioner was requested to attend with a qualified surveyor of his choice. In response to the communication, all interested members of the public including the first petitioner attended the session on May 19, 2021.
14. Eng Kenneth Ochieng further stated that the sixth respondent who attended the road mapping session informed him that the first petitioner attended the mapping session without a surveyor of his choice as directed by the Assistant County Commissioner. He added that the report by the County Surveyor - Kakamega which was ready by July 27, 2021 indicated that there was encroachment on to the road corridor at section 0+323M to 0+605M of the road by reducing the road corridor from 36m to 20m on the ground. He further stated that the extent of encroachment on the left side of the road by the petitioners is approximately 9 metres for a length of the road measuring 280 metres and that he wrote back to the third respondent on June 11, 2021 updating him of the progress of the work done in addressing the petitioner's grievances. That on July 29, 2021 a meeting was held during which the Head of GIS Ministry of Lands, Housing, Urban Areas and Physical Planning, County Government of Kakamega presented the report and explained the encroachment in his (Eng Kenneth Ochieng's) presence.
 15. Eng Kenneth Ochieng also deposed that the report indicated among other things that the petitioners together with other neighbouring parcels had encroached the road corridor thereby increasing the size of S Wanga/Ekero/1589 from 2.9 acres to 3.12 acres. That following the meeting of July 29, 2021, the report was unanimously adopted, and it was agreed that the exercise of mapping the road and erection of road reserve marker posts be undertaken so that the structures within the road corridor would be removed by the affected parties.
 16. He stated further that construction of the road had continued and issuance of the prayers sought in the petition will be detrimental to the completion of the project within the agreed timelines and lead, *inter alia*, to claims by the contractor for extension of time to complete the project outside the agreed timelines and associated costs totalling to hundreds of millions of shillings which will adversely affect the first, third, fourth, fifth and sixth respondents given that the petitioners had not provided any security. That contrary to what is alleged by the petitioners, the design of the road is safe and does not create a dangerous blind corner that endangers lives and that the design meets all the required standards as per the Road Design Manual Part 1 (Geometric Design of Rural Roads) and design details. That part of the final designs at the curve sections of the road includes speed bumps together with rumble strips well marked with a sign as well as a speed limit which will be clearly erected to ensure road safety.
 17. Eng. Kenneth Ochieng further deposed that the first petitioner had been forcefully and illegally interfering with road works along Km 00+323 to Km 00+605 which resulted in him being arrested and charged in Mumias Criminal Case Number 925 of 2021 with the offences of obstruction of National Government Project, Malicious Damage of Government Property, resisting arrest and attempting to harm a police officer. That there had been no re-alignment on the section of the road as alleged by the petitioners and that the first petitioner's school had remained fenced, secured, and supplied with water throughout contrary to the petitioners' allegations. That the existing worn-out culvert at the school's gate is to be replaced with a standard design culvert with a view of enhancing accessibility to the school in its best interest and that the main school gate, the live fence, and wire mesh securing the school were intact hence no insecurity had been occasioned or the school damaged as alleged by the petitioners.



18. He went on to state that granting of the prayers sought in the petition would be detrimental to the public good as the petitioners have encroached on public land and that the citizens stand to lose if the road is not constructed since it serves many people around the area by connecting Mumias to Musanda through Enyapora and further that the stretch of around 2.7 km has hospitals, schools and social amenities like mosques and several churches. That in view of the outcome of the repeat survey on September 9, 2021, the petition ought to be dismissed with costs to the respondents.
19. The second respondent filed a response to the petition on October 4, 2021. It denied the averments in the petition and stated that upon survey being done and a report being furnished to all parties, it came to the attention of the respondents that the first and second petitioners had encroached on public land by constructing and fencing thereon and that it was on that basis that the first and second petitioners' fence was demolished so as to enable the respondents perform their work as per the terms of the contract. It further averred that the petition as presented has no public interest but is advancing the petitioners' personal interests. The second respondent therefore prayed that the petition be dismissed with costs to it.
20. Following an order made on August 31, 2021 by A Omollo J as duty Judge, a repeat survey was conducted on September 9, 2021 and a survey report dated September 14, 2021 filed in court on November 3, 2021 by the Land Registrar Kakamega and the District Land Surveyor Kakamega.
21. The petition was canvassed through written submissions. The petitioners argued that the respondents' actions have infringed on petitioner's rights to quiet enjoyment of their property and that with the road so close to the school and other properties, the petitioners have to deal with the constant nuisance caused by the sharp bend on the right road next to their property but conveniently removed from the local chief's land on the opposite side of the road. The petitioners further submitted that there was open bias and discrimination and that the petitioners have been discriminated upon on two occasions, the first one being that the respondents in the survey severally refused to venture in to the land across the road from the petitioners belonging to the local area chief who is a person of influence and authority in the society and secondly that the respondents agreed to move the road by two metres to avoid hitting the Chinese water line but then refused to do the same on the petitioner's property.
22. It was the petitioners' further submissions that the court ordered survey was unprofessionally carried out and that all the government surveyor did was to agree with the respondents without giving reasons and illustrations as to why. That the conclusion of the report dated September 14, 2021 was clearly biased and inconclusive as the land registrar demonstrated in the report that 'it is my wish this honorable court, to give a permission for KeRRA authority to continue with their work as there was no any dispute raised during the survey that was carried out.' That the allegation was not only unsupported but also very biased because many concerns had been raised before and even bigger concerns raised during the actual re-survey and that the registrar went to the ground, talked with KeRRA officials, and made up his mind that he was in no position to disagree with his fellow government officials. That on the same day, an independent survey was carried out by ROKOS mapping hired by the petitioners who produced a detailed report dated September 9, 2021, to the effect that there was encroachment by KeRRA on various lines as indicated in the sketch. That the petitioners' said surveyor demonstrated that there was encroachment by KeRRA on line a-b of six meters, line g-h of seven meters and line e-f of 5 meters, which detail was left out of the report filed by the Land Registrar, which goes to show the open bias on the part of the registrar.
23. The petitioners further submitted that they supported their petition sufficiently with documentation including a detailed survey report while the respondents relied on the fact that they were government entities carrying on public interest construction and should be excused. They argued that they met the



standard of proof on a balance of probabilities. That the amount of inconvenience to be occasioned to the petitioners if the road is left as is will be permanent and that the inconvenience occasioned to the respondents if they are asked to move the road by say, two metres is temporary. Reliance was placed *inter alia* on the case of [Pius Kipchirchir Kogo v Frank Kimeli Tenai](#) [2018] eKLR. In conclusion, the petitioners submitted that they have been subjected to compulsory acquisition without any compensation and that they have proved their case on a balance of probabilities and should thus be granted the orders prayed.

24. The first, third, fourth, fifth and sixth respondents filed their submissions on April 27, 2022 and challenged the jurisdiction of this court arguing that the petitioners' claim is based on boundary dispute and that the law has provided other avenues to deal with disputes of such nature. That as per paragraph 17 of the petition, the petitioners averred that the respondents encroached into their land by moving the road reserve boundary into their land. They contended that the said averment clearly shows that the dispute is a boundary dispute. They relied on Section 18 (2) of the [Land Registration Act](#) which restricts the jurisdiction of the courts by committing boundary disputes to the land registrar for determination in the first instance. They argued that the petitioners have not demonstrated that the dispute was first referred to the Land Registrar for determination before it was brought to this honourable court. They therefore argued that this court cannot determine this petition as the law has provided other mechanisms through which to determine such disputes and relied on the cases of [George Kamau Macharia v Deska Limited](#) [2019] eKLR and [Ibrahim Wakhanyanga & 2 others v Chief Magistrate's Court Kakamega & 2 others; Attorney General for Land Registrar Kakamega \(Interested party\)](#) [2022] eKLR.
25. As regards whether the petition discloses any legal interest capable of protection under the law, the first, third, fourth, fifth and sixth respondents submitted that the petition does not disclose any such interest and that the upgrading of Mumias-Musanda Road has not encroached into the petitioners' land but has been maintained within the road reserve. That the construction of the road has not been influenced by the area chief in any way, that the results of the survey done on March 11, 2021 were not altered by the respondents, that the first petitioner is not a respecter of the law and that he has brought this petition after taking matters in his own hands severally against the law. They argued that the petition does not raise any constitutional question and that there has been no violation of any provisions of the constitution.
26. On the question of whether the petitioners' constitutional rights have been violated, the first, third, fourth, fifth and sixth respondents argued that as demonstrated at paragraphs 44 and 60 of the first, third, fourth, fifth and sixth respondents' replying affidavit, the petitioners have not demonstrated any such violation. They further submitted that the petition has not been proved to the required standard as no evidence has been provided to prove the alleged constitutional violations and that the first, third, fourth, fifth and sixth respondents have demonstrated that they did not encroach on the petitioners' land or discriminate against them in any way. Arguing that the petitioners were required not only to identify the relevant articles of the constitution that had been violated but also to avail evidence of such violation, they relied on [Peter Thuita Kariuki v Kenya Rural Roads Authority](#) [2020] eKLR and urged the court to dismiss the petition with costs.
27. The second respondent filed its submissions on April 11, 2022 and argued that the petitioners' parcels of land were not unlawfully encroached into by the respondents and that on the contrary, it is the petitioners who encroached into a public road and that the petitioners' concerns were duly dealt with prior to commencement of the road construction project. That it was not necessary to expand or place beacons on the opposite parcel of land being the chief's land as the same was not encroaching on to the public road reserve as compared to the first petitioner and second petitioners who, according to



- the cadastral map and the survey, had encroached onto the public road reserve. That the allegations that the petitioners were not accorded an opportunity to be heard during the meeting held on April 8, 2021 are untrue as both parties were granted an opportunity to be heard.
28. The second respondent further submitted that none of the petitioners' constitutional rights have been infringed and that on the contrary, it is the petitioners' conduct that amount to an illegality for having encroached on a public road reserve and erected structures thereon and that the petitioners cannot claim that their right to own property has been violated since Article 40 (6) of the *Constitution* does not extend to any property that has been found to have been unlawfully acquired. The second respondent therefore contended that the petitioners are not entitled to the orders sought and that the respondents' actions are meant for public interest as the road serves sugarcane farmers, traders and the locals in general. Relying on *Okiya Omtata Okoiti & 2 others v Attorney General & 3 others* [2014] eKLR, the second respondent urged the court ought to dismiss the petition with costs.
29. I have considered the petition, the affidavits, and the submissions of parties. The issues that arise for determination are whether the court has jurisdiction and whether the reliefs sought should issue.
30. Jurisdiction, as has often been stated, is everything. It is the very life and soul of any proceedings. Without it, the proceedings come to a certain end and the court cannot make any further step. See *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR.
31. The Supreme Court emphasised the importance of jurisdiction in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR where it stated as follows:
- A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.
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32. The Court of Appeal had occasion to address the issue in *Phoenix of EA Assurance Company Limited v SM Thiga t/a Newspaper Service* [2019] eKLR where the court emphasised as follows:
- ... Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. ...
33. Pursuant to Article 162(2) (b) of the *Constitution of Kenya*, the jurisdiction of this court is to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. Further provisions on the court's jurisdiction are found at Section 13 of the *Environment and Land Court Act, 2011* which provides:
13. "Jurisdiction of the Court
- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (2) In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court shall have power to hear and determine disputes—



- (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- (b) relating to compulsory acquisition of land;
- (c) relating to land administration and management;
- (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- (e) any other dispute relating to environment and land."

34. It follows, therefore, that this court has jurisdiction in matters to do with the environment and the use and occupation of, and title to, land as well as in matters concerning redress of a denial or infringement or threat to rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the *Constitution*. The court also has wider jurisdiction when dealing with disputes involving environment and land, to resolve claims concerning breaches of other fundamental rights related to environment and land. See *Daniel N Mugendi v Kenyatta University & 3 others* [2013] eKLR.
35. The first, third, fourth, fifth and sixth respondents have argued that the petitioners' claim is based on a boundary dispute which should be resolved through alternative avenues such as by the Land Registrar under Section 18 of the *Land Registration Act*, and that consequently, this court lacks jurisdiction. The said respondents are in essence raising the principle of constitutional avoidance.
36. Procedural law in regard to constitutional matters is that where there exist ample statutory avenues for resolution of a dispute, the statutory options for redress must be followed and the constitutional court will decline to entertain the dispute. This is what is called the principle of constitutional avoidance. It frowns upon the practice of bringing ordinary disputes to the constitutional court. The Supreme Court observed as follows in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR:

"(256) The appellants in this case are seeking to invoke the "principle of avoidance", also known as "constitutional avoidance". The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

"I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."

(258) From the foundation of principle well developed in the comparative practice, we hold that the 1st, second and 3rd respondents' claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright-infringement claim, and it was not properly laid before that Court as a



constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court.

37. Consequently, when formulating his claim, a litigant must be careful to avoid the constitutional route where an adequate statutory route is available. The Court of Appeal discussed the principle in *Sumayya Athmani Hassan v Paul Masinde Simidi & another* [2019] eKLR as follows:

" ... where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the Constitution without challenging the legislation in question. That principle has been reinforced by the Supreme Court in Communications Commission case (*supra*).

(17) In conclusion, we find that the alleged unlawful interdiction and termination of a contract of employment was not a constitutional issue and thus the petition did not disclose a cause of action anchored on the Constitution. Accordingly, the petition being incompetent, the court acted in excess of jurisdiction and erred in law in determining the petition. ..."

38. As I understand it, the petitioners' case is that while executing the Mumias- Musanda Road project in the section of the road that borders their land, the respondents created a risky blind corner which endangers the lives of young school going children as well as lives of members of the public in general who use that section of the road. They further contend that the respondents encroached on their land and infringed on their fundamental rights to own property as well as rights under Articles 19 (1) and (3), 24 (1), 28, 40, 43(1) (f), 47, and 73 (2) (b) of the *Constitution*.
39. It is not in dispute that the matter herein touches on boundary re-establishment and demarcation of the road corridor for Mumias-Musanda road at the affected section vis-à-vis the boundaries of land parcels S/Wanga/Ekero/1589, S/Wanga/Ekero/1587 and S/Wanga/Ekero/1590. The petitioners averred at paragraph 17 of the petition that the respondents encroached into the petitioners' land by moving the road onto the petitioners' land thereby exceeding the road reserve. Success of the petitioners' case rests solely on whether it is true that there was encroachment on their land. Their claim of infringement of the right to property under Article 40 of the *Constitution* can only hold water if they establish encroachment. There are ample statutory avenues for establishing boundaries and demarcations of land under the *Land Registration Act* and the *Survey Act*. Equally, the rights and privileges of a registered proprietor of land have a loud and clear statutory voice under the *Land Registration Act*. Similarly, the petitioners' claims that there is a risky blind corner in the road under construction is a matter that has ample avenues for redress in statutory law relating to standards, engineering, and road construction, among others. One doesn't need to file a constitutional petition to establish such matters.
40. In the case of *Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) v Habil Olaka – Executive Director (Secretary) of the Kenya Bankers Association Being sued on behalf of Kenya Bankers Association) & another* [2018] eKLR E C Mwita, J stated as follows on the issue of alternative remedy in lieu of constitutional remedies:

"65. It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a Court of law in the manner allowed by that particular statute or in an ordinary suit as provided for by procedure. It is not every failure to



act in accordance with a statutory provision or where an action is taken in breach of a statutory provision that should give rise to a constitutional petition. A party should only file a constitutional petition for redress of a breach of the Constitution or denial, violation or infringement of, or threat to a rights or fundamental freedom. Any other claim should be filed in the appropriate forum and in the manner allowed by the applicable law and procedure."

41. Among the reliefs that the petitioners seek in the petition is a declaration that a portion of their proprietary interests in the mentioned parcels has been compulsorily acquired by the state beyond the road reserve. Establishment of encroachment or loss of proprietary interest and ascertainment of the extent of compensation are all matters that can be adequately addressed through an ordinary suit. Mere mention of article 40 of the *Constitution* does not escalate them to a constitutional question which would then require the attention of the constitutional court. I find and hold this this court, sitting as a constitutional court, lacks jurisdiction to hear and determine the petitioners' claims of encroachment.
42. The petitioners also claim that their rights under article 47 of the *Constitution* were violated. There are statutory avenues for addressing alleged breach of the right to fair administrative action. Suffice it to mention Section 7 of the *Fair Administrative Action Act* which provides that a person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision.
43. In view of the foregoing, I find and hold that this petition offends the doctrine of constitutional avoidance and that this court, sitting as a constitutional court, lacks jurisdiction to hear and determine it. I therefore strike out the petition. Considering the nature of the dispute, I make no order as to costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 25TH DAY OF OCTOBER 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Mburu for the petitioners

No appearance for the 1st, 3rd, 4th, 5th and 6th respondents

No appearance for the 2nd respondent

Court Assistant: E. Juma

