



Mombasa – Lungalunga Roadside Residents Committee (Pungu Check Point To Tiwi) & 4 others v Kenya National Highways Authority (Constitutional Petition E001 of 2021) [2024] KEELC 14149 (KLR) (3 December 2024) (Judgment)

Neutral citation: [2024] KEELC 14149 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
CONSTITUTIONAL PETITION E001 OF 2021**

AE DENA, J

DECEMBER 3, 2024

IN THE MATTER OF THE ALLEGED VIOLATION OF RIGHT TO FAIR ADMINISTRATIVE ACTION, RIGHT TO PROPERTY, RIGHT TO PRIVACY RIGHT TO LIVE IN DIGNITY

BETWEEN

**THE MOMBASA – LUNGALUNGA ROADSIDE RESIDENTS COMMITTEE
(PUNGU CHECK POINT TO TIWI) 1ST PETITIONER
CHAIRPERSON – HALIMA SAIDI MWAGOMBA 2ND PETITIONER
VICE- CHAIRMAN- CHUMA MOHAMED 3RD PETITIONER
SECRETARY – HALIMA YUSUF TAURAMBWA 4TH PETITIONER
TREASURER – AMINA SALIM KUNYAPA (GOR AND ON BEHALF OF
THEMSELVES AND OVER 200 RESIDENTS) 5TH PETITIONER**

AND

KENYA NATIONAL HIGHWAYS AUTHORITY RESPONDENT

JUDGMENT

The Petition

1. This petition was filed on 9th November 2021. It is dated 8th November 2021. The Petitioners state that at all material times they were registered owners of the land titles along the Mombasa Lungalunga road (the road) and or alternatively they were owners of the developments on land titles located by the said roadside. That these are property rights recognised by *the Constitution*. That in 2018 the Respondent while executing its lawful mandate while expanding the road carried out demolitions of the petitioners’ properties and also expropriated part of their properties being 30 metres claiming it was road reserve. That beacons were placed into the petitioners’ properties and over which the Petitioners



- held titles. Demolitions were also undertaken in the presence of the police officers and with threats. That compensation for the said demolitions and expropriation of the lands was pursued without success.
2. It was further stated that the Petitioners on 29th September 21 started the same exercise of placing the beacons but with an extra 10metres making a total of 40 meters into the Petitioners lands without compensation. That on 27th October 2021 the Petitioners presented their demands for compensation with the Respondents Regional Director Mombasa who convened a meeting at Kombani Chiefs Office where many residents attended but no commitments for compensation including public participation were reached. The Petitioners stated that their rights as enshrined in Articles 19, 28,21 35 and 40 of [*the Constitution*](#) have been violated.
 3. The Petitioners pray for the following orders; -
 - a. A declaration that the respondent has no power to expropriate the petitioners without public participation and full compensation to the petitioners
 - b. An order for compensation of the petitioners by the respondents before any expansion of the road is done after a proper and agreed valuation is carried out
 - c. An order of judicial review by way of certiorari to issue to bring to court the decision by the Respondent to acquire an extra 10 Metres or any amount of land along the road without compensation
 - d. An order of judicial review by way of prohibition to prohibit the implementation if the decision to acquire 10 extra metres or any amount of land without compensation
 - e. Any further or other orders that will ensure that ends of justice are served
 - f. Costs of the petition.
 4. The petition is supported by the affidavit of Halima Saidi Mwangomba the Chairperson of the Committee of Mombasa Lungalunga roadside residents. The deponent reiterates the substance of the petition foregoing on behalf of the committee and 247 roadside residents who are potential victims of demolitions and expropriation of their land. Attached were minutes of meetings held on 6/10/2012 and 3/11/21, letters dated 31/10/2021 to the Task Force on Historical Land Injustice and 1/11/2021 to the Respondent and list of the affected residents.
 5. Filed alongside the Petition was a Notice of Motion application dated 8th November 2021 that sought orders of injunction against the respondents from carrying out the demolitions.

Response

6. The petition and the application above were opposed through the Replying affidavit sworn by Kipkemoi Rono a Surveyor working with the Respondent. It is averred that the Respondent was discharging its mandate under the Provisions of Section 4(2) of the [*Kenya Roads Act*](#) 2007 (herein the Act). That the Respondent has not expanded the Mombasa Kwale Highway but was executing its mandate. It is averred that during construction of the road in the year 1974 and upon completion marker posts were placed at 30 metres on both sides of the road centerline but no maps were published until 1979. That the process of defining the road reserve boundaries was for protection of the same. It is during the replacement of marker post that it emerged some of the parcels of land along the section were encroaching into the road reserve. That the affected land owners were duly issued with Notice under Section 49(4) of the Act and upon expiry the Respondents removed the encroachments that had not been voluntarily removed. This was undertaken during the day.



7. The Respondent state further that subsequently in 2021 the surveyors obtained maps which indicated that some sections had a road reserve width of 80 meters and some encroachments by 10 metres. The Respondent set out to align the road reserve boundary with the new maps. The operation to mark the same elicited strong reactions and the exercise was stopped to address the dispute. A meeting was held where it was agreed demarcation would continue without installation of the marker posts until Public barazas were held. One baraza was held with the residents and more were to be held for Waa, Tiwi Ngombeni and Ukunda residents. No further marker posts were erected.
8. That the petitioners have failed to lead evidence of the unconstitutional action or inaction on the part of the Respondent. That there has been no partial land acquisition or at all. That no claim can lie against the Respondent for compulsory acquisition. The affected developments were situate within the road reserve as per the existing maps. The marking was for the protection of the reserve against encroachment. The issue of notice was caused by the Petitioners encroachment on the road reserve.
9. It is stated that the Petition has failed to set with reasonable precision the provisions said to have been infringed and the manner of the infringement thereof as required in *Anarita Karimi Njeru Vs. Republic (1979)* eKLR. That the petition is a boundary dispute and should be directed to the Land Registrar as provided under the provisions of Section 18(2) of the *Land Registration Act*. Further that the Petition has failed to comply with the mandatory provisions of section 67(a) as to prior notice to the Director General before filing of suit. That there is also no authority by the petitioners approving the institution of the Petition. Attached to the replying affidavits is a bunch of the notices issued, the maps.

Hearing of the Petition

10. The Petition was dispensed by way of written submissions. It is important to note that judgement in this matter was scheduled to be delivered on 15th day of November 2024. The court proceeded to prepare the same based on the material on record which included the submissions of the Respondents dated 29/07/24. The Petitioners had not filed submissions. The Respondent subsequently filed an application dated 8th November 2024 seeking leave to be allowed to file submissions on behalf of the Petitioners on the basis that he was not aware of the directions having also been away from his office taking care of his sick mother. Additionally, he was involved in a road accident that necessitated bed rest on the advice of the doctors. In the interest of justice, I granted the said leave and the Petitioners filed their submissions dated 8/11/24. The court has considered the submissions filed by both parties.

Analysis and Determination

Preliminaries

11. The Respondents have raised several preliminary issues which I find necessary to address at this early stage of this Judgement and on whose basis the respondent seeks the striking out of the petition.
12. The court has been invited to strike out the petition for failure on the part of the Petitioners to issue 30 days' notice as required the provisions of section 67(a) of the Kenya Road Act 2007. I will not belabor this point as the same was the subject of this courts ruling delivered in this matter on 14th October 2022. The court was guided by the holding in *Benson Ruiyi Njane Vs. Kenya Rural Roads Authority & 36 Others (2016)* and *Anthony Ngili Munguti & 12 Others Vs. Kenya National highways Authority & Ano. (2017)* eKLR. where the court pronounced that the limitation set in section 67(a) only apply to ordinary civil claims and not petitions alleging violations of constitutional rights. That such a right on access to justice cannot be defeated by a statutory provision.



13. The Respondents urge that the Petition has not met the criteria set out in the Anarita Karimi Njeru Versus Republic [1979] KLR. Constitutional litigation serves to protect fundamental rights and freedom both under Article 22 and 258 of *the Constitution* of Kenya 2010. The filing is regulated under *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. Rule 10 (1) sets out content which includes the facts relied upon, the constitutional provision violated, the nature of the injury caused or likely to be caused. Indeed, the courts have rendered that a petitioner must set out with a reasonable degree of precision the nature of the alleged violations, the person or institution responsible for the violation, the manner of the violation and the provision of *the constitution* which creates and gives the constitutional right that is under violation or threatened violation.
14. I have reviewed the Petition and I have noted that paragraph 22 C i) – vi) lists particulars of violation of *the constitution* and sets out the specific articles which I have identified hereinbefore. The nature of violations are laid out in the background information and facts. In my view I think the same suffice for purposes of the threshold set in the case of Anarita Karimi Njeru (supra). As to the merits thereof, this is another matter altogether. This court finds that the petition has met the requisite threshold.
15. Is this a boundary dispute? I have noted that while this point has been pleaded by the Respondents at paragraph 31 of the respondents reply to the Petition, it has not been addressed in the submissions. To me I think this an issue commending this courts consideration as it goes to the root of jurisdiction of this court. Section 18(2) of the *Land Registration Act* prohibit any court from entertaining any action or other proceedings relating to a dispute as to boundaries of registered land.
16. The Petitioners aver that that they are the registered owners of the land titles along the Mombasa Lungalunga Road. That the respondents appropriated part of their properties 30 Metres in claiming that it was road reserve. On the other hand the Respondents state that during the replacement of marker posts it emerged some of the parcels of land along the section were encroaching into the road reserve. Clearly this depicts there is a boundary issue and which would have to be resolved by the Land Registrar. It is trite that jurisdiction is everything and without it a court cannot move a step but to down its tools. See the Court of Appeal Case of Estate Sonrisa Ltd & another v Samuel Kamau Macharia & 2 others [2020] eKLR,
17. The Petitioners also aver that portions of their private land were appropriated without compensation thus infringing on their right to property under article 40 of *the Constitution*. My careful review of the petition boils down to compensation and this is in fact buttressed by prayers b,c and d of the petition. The prayers have been set out elsewhere in this judgement. Consequently, the proper forum for this dispute would be the National Land Commission which is vested with the jurisdiction over matters compensation for compulsory land acquisition. The *Land Act* 2012 sets out an elaborate mechanism for the same However, the boundary issue would still require resolution by the Land Registrar before the question of compensation if at all. There was therefore no point of disguising the claim for compensation as a Constitutional Petition.
18. But having stated the above I have reviewed the Petitioners submissions. While counsel claims that the Petitioners have ownership documents and if the intended demolitions proceed then the titles will be rendered useless. No evidence of the titles were presented before this court. There was also no evidence of the previous demolitions. All this emboldens the court observations above that this would not be the forum to adequately deal with the issue of compensation.
19. I think I have said enough to show that this petition is a non starter before this court and the court must down its tools. Consequently, the Petition is hereby struck out. Let each party bear its own costs.



Orders accordingly.

RULING DATED SIGNED AND DELIVERED THIS 3RD DAY OF DECEMBER 2024

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A E DENA

JUDGE

Ms Bodo Holding Brief for Maruti for the Respondent

Mr. Komora for the Petitioners

Disii - Court Assistant

