



REPUBLIC OF KENYA



**Marete v CECM Lands Physical Planning Urban Development, Housing and Public Works & another (Petition E008 of 2024) [2024] KEELC 6916 (KLR) (16 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6916 (KLR)

**REPUBLIC OF KENYA**

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

**PETITION E008 OF 2024**

**CK NZILI, J**

**OCTOBER 16, 2024**

**IN THE MATTER OF THE BREACH OF THE CONSTITUTION AND SPECIFICALLY ARTICLES 1, 2, 3, 20, 21, 22, 23, 25, 27, 28, 40, 47, 159 AND 165 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS PRACTICE AND PROCEDURES REULES 2013**

**BETWEEN**

**RAJAB OSMAN MARETE ..... PETITIONER**

**AND**

**CECM LANDS PHYSICAL PLANNING URBAN DEVELOPMENT, HOUSING AND PUBLIC WORKS ..... 1<sup>ST</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF MERU ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. What is before the court is a petition dated 20.5.2024 brought by Rajab Osman Marete. He describes himself as the legal administrator of the registered owner of Plot No. Meru Municipality Old Town (Majengo 160, formerly Meru Municipality Old Town/Majengo 67), the late Osman Johare Marete. It was averred that a purported committee made a mistake in taking measurements of plots without coming to the ground to verify them following the rightful procedure.
2. The petitioner averred that in 2000, the Director of Physical Planning of the county council of meru was informed of the anomalies but to no avail; thus, in 2006, the area M.P. referred the matter to the area chief vide letter dated 18.12.2006.



3. The petitioner averred that several persons were issued with title deeds in 2017, which did not reflect the actual position where the plots are situated. The petitioner averred that despite frequent plea to the respondents, both verbal and written, to resolve the issue their concerns have fallen on deaf year, leading to a demolition notice issued on 18.7.2023.
4. The petitioner averred that most inhabitants of the area only knew of their ancestral boundaries and not the new boundaries and were not involved in the setting up of the new boundaries.
5. Further, the petitioner averred that the only way forward was for the respondents and other national government organs, in conjunction with the land registrar and county physical planner, to conduct a fresh survey before any tampering with the suit properties to avoid any clashes with the residents.
6. The petitioner prayed for:
  - a. Permanent injunction restraining the respondents from trespassing or interfering with parcel No. Meru Municipality/Old Town Majengo/60, (formerly No. Meru Municipality/Old Town/Majengo 67).
  - b. A declaration that the process of surveying and the issuance of title deeds in Meru Municipality/Old Town/Majengo area was null and void and done in contravention of the petitioner's constitutional rights.
7. In support of the petition, the petitioner relied on a supporting affidavit of Rajab Osman Marete sworn on 20.5.2024 in which he attached a copy of a grant ad litem, a copy of the confirmation of ownership, list of the plot owners, a copy of a letter dated 18.12.2000 from the area M.P., notice of demolition issued on 18.7.2023 and a demand letter dated 26.7.2023 marked as annexures No's. ROM "1", 2(a), 2(b), 3, 4(a) (b), (c), (d) and (e), 5 & 6 respectively. The petition was also supported by a list of witness statements and documents dated 24.9.2024.
8. After directions were given to proceed through oral evidence, Rajab Osman Marete testified as PW 1. As the chairman of the Majengo community, he told the court that all the members of the local community who are plot owners had complained to the respondents pertaining to the resurvey and re-planning of the Meru Municipality/Old town/Majengo/1580 vide a letter dated 26.7.2023.
9. PW 1 told the court the court that in 2017 title deeds were issued without the area residents being notified or the relevant land officers to survey and plan the area with the consent or participation of the residents on the ground.
10. PW 1 said that new survey plans and maps were later created without the county surveyor or the county physical planner ever visiting the area to understand ascertain and verify with residents in the area over their plots.
11. Unfortunately, PW 1 said that some of the title deeds issued in 2017 were done without the residents knowing where their properties were situated on the ground. PW 1 said that new survey plans being relied upon were being used to re-plan and displace the residents from their homes, hence destabilizing them from localities where they have resided for many years. PW 1 added that the exercise was carried out without public participation.
12. Again PW 1 stated that following the said complaints, the Ministry of Physical Planning wrote to the Ministry of Land and Settlement vide a letter dated 18.12.2000, which led to a meeting involving the town clerk and the local leadership of Majengo village at the town clerk offices on 15.12.2000. Out of the meeting, PW 1 said that the meeting was aimed at resolving the boundary disputes. PW 1 said that after the resurveying and re-planning of the area, some anomalies were detected in the PDP Reference



Number 167/95/37 (as approved by the Commissioner of Land on 23.7.1996 and which had been used as the basis of documentation of the plots as mentioned earlier.

13. PW 1 also stated that some of the allotment letters issued to the beneficiaries did not reflect the ground position of the respective plots; some of the access roads existing on the ground were not reflected in the approved PDP; the approved PDP showed overlaps between Majengo plots and the private parcels of land and that some of the beneficiaries had no allotment letters.
14. Additionally, PW 1 said that in view of the detected anomalies, it was decided that the documentation would be flawed if done based on the documentation and therefore, it was resolved that the letters of allotment issued be withheld or canceled. PW 1 said that some third parties have illegally and fraudulently collided with the respondents, subdivided the plots, and issued new title deeds.
15. PW 1 added that the respondents, without the family's consent or prior consultation, demolished family buildings, excised a three-meter access road from each side of the plots, and proceeded to expand or create an access road without following due process. PW 1 relied on annexures to the supporting affidavit marked ROM "1", 2 (a), 2(b), 3, 4(a) – (e), 5 (a) & 6 as P. Exh no. 1, 2 (a) (b), e, 4 (a) – (e), 5 (a) & 6. The public notice dated 16.7.2023 as P. Exh No. (6), letter to the defendants dated 26.7.2023 as P. Exh No. (7) photographs of the houses earmarked for demolitions P. Exh No. (8) and sketch maps of the area as P. exh No. (9).
16. In cross-examination, PW 1 insisted that his lawyer was the one with a copy of the limited grant for the estate of his late father. PW 1 stated that the title deeds were issued by the national government in the run-up to the 2017 general election before the parcels of land were surveyed or planned on the ground.
17. PW 1 confirmed that the complaint against the County Government of Meru was because it issued enforcement or demolition notices without due process and proceeded to demolish their houses, to pave the way for an access road while the suit was pending before the court. PW 1 clarified that Mr. Munene, a County Land Surveyor, visited the village in 2023 to effect beacons on the plots, and after the said visit, the respondents issued demolition or enforcement notices to vacate the road reserve, without any public participation.
18. Similarly, PW 1 also acknowledged that the leadership of the County Government of Meru, led by the governor, visited the village on 16.6.2023 for a public participation exercise. PW 1 denied that it was the locals who demanded an access road to be established as per the existing survey maps or plans.
19. PW 1 denied being a signatory to the minutes and the list of attendees during the said meeting, save to add that the respondents aired their views on dissatisfaction with the enforcement or demolition notice issued by the County Government of Meru, without re-planning and resurveying of the plots.
20. Further, PW 1 confirmed that there was an ongoing construction of an access road in the said Majengo village by Meru Youth Service. PW 1 admitted that P. Exh No. (7) had no acknowledgment stamp, signature, or date from the County Government of Meru. Moreso, PW 1 stated that he was suing on his behalf and that of the residents of the Majengo village even though he had not sought or obtained authority to sue from the plot owners.
21. John Mbaya M'Iriongo testified as PW 2. He associated this evidence with that of PW 1. Confirming that he was the owner of Plot No. 3356, he told the court that his plot was one of those that were demolished to extend the access road.
22. PW 2 said that while he was not opposed to improvement and the expansion of road networks in Majengo village, the respondents had resorted to demolition, construction and expansion of the access road in the areas without public participation or notice to the genuine owner of the plots.



23. Hamisi Osman testified as PW 3. He told the court that he was aware of a complaint that plot owners in Majengo estate had lodged with the respondents after it purported to erect a beacon on the extent of the roads of access, which exceeded the existing road of access and encroached out to people plots.
24. PW 3 said that after the encroachment onto their plots by the respondents in an effort to expand the access road, a complaint was lodged by the respondents with the respondents as well as the national government in 2016 and 2023.
25. Consequently, PW 3 stated that without addressing their concerns, the respondents issued a demolition notice and eventually effected it on the ground, causing wanton destruction or loss to the respondents. Further, PW 3 said that the residents were equally aggrieved by the beacons that were erected by the county land surveyor right inside the plots subsequent to which the access road was constructed.
26. The respondents opposed the petition through a replying affidavit sworn by Eric Munene Njiru on 30.9.2024. It was averred that the petition lacked precision and clarity. For instance, it did not indicate which committee came to the ground, the plots measured, plot numbers, and when the exercise was undertaken. The deponent averred that the 2<sup>nd</sup> respondent, in collaboration with the Community Road Empowerment Provisions and Meru Youth Service in an initiative assisted by the government of Japan, was undertaking construction work to improve the road network in Majengo, Mjini and Gitimbine on public roads for the benefit of the residents of the said areas.
27. The deponent further averred that it was not true that the 2<sup>nd</sup> respondent had encroached on private land but only sought to implement the survey plan for purposes of ensuring that the access roads were opened for the project to sail thoroughly. Further, the deponent averred that before commencing the public works, various stakeholder meetings were held, and sufficient notices were issued to the residents and traders who had encroached on the road reserve as per an annexure marked E.M "1".
28. The 2<sup>nd</sup> respondent denied issuing any title deeds to the residents or undertaking any alleged survey process in 2017. However, the respondents averred that they were aware that the survey, planning and the issuance of title deeds were done by the national government in 2017. The respondents averred that when the community requested to be shown the boundaries of their plots, the same was done relying on a survey plan from the Director of the Survey as per the survey plan marked EM "2".
29. Again, the respondents averred that if the petitioner was aggrieved by any omission by the Director of Physical Planning to act on their complaints or letters, he should have complained to the Liaison Committee, which has the requisite mandate to inquire and hear complaints made against the Director of Physical Planning.
30. Subsequently, the respondents insisted that public participation and stakeholder meetings were undertaken, where the community was given a chance to air their views, which were taken into consideration during the exercise of reestablishing the beacons as per minutes annexed as EM "3" otherwise, the County Government of Meru did not reestablish the boundaries but implemented the survey plan and placed beacons on the ground. The respondents termed the deponent of the petition as lacking the capacity to sue for Khadija Mohamad and further denied that the petition was raising a constitutional question (s).
31. In support of the defense, Eric Munene Njiru testified as D 1, entirely relying on the affidavit as his evidence in chief.
32. DW 1 produced the public notices, the survey plan or maps, and the minutes for public participation as D. Exh No. 1 (a) – (d), 2 (a) – (d) and 3. DW 1 said that the plots and their title deed were freeholds



- issued by the national government without the involvement of the 2<sup>nd</sup> respondent. DW 1 said that the 2<sup>nd</sup> respondent had no role in the initial surveying planning and the issuance of freehold titles save upon request by the locals to reestablish and map out the existing access road as per the survey maps prepared and as published by the Director of Survey from the headquarters Nairobi.
33. DW 1 added that in the course of the said exercise, he established that some of the plots were encroaching on the road reserves, hence the notice to vacate by the County Government of Meru. DW 1 said that he entirely relied on the survey plans or maps to reestablish the boundaries and affect the beacons on the ground. DW 1 also confirmed that the exercise was conducted with the notice and the involvement of the residents, especially PW 1. He denied receiving P. Exh No. (4) & (7) in their offices.
34. D.W. 1 admitted that after the expiry of the notices, the county embarked on clearing whatever structures were on the road reserve. DW 1 denied knowledge of any old maps that were different from the ones that he used to map out the access road and the boundaries of the respective plots.
35. DW 1 said that as a land surveyor, he was bound to follow the prepared and published survey plans held by the Director of surveys NRB. However, DW 1 denied that there was any fraud, illegality, or breach of the constitutional rights to the property of the residents of Majengo during the exercise. He also denied the alleged collusion with third parties to deny the petitioner and the residents their land rights or flouting the law in undertaking the constitutional work in the Majengo estate. He also denied subdividing, consolidating, amalgamating, re-parceling, or partitioning any of the residential plots.
36. The issues calling for my determination are:
- i. Whether the petitioner can bring the petition on his behalf and that of the residents of Majengo estate.
  - ii. If the petitioner should have exhausted the internal dispute mechanism under the Physical Land Use and Planning Act (PLUPA) and Public Road and Road of Access Act.
  - iii. If the petition raises a constitutional question.
  - iv. Whether the petitioner is entitled to the reliefs sought.
  - v. What is the order as to costs?
37. Rules 4 & 10 of the Mutunga Rules provide that a constitutional petition has to set out the capacity to address particulars of the petitioners, the constitutional rights or freedoms, infringed violated or breached, manner, nature and the particulars of the breach, disclose pending or concluded disputes over the issues, reliefs sought and the signatures of the petitioner.
38. While addressing the same, the court in *Anarita Karimi Njeru vs Republic* (1979) eKLR, *Mumo Matemu vs Trusted Society of Human Rights Alliance and others* (2014) eKLR *CCK vs Royal Media Services* (2014) KESC 53 (KLR) (29<sup>th</sup> September 2014) (judgment), the courts emphasized the need of precision, clarity, and specificity in constitutional petitions. In *Benard Ouma Omondi & another vs AG. & another* (2021) eKLR, the court observed that there must be clear particulars of the alleged infringement to enable the respondents to respond and answer to the alleged complaints.
39. In *Abdullah Mangi Mohamed vs Lazarus Beja & others* (2021) eKLR, the court observed that it was improper practice to make all private disputes on land ownership as constitutional claims of breach of rights. In *Silas Make Otuke vs A.G. & others* (2014) eKLR, the court cited *Anarita Karimi Njeru* (supra) on the importance of defining the dispute to be decided by the court for the court and the parties to know the issues in controversy.



40. In the petition before the court, I must say that it was drafted haphazardly. See *Meme vs Republic* (2004) eKLR. In *CCK & others* (supra), the court emphasized the necessity of a link between the aggrieved party, the provisions of *the constitution* infringed, manifestation of the contravention and the reliefs sought. In *Mumo Matemu vs Trust* (supra), the court said that due process, substantive justice and the exercise of jurisdiction are a function of a precise legal and factual claim, so as to define issues in litigation and adjudication and to demand exactitude, ex-anto is to miss the point to give fair notice to the other party.
41. In *Kiambu County Tenants Welfare Association vs AG & another* (2017) eKLR, the court observed that a constitutional question was an issue whose resolution requires the interpretation of *the Constitution* rather than that of a statute. Again, a constitutional court is not a substitute for other avenues available for dispute resolutions as per Article 159 of *the Constitution*, where a suit may be brought in the usual manner. In *Harrison vs AG of Trinidad & Tobago* (1980) A.C 265, the court (Lord Diplock), described the tendency of filing constitutional petitions alleging violation of fundamental rights and freedoms, where there was none.
42. In *Bernard Murage vs Fine Serve Africa Ltd, & others* (2015) eKLR, the court observed that not each and every violation of the law must be raised as a constitutional issue, and where there exists an alternative remedy under statutory law, then such statutory remedy should be pursued first. Other than citing the constitutional provisions, bear reliefs sought, and the facts left upon the petition have made it imprecise for the court and the respondents to know precisely what the specific issues are.
43. That notwithstanding, the petition was supported by witness statements and annexures, out of which the respondents were able to respond by way of a replying affidavit on the issues as to whether there was a lack of public participation, interference with the property rights of the petitioner and the rest of the residents of Majengo estate in issuing demolitions notices, mapping the access road, demolishing the structures appearing on the road reserves and constructing the access road in the expanded space of the access road.
44. The petitioner has brought the petition as a resident land user and a legal administrator of the estate of his late father. In the witness statement, he also explained that he is the chairman of the residents of Majengo. In all these capacities, I find that he has the right to bring the petition on his own accord and on behalf of the other residents, notwithstanding that he has no written authority to sue or plead on their behalf.
45. Coming to whether the issues raised are constitutional or not, a constitutional question is one whose answers flow from either *the Constitution*, its interpretations, enforcement of constitutional freedoms and rights, the roles, powers, directions, and decisions of state organs, as they exercise power and or whose reliefs must flow from *the Constitution* and not a statute. This was the holding in *Gabriel Mutava & others vs Managing Director Kenya Ports Authority & another* (2016) eKLR.
46. In *Speaker of National Assembly vs James Njenga Karume* (1992) eKLR, the court observed that alternative dispute mechanisms outside the court must first be exhausted. Similarly, a party must also demonstrate either an actual infringement of a right or a threat of an infringement of a right. See *National Assembly of Kenya vs Kina & another* Civil Appeal No.1 66 of 2019 (2022) KECA (548) KLR (18<sup>th</sup> June 2022) (Judgment).
47. The respondents have averred that the petitioner failed to invoke the jurisdiction of the Liaison Committee if the acts of the Director of Physical Planning aggrieved him. A liaison committee under PLUPA receives primary evidence. It exercises primary adjudicatory jurisdiction under Section 61



- (4), Part (vv) of PLUPA, and Section 115 of the County Government Act provides that public participation is mandatory in county planning and in the making of decisions that affect the citizenry.
48. The petition, however, raises issues relating to allegations of violation of constitutional rights. There is evidence that the petitioner and the locals had raised the complaints as early as 2016 in writing, and the local leadership of the County Government of Meru held several intervention meetings and consultations.
  49. The replying affidavit of the respondents has confirmed that there were public participation forums that, unfortunately, were not able to resolve the issues raised by the locals. Other than the public participation forums and the minutes, the respondents have not shared with the court any decisions that were made over the issues before the court, which the petitioner should have appealed against the liaison committee.
  50. The specific complaints by the petitioner before this court are entry into the individual parcels of land and committing acts of destruction in the name of expanding access road and without public participation or ascertainment of the plots through survey maps to define the boundaries of the existence and the extent of the access road in the first instance so as to avoid interference with private property in line with the existing survey map. Article 40 (3) (b) of *the Constitution* gives room to one who has been deprived of property or interest in or right over property for a public purpose or in the public interest. Such a deprivation must also be carried out in accordance with *the Constitution* and any act of parliament with the right to compensation and access to a court of law. See Jimmy Ndaka Munde & another vs County Government Kilifi (2021) eKLR.
  51. The respondents have invoked the *Survey Act* and the Public Road and Road of Access Act. The respondents have pleaded that the petitioner was given adequate notice to remove whatever structures were on a road reserve to give way for access road improvement. The respondents, therefore, insisted that there was unlawful trespass to public land necessitating demolition.
  52. Section 2 of the Public Roads and the Roads of Access Act (Cap 399) defines what a road reserve is and outlaws any blockade or closure of a public road. See Katungi Developers Ltd vs A.G. & another (2019) eKLR, Silipet Properties Ltd & another vs Chege Mwaura & another (2017) eKLR, Dellian Langata Ltd vs Symon Thuo Muhia & others (2018) eKLR.
  53. The creation of roads of access is governed by Section 98 of the *Land Registration Act* and the *Public Roads and Roads of Access Act*. The petitioner seeks a permanent injunction to stop the alleged trespass into the private plots and a declaration that the survey and issuance of the title deeds were irregular, null, and void and in contravention of their constitutional rights.
  54. DW 1 told the court that the national government organs were the ones who did the survey works, planning and issuance of title deeds in 2007 and 2017, without the involvement of the County Government of Meru. DW 1 stated that all the respondents did was to reestablish the beacons and boundaries in line with the published survey plans and maps from the Director of Surveys.
  55. Other than the copies of the title deeds, list of plot owners' unverified maps, and complaint letters, the petitioner was unable to produce any public/private survey reports on possible encroachment nature and particulars of the loss occasioned to his plot and those of his neighbors.
  56. A public road is defined by Section 2 of the *Public Roads and Roads of Access Act*. The creation of a public road is governed by section 9 thereof. A land registrar is one mandated to effect the registration of a road under Section 11 of the Act, as read together with the Land Laws. The creation of access roads must accord with the area's existing survey maps and plans. The petitioner did not tender evidence of the contrary in this petition. The petitioner pleaded that there was no mutual agreements on the



resurvey, subdivisions, re-parcellation, and transfer of their plots to create an access road of three meters on each side.

57. Evidence that there was resurvey, re-parcellation and re-planning of the access road in Majengo estate was not supported by any expert reports. The land registrars, road engineers, and land surveyors were not called to sustain the petitioner's claim that there was an unconstitutional interference with their plots, through resurvey, re-parcellation, and creation of access roads out of their private parcels of land beyond the existing road network before 2016. See *Moses Wamuti Kinuthia vs John Njau Kimani* (2020) eKLR.
58. A party who alleges a breach of a constitutional right or freedom must prove with tangible and cogent evidence. See *Gitobu Imanyara & others vs AG* (2016) eKLR. The existence of a road of access is a matter of law and not of speculation. The petitioner was unable to prove any new access road established on private plots in Majengo estate between 2016 – 2023. Evidence of illegal re-planning, resurvey and issuance of title deeds was not availed.
59. The upshot is that I find the petition lacking merits. It is dismissed with no order as to costs.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERUON  
THIS 16<sup>TH</sup> DAY OF OCTOBER, 2024**

In presence of

C.A Kananu

Petitioners

Mwirigi B for the respondents

Otieno C. for the appellant

**HON. C K NZILI**

**JUDGE**

