



**Ng'ang'a & 32 others v Kenya Urban Roads Authority & 6 others (Environment & Land Petition E032 of 2021) [2023] KEELC 16546 (KLR) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16546 (KLR)

**REPUBLIC OF KENYA**

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

**ENVIRONMENT & LAND PETITION E032 OF 2021**

**JA MOGENI, J**

**MARCH 9, 2023**

**IN THE MATTER OF ARTICLES 22,23,47,48, 62, 68 AND 70 OF**

**THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF  
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 42 OF**

**THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION  
OF RIGHTS AND FUNDAMENTAL FREEDOMS), PRACTICE AND**

**PROCEDURE RULES 2013**

**BETWEEN**

**ANTHONY MWANGI NG'ANG'A & 32 OTHERS ..... PETITIONER**

**AND**

**KENYA URBAN ROADS AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY MINISTRY OF INTERIOR AND COORDINATION OF  
THE NATIONAL GOVERNMENT ..... 2<sup>ND</sup> RESPONDENT**

**NAIROBI COUNTY GOVERNMENT ..... 3<sup>RD</sup> RESPONDENT**

**NAIROBI METROPOLITAN SERVICES ..... 4<sup>TH</sup> RESPONDENT**

**KENYA POWER & LIGHTING COMPANY LIMITED ..... 5<sup>TH</sup> RESPONDENT**

**WATER RESOURCES MANAGEMENT COMPANY ..... 6<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 7<sup>TH</sup> RESPONDENT**



## JUDGMENT

### Introduction

1. The Petition for hearing and determination before me is dated 13/08/2021 and filed on 16/08/2021. The Petitioners prayed for the following orders and declarations in the petition: -
  - i. A declaration that there exists a 10 meter wide public road adjoining the land parcel no. Dagoretti/Kangemi/712.
  - ii. A declaration that occupants of land parcel no. Dagoretti/Kangemi/712 have been denied the use of the public road adjoining it.
  - iii. An order that the Kenya Urban Roads Authority to mark out, peg and put beacons identifying the 10 meter road and its reserves if any as adjoining parcel of land number Dagoretti/Kangemi/712.
  - iv. That an order be issued to Kenya Urban Roads Authority to maintain the 10 meter road, stop any encroachments and ensure its usable and motor-able standards to and by everyone.
  - v. Spent.
  - vi. An Order of permanent injunction for the removal of any structure on the road and road reserve and the whole road adjoining Dagoretti/Kangemi/712.
  - vii. The Ministry of Interior and Co-Ordination of the National Government do provide the necessary coordination with the State Department of Transport to peg the road and provide security if needed for the implementation of the orders of the court.
  - viii. Special damages of Kshs. 545,000/- (five hundred and forty five thousand Kenya shillings only).
  - ix. An Order for costs against the Respondents in the petition.

### The Petitioners' Case.

2. The Petitioners' case is that all the petitioners are residents of the parcel of land Dagoretti/Kangemi/712 holding leases and/or Certificates of Leases. The residents occupying the parcel of land Dagoretti/Kangemi/712 have been denied the right to use, access and gain of all the qualities that a land parcel owner should have as they reside therein.
3. The Petitioners contend that at their parcel of land number Dagoretti/Kangemi/712 (together the neighboring parcels of land) is served with a public road of a length of about two kilometers but the road has been fully encroached leading this petition.
4. The Petitioners contend that on their parcel of land number Dagoretti/Kangemi/712 there have developed various dwelling/residential apartments with multi users whereby they have collectively been denied the equal use of the public road and the rear part of their suit parcel of land by the negligence of the respondents' failure to ensure equality and non-discrimination in land use, which they pray that the respondents' be compelled to halt anybody constructing on the road pending the hearing of this suit.
5. It is the Petitioners' case that as residents and purchasers of the apartments on the parcel of land number Dagoretti/Kangemi/712, they have been denied the rights provided for under Article 42 of



the Constitution of Kenya 2010 that provides for Clean and Healthy environment, economic rights, reasonable standards sanitation hygiene, physical accessibility to their houses have all been denied due to the ongoing encroachment to the road and road reserve.

6. Further, that the current use of the road adjoining their parcel of land number Dagoretti/Kangemi/712 has disregarded the principles of accessible, sustainable use of their land and road disregarded the existence of a road and encouraging the encroachments of the road adjoining Dagoretti/Kangemi/712 and the same needs to curbed and further developments therein stopped.
7. The Petitioners aver that some illegal structures have been constructed in a style that leads to reclamation of the land from the dam threatening the existence of the Kangemi dam. There is a stream that leads/feeds the Kangemi Dam with water and the same has been misused by erecting structures on it illegally and by diverting its water illegally and used in an unsustainable manner threatening its existence of the spring and dirtying dam water.
8. They contend that numerous fire incidents recently on 3/08/2021 and 10/09/2020 was a threat to the lives and property of the occupants of land parcel no. Dagoretti/Kangemi/712, the presence of illegal structures on the adjoining road curtailed the movement of emergency personnel and their equipment as firefighters and medics used the compound of the land parcel no. Dagoretti/Kangemi/712 to put of the fire to save the lives of the encroachers but unfortunately numerous people got injured and lives were lost.
9. It is a principle of environmental law that all are entitled to use their parcels of land to the best of their abilities, use that accords them maximum benefits, use of access of adjoining roads, unfettered access of the resources attached to their parcels of land and a clean environment in relation to all the road adjoining land parcel no. Dagoretti/Kangemi/712. That the respondents have neglected their statutory mandate to manage and maintain urban trunk roads, water resources and facilitated illegal connection to power to unregistered and undelegated areas. These actions have facilitated continued encroachment of a public road.
10. They listed the statutory mandate of the Kenya Urban Roads Authority relevant to this case as follows:
  - a. To maintain all urban roads in a motorable manner/conditions.
  - b. To avoid encroachment of all urban roads
  - c. To avoid; misuse, use in unsustainable manner.
  - d. To ensure public access of all urban roads
11. Further, the Petitioners also listed particulars of neglect and abdication of statutory duty by the respondents (in relation to the public road adjoining land parcel no Dagoretti/Kangemi/712) as follows:
  - i. Failure to manage and facilitate the use of the 10 meter public road
  - ii. Failure to rehabilitate the public road
  - iii. Neglected to control the use of the public road
  - iv. Failure to avoid encroachment of the public road.
  - v. Failure to develop the infrastructure of the public road
12. The Petitioners contend that the Kenya Urban Roads Authority have deliberately abdicated their roles in relation to this suit road denying the petitioners a quiet enjoyment of their parcel of land



- number Dagoretti/Kangemi/712. That it is therefore necessary for the Kenya Urban Roads Authority to peg the road, identify its extent to facilitate its full use by all members of the public including the petitioners.
13. That the several fire incidences have always led to the destruction of the property of the Waterfront Waiyaki Way Apartments Ltd. That the last fire on the 3/08/2021 their property was destroyed to extent and value of Kshs 545, 000.00.
  14. The Petitioners listed the particulars of damages and destruction on the parcel of land Dagoretti/Kangemi/712 as follows: Destruction of the various plumbing works, destruction of the water tanks, destruction of the perimeter electric wire fence, destruction of the cabro and pavements works on the night 3/08/2021 by the fire engine brigade and the petitioners pray for damages.
  15. Lastly, the petitioners pray that the respondents be condemned for damages since they have written letters of protests and requesting assistance to various state agencies including all the respondents.
  16. The Petition is opposed. It is only the 1<sup>st</sup> Respondents who opposed the Petition. The 1<sup>st</sup> 2<sup>nd</sup> 4<sup>th</sup> and 7<sup>th</sup> Respondents entered appearance on 29/11/2021 through the Attorney General's office and the 1<sup>st</sup> Respondent filed a Replying Affidavit dated 27/08/2021 on 29/11/2021. The 3<sup>rd</sup> Respondent only entered appearance on 24/09/2021.
  17. As at 15/03/2022, counsel for the Petitioners informed the Court that parties had not complied. The matter came up for PTC on 7/12/2022 and all the parties were present. It is only the 1<sup>st</sup> Respondent who had filed a Replying Affidavit. Counsel for the 3<sup>rd</sup> Respondent sought for leave of 7 days to file a Replying Affidavit but she has not done so.

### **Respondents' Case**

18. The Respondent in response to the Petitioners' Petition filed a Replying Affidavit sworn by Paul Owino Odak on 27/08/2021.
19. In the said Replying Affidavit, the Assistant Director for Surveys at the Kenya Urban Roads Authority (KURA) contended that *the Constitution* of Kenya, 2010 at the fourth Schedule classifies roads in Kenya into two categories, namely; National Trunk Roads and County Roads and vests their jurisdictions accordingly to the respective levels of government.
20. He contends that the 1<sup>st</sup> Respondent Authority is the State Corporation under the National Government with the mandate to develop, manage, control, rehabilitate and construct national trunk roads as they traverse urban areas in Kenya.
21. That character and functionality determine the classification of roads. The cause of action concerns a public road which abuts the Petitioners property, situate at Dagoreti Sub County, Kangemi Location within the Nairobi County, and is as such a residential access road categorized as a County Road.
22. The said access road being a County Road, its superintendence, management and control vests in the County Government of Nairobi.
23. In view of the above the 1<sup>st</sup>, 2<sup>nd</sup> and 7<sup>th</sup> Respondents herein lack jurisdiction over this public road and are thus nonsuited, and therefore cannot, as a matter of law, implement any of the orders prayed for herein. By reason further of the foregoing, the Petition and Motion filed herein, are in so far as they relate to the 1<sup>st</sup> 2<sup>nd</sup> and 7<sup>th</sup> Respondents, incompetent and misconceived, and are therefore for striking out, or for dismissal with costs.



## Written Submissions

24. The Court gave directions on the filing of written submissions on 7/12/2022. By the time of writing this Judgment, it is only the Attorney General had filed their submissions dated 6/03/2023 on behalf of the 1<sup>st</sup> 2<sup>nd</sup> and 7<sup>th</sup> Respondents, which I have considered.

## Analysis and Determination

25. I have very carefully considered the Petition, the 1<sup>st</sup> Respondent's Relying Affidavit together with the Attorney General's submissions. I have also considered the relevant constitutional and statutory frameworks. Similarly, I have considered the relevant jurisprudence on the key issues in the petition. I postulate that the issues for determination are:
- a. Whether the Petition raises any constitutional issues?
  - b. What reliefs are the Petitioners entitled to in this Petition?

## Whether the Petition raises any constitutional issues?

26. On whether the Petition raises any constitutional violations, the Petitioners herein contend that the legal basis of the Petition is as follows:
1. Article 1(2) provides that all sovereign power belongs to the people of Kenya. The people may exercise their sovereignty directly or through their elected representatives (in the National Assembly) who have been accorded and granted the right to use the land Dagoretti/Kangemi/712 as long as they reside therein.
  2. Article 2(1) of *the Constitution* provides that *the Constitution* is the supreme law of the Republic and binds all persons and state organs at both levels of government whereby the residents of Dagoretti/Kangemi/712 have been denied use of the 10meter wide road adjoining their parcel of land arbitrarily by the respondents' state organs.
  3. Article 10 (2) a, b and c provides for the national values and principles of governance include when making public policies; Rule of Law, democracy and participation of the people; inclusiveness; good governance, integrity, transparency and accountability which values have been ignored while encroaching the road adjoining Dagoretti/Kangemi/712.
  4. Article 19 of *the Constitution* provides that the rights and fundamental freedoms in the Bill of Rights are subject only to the limitations contemplated in *the Constitution*.
  5. Article 20 applies the Bill of Rights to all and binds all state organs and all persons, and further obligates this Honourable Court while interpreting the Bill of Rights to promote the values that underlie an open and democratic society and to adopt an interpretation that most favors the enforcement of a right or fundamental freedom.
  6. Article 21 states that it is a fundamental duty of the State and every State Organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.
  7. Article 23 vests the Honourable Court with the authority to uphold and enforce the Bill of Rights and the jurisdiction to grant appropriate remedies and reliefs. In this case the petitioners pray for injunctive orders and mandamus to facilitate their quiet use of their premises Dagoretti/Kangemi/712 and the adjoining 10 meter road.



8. Article 24 of *the Constitution* provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law.
9. Article 27 of *the Constitution* guarantees equality and non-discrimination. Hence, public participation should ensure equality and non-discrimination.
10. Article 40 of *the Constitution* provides for the protection of right to property. That some of the petitioners have purchased apartments /condominium property on the parcel of land Dagoretti/Kangemi/712 and have been provided with titles by the Ministry of Lands for their respective apartments. However due to the encroachments of the 10-meter-wide road the petitioners are unable to enjoy the use of their property.
11. Further to their right to protect their property they suffer economically due to the loss of the value of their property contrary to article 43 of *the constitution* of Kenya.
12. Article 42 provide for economic rights which have been disregarded by the use of the adjoining road leading to a degradation of our residential apartments.
13. Article 60 provide for the principles of land use which among them include sustainable, equitable, sound conservation and allowing physical access to land, that these principles have been disregarded leading to the encroachments of the road adjoining Dagoretti/Kangemi/712 and the same needs to curbed and further developments therein stopped.
14. That article 62 provides for what public land includes. They include roads for purposes of this matter. That it is therefore necessary to ensure that public roads are respected, protected and used for the purpose that is supposed and not for individual gain of a few.
15. That article 68 provides for environmental land use. That the road adjoining land parcel no. Dagoretti/Kangemi/712 has been used in manner that has led to the degradation of the adjoining water stream and Kangemi Dam water to the detriment of the users downstream and the neighbors. That numerous fire incidents have occurred most recently on 3<sup>rd</sup> August 2021 and 10<sup>th</sup> October, 2020 which was a threat to the lives and property of the occupants of land parcel no Dagoretti/Kangemi/712.
27. The Petitioner further contends that the presence of illegal structures on the adjoining road curtailed the movement of emergency personnel and their equipment as firefighters and medics used the compound of the land parcel no Dagoretti/Kangemi/712 to put out the fire to save the lives of the encroachers but unfortunately numerous people got injured and lives were lost.

### **Analysis and Determination**

28. To begin with, I am guided by the sentiments of the Court in the case of Anarita Karimi Njeru v R [1976 - 80] KLR 1272 which was also affirmed in Mumo Matemu v Trusted Society of Human Rights Alliance & others [2013] eKLR, where the Court held that a party seeking redress by way of Constitutional Petition must set out with a reasonable degree of precision the constitutional provisions which he alleges to have been infringed and the manner of the alleged infringement.
29. The Supreme Court in Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR had the following on Constitutional Petitions: -

“Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as



the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru vs. Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”

30. The Petitioners’ Petition is premised on Articles 22, 23, 42, 47, 48, 62, 68 and 70 of *the Constitution* of Kenya as indicated on the face of the Petition. The Petitioner also relied on Articles 1(2), 2(1), 10(2) a, b and c, 19, 20, 21, 24, 27, 40 and 60 of *the Constitution* of Kenya. Some of the Articles relied upon are also set out in the body of the Petition.
31. The principle was emphasized by the Court of Appeal in *Mumo Matemo vs. Trusted Society of Human Rights Alliance* (2014) eKLR, where it stated that:-

“...The principle in *Anarita Karimi Njeru* (supra) underscores the importance of defining the dispute to be decided by the court....Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.”
32. The Petitioners have specifically mentioned the articles of *the constitution* that they claim have been violated but a mere mention of the articles without substantiation is not enough. The petitioners are under a duty to link up the article with the actual and specific violations with proof.
33. A glance of the present Petition demonstrates that the Petitioners allege that the Respondents have mainly violated Articles 2(1), 22, 23, 40, 42, 43, 47, 48, 60, 62, 68 and 70 of *the Constitution* of Kenya.

### **Right to enforcement of bill of rights**

34. It is the Petitioners’ case that Article 2(1) of *the Constitution* provides that *the Constitution* is the supreme law of the Republic and binds all persons and state organs at both levels of government whereby the residents of Dagoretti/Kangemi/712 have been denied use of the 10-meter-wide road adjoining their parcel of land arbitrarily by the respondents’ state organs.
35. It is true that Article 2(1) provides that *the Constitution* is the supreme law of the Republic and binds all persons and all State organs at both levels of government. However, it is not clear how being denied the use of the 10-meter-wide road adjoining the Petitioners’ parcel of land violates Article 2(1) of *the Constitution*.
36. With regard to Article 22 of *the Constitution*, it provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, or infringed, or is threatened. The Petitioners are already in Court. Therefore the Petitioners have not established how their right under Article 22 of *the Constitution* were violated.

### **Authority of Courts to uphold and enforce the Bill of Rights**

37. Article 23 of *the Constitution* provides that the High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of; or threat to, a right or fundamental freedom in the Bill of Rights and further that the Court may grant various



appropriate reliefs as follows: “a declaration of rights, an injunction, a conservatory order, a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24, an order for compensation and an order of judicial review.”

38. Turning to the issue of whether or not the petitioners’ rights to enforce the bill of rights under Article 23 of *the Constitution* was violated, the Petitioners case was that Article 23 vests the Honourable Court with the authority to uphold and enforce the Bill of Rights and the jurisdiction to grant appropriate remedies and reliefs. In this case the petitioners pray for injunctive orders and mandamus to facilitate their quiet use of their premises Dagoretti/Kangemi/712 and the adjoining 10-meter road.
39. Article 23 is important in our constitutional dispensation as it provides for the authority of courts to uphold and enforce the Bill of Rights and therefore this does not violate any constitutional intent.
40. With regard to Article 40 of *the Constitution*, it is the Petitioners case that Article 40 provides for the protection of right to property. That some of the petitioners have purchased apartments / condominium property on the parcel of land Dagoretti/Kangemi/712 and have been provided with titles by the Ministry of Lands for their respective apartments. However due to the encroachments of the 10-meter-wide road the petitioners are unable to enjoy the use of their property.
41. The thrust of Article 40 is to protect proprietary rights under the law. Such rights are governed by statutes. The courts are mandated by statute to consider a title document as prima facie evidence of ownership to land and a conclusive evidence of proprietorship to land that can only be challenged on grounds stipulated in section 26 of the *Land Registration Act* 2012. The Court notes that the Petitioners only adduced lease agreements demonstrating that they reside at Waterfront Waiyaki Way Apartments Ltd. In order to enforce this right, a Petitioner must demonstrate that it is entitled to the property in issue and clearly show the proprietary interest sought to be protected. No title deed was adduced before this Court. The Petitioners have therefore not demonstrated how their right under Article 40 has been violated.

### **Right to a clean and healthy environment**

42. I shall reproduce some of the contentions that were made by the Petitioners in the instant Petition. It was their case that some illegal structures have been constructed in a style that leads to reclamation of the land from the dam threatening the existence of the Kangemi dam. There is a stream that leads/ feeds the Kangemi Dam with water and the same has been misused by erecting structures on it illegally and by diverting its water illegally and used in an unsustainable manner threatening its existence of the spring and dirtying dam water.
43. They also contended that it is a principle of environmental law that all are entitled to use their parcels of land to the best of their abilities, use that accords them maximum benefits, use of access of adjoining roads, unfettered access of the resources attached to their parcels of land and a clean environment in relation to all the road adjoining land parcel no. Dagoretti/Kangemi/712. That the respondents have neglected their statutory mandate to manage and maintain urban trunk roads, water resources and facilitated illegal connection to power to unregistered and undelegated areas. These actions have facilitated continued encroachment of a public road.
44. From the above, the Petitioners relied on Articles 42, 60, 62, 68 and 70 of *the Constitution* where they concentrated on the allegation that their rights have been infringed due to encroachment which has in turn led to the violation of their right to a clean and healthy environment.



45. Article 42 of *the Constitution* guarantees every person the right to a clean and healthy environment and to have the environment protected for the benefit of present and future generations through the measures prescribed by Article 69. The right extends to having the obligations relating to the environment under Article 70 fulfilled.
46. The Petitioners also alleged that their rights under Article 70 were violated. Article 70 of *the Constitution* of Kenya empowers any person who alleges that a right to a clean and healthy environment has been infringed or is threatened to apply for redress from the court in addition to any other legal remedies available in respect of the matter. An applicant alleging that a right to a clean and healthy environment need not demonstrate that any person has incurred loss or suffered injury. The court may make any order or give any directions it considers appropriate to prevent, stop or discontinue any act or omission that is harmful to the environment and may compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment. In the court's view, the Petitioners did not have to demonstrate that any person had suffered injury in the petition.
47. The Petitioners further alleged that their rights under Article 68 were violated. The Petitioners case was that article 68 provides for environmental land use. That the road adjoining land parcel no. Dagoretti/Kangemi/712 has been used in manner that has led to the degradation of the adjoining water stream and Kangemi Dam water to the detriment of the users downstream and the neighbors. Further, that numerous fire incidents have occurred most recently on 3<sup>rd</sup> August 2021 and 10<sup>th</sup> October, 2020 which was a threat to the lives and property of the occupants of land parcel no Dagoretti/Kangemi/712.
48. With regard to Article 60 of *the Constitution*, the Petitioners argued that Article 60 provides for the principles of land use which among them include sustainable, equitable, sound conservation and allowing physical access to land, that these principles have been disregarded leading to the encroachments of the road adjoining Dagoretti/Kangemi/712 and the same needs to be curbed and further developments therein stopped.
49. Lastly, under the headline for clean and healthy environment, the Petitioners also relied on Article 62. It was the Petitioners' case that article 62 provides for what public land includes. They include roads for purposes of this matter. That it is therefore necessary to ensure that public roads are respected, protected and used for the purpose that is supposed and not for individual gain of a few.
50. Article 62(3) particularly provides that: "Public land classified under clause (1) (f) to (m) shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission."
51. Article 62(1) (h) provides for: "all roads and thoroughfares provided for by an Act of Parliament."
52. Unlike the other rights in the bill of rights which are guaranteed for enjoyment by individuals during their lifetime, the right to a clean and healthy environment is an entitlement of present and future generations and is to be enjoyed by every person with the obligation to conserve and protect the environment. The right has three components; the right itself, the right to have unrestricted access to the courts to seek redress where a person alleges the right to a clean and healthy environment has been infringed or is threatened; and the right to have the court make any order or give any directions it considers appropriate to either prevent or discontinue the act harmful to the environment, or compel any public officer to take measures to prevent or discontinue the act that is harmful to the environment or award compensation to any victim of a violation of the right to a clean and healthy environment.
53. It is useful to define what a clean and healthy environment entails in the context of the use of public roads which is the subject of this petition. The Longman Dictionary of Contemporary English defines "clean" in relation to the environment as containing or producing nothing that is dirty or harmful.



“Healthy” is defined in relation to persons, animals, or plants as physically strong and not likely to become weak or ill. Black’s Law Dictionary, 10<sup>th</sup> edition defines “health” as the quality, state or condition of being sound or whole in body mind or soul especially freedom from pain or sickness; or the relative quality or state of one’s physical or mental well-being whether good or bad. The Longman Dictionary of Contemporary English defines “well-being” as the feeling of being comfortable, healthy and happy.

54. The Environmental Management and Coordination Act (EMCA) defines the environment to include physical factors of the surroundings of human beings including land, water, atmosphere, climate; biological factors of animals and plants; and the social factor of aesthetics which includes both the natural and healthy environment.
55. A clean and healthy environment for persons using a road would be one that is devoid of dirt or anything harmful which may interfere with the physical or mental well-being of persons using the road. Some of the factors that are deleterious to the environment can be discerned from Part VIII of EMCA include effluents, emissions, waste, toxic and hazardous material etc. The [Traffic Act](#) mentions other factors that are likely to infringe on the right to a clean and healthy environment on the roads. Roadside developments and/or the road reserves should be clean and well planned to give effect to the right to a clean and healthy environment on the public roads. (See *Adrian Kamotho Njenga v Council of Governors & 3 others* [2020] eKLR.)
56. Section 3 of EMCA allows any person who alleges that the right to a clean and healthy environment has been or is being infringed or violated to apply to the Environment and Land Court in the public interest. The Petitioners were not obliged to prove that they had suffered loss or damage in their application for enforcement of the right to a clean and healthy environment.
57. It is the Petitioners’ contention that they have a right to a clean environment in relation to all the road adjoining land parcel no. Dagoretti/Kangemi/712. That some illegal structures have been constructed in a style that leads to reclamation of the land from the dam threatening the existence of the Kangemi dam. There is a stream that leads/feeds the Kangemi Dam with water and the same has been misused by erecting structures on it illegally and by diverting its water illegally and used in an unsustainable manner threatening its existence of the spring and dirtying dam water and further to that numerous fire incidents recently on 3/08/2021 and 10/09/2020 was a threat to the lives and property of the occupants of land parcel no. Dagoretti/Kangemi/712. It is their case that the presence of illegal structures on the adjoining road curtailed the movement of emergency personnel and their equipment as firefighters and medics used the compound of the land parcel no. Dagoretti/Kangemi/712 to put out the fire to save the lives of the encroachers but unfortunately numerous people got injured and lives were lost. They contend that the respondents have neglected their statutory mandate to manage and maintain urban trunk roads and water resources. These actions have facilitated continued encroachment of a public road.
58. It is the 1<sup>st</sup> Respondent’s case that he 1<sup>st</sup> Respondent Authority is the State Corporation under the National Government with the mandate to develop, manage, control, rehabilitate and construct national trunk roads as they traverse urban areas in Kenya. That character and functionality determine the classification of roads. The cause of action concerns a public road which abuts the Petitioners property, situate at Dagoretti Sub County, Kangemi Location within the Nairobi County, and is as such a residential access road categorized as a County Road and the said access road being a County Road, its superintendence, management and control vests in the County Government of Nairobi. That the 1<sup>st</sup>, 2<sup>nd</sup> and 7<sup>th</sup> Respondents herein lack jurisdiction over this public road.



59. The provision of water and sanitation facilities is the preserve of county governments as per Part 2, Section 11 (b) of the Fourth Schedule of the Constitution. The court has looked at the Constitution and the Acts relating to devolution. The Fourth Schedule to the Constitution distributes functions between the national and county governments. Transport and communications including road traffic, the construction and operation of national trunk roads and the standards for the construction of and maintenance of other roads by counties is a function of the national Government under Part 1 of the schedule.
60. One of the functions of the county under Part 2 of the Fourth Schedule to the Constitution is county health services including in particular refuse removal, refuse dumps and solid waste disposal. County transport including county roads and public road transport also fall under the mandate of the county, as well as county public works and services including water and sanitation services.
61. It is the county governments that are mandated to deal with water, sanitation and solid waste disposal. In the court's view, the broad function of road transport is conferred on both the national and county governments under the Fourth schedule of the Constitution; and the function therefore falls under the concurrent jurisdiction of each of the two levels of government pursuant to Article 186(2) of the Constitution. Article 189 provides the framework of how the national and county governments are to cooperate in the performance of their functions and exercise of their powers. The road authorities and the counties have to cooperate in the performance of their duties.
62. Looking at the Kenya Roads Act, the 1<sup>st</sup> Respondent is established under Section 9 of the Kenya Roads Act of 2007 and under Section 10 of the Act is responsible for the management, development, rehabilitation, and maintenance of all public roads in cities and municipalities in Kenya except where those roads are national roads. Its powers are set out under Section 10(2) as follows:

“Functions of the authority:

- (1) ...
- (2) For the purposes of discharging its responsibility under subsection (1) the Authority shall have the following powers and duties-
  - (a) constructing, upgrading, rehabilitating and maintaining roads under its control.
  - (b) controlling urban road reserves and access to roadside developments.
  - (c) implementing roads policies in relation to urban roads.
  - (d) ensuring adherence by motorists to the rules and guidelines on axle load control prescribed under the Traffic Act (Cap.403) and under any regulations under this Act.
  - (e) ensuring that the quality of road works is in accordance with such standards as may be defined by the Minister.
  - (f) in collaboration with the Ministry responsible for transport and the Police Department, overseeing the management of traffic and road safety on urban roads.
  - (g) monitoring and evaluating the use of urban roads.



- (h) planning the development and maintenance of urban roads.
- (i) collecting and collating all such data related to the use of urban roads as may be necessary for efficient forward planning under this Act.
- (j) preparing the road works programmes for all urban roads.
- (k) liaising and coordinating with other road authorities in planning and on operations in respect of roads.
- (l) advising the Minister on all issues relating to urban roads; and
- (m) performing such other functions related to the implementation of this Act as may be directed by the Minister.”

63. Section 49 (1) (a) of the *Kenya Roads Act* further provides as follows:

“No person is permitted to erect, construct or lay, or establish any structure or thing, on or over or below the surface of a Road Reserve or Buffer Zone.”

64. To my mind the Section prohibits any person from constructing, erecting, or establishing any structure on or above the surface of a road reserve or buffer zone.

65. Section 18 (b) and (c) of the Fourth Schedule of *the Constitution* of Kenya provides that a function of the National Government includes: “the construction and operation of national trunk roads; and “standards for the construction and maintenance of other roads by counties, respectively.”

66. Section 5 of the of the Fourth Schedule of *the Constitution* of Kenya provides that a function of the County Government includes:

“County transport, including—

- (a) county roads.
- (b) .....
- (c) .....
- (d) .....
- (e) .....

67. Article 182 (2) provides that a function or power that is conferred on more than one level of government is a function or power within the concurrent jurisdiction of each of those levels of government.

68. The court notes that Section 6(3) of the *Urban Areas and Cities Act* designates Nairobi as the city to provide infrastructure necessary to sustain among others, the efficient transport network connecting to rural areas, towns and other local, regional and international cities.

69. The 1<sup>st</sup> Respondent did describe themselves as State Corporation under the National Government with the mandate to develop, manage, control, rehabilitate and construct national trunk roads as they traverse urban areas in Kenya.



70. Part C of the First Schedule of the *Kenya Roads Act* describes urban roads, class UL as “Urban local roads including minor distributors, local streets, residential stand accesses, commercial and industrial stand accesses, shopping streets.”
71. It is the 1<sup>st</sup> Respondent’s contention that and I quote “public road which abuts the Petitioners property, situate at Dagoreti Sub County, Kangemi Location within the Nairobi County, and is as such a residential access road categorized as a County road.”
72. This Court is further guided by the list of urban roads listed at page 118 and 119 under the Kenya Roads (Kenya Urban Roads Authority) (Vesting) Order, 2011 (L.N No. 194 of 2011).
73. This Court is aware that the roles of the 1<sup>st</sup> Respondent should be in line with the division of functions between the two levels of Government in accordance with *the Constitution*. The Courts would not normally second-guess guidance given pursuant to the lawful exercise of that discretion or authority however, the 1<sup>st</sup> Respondent did not adduce evidence demonstrating that the public road being referred to in this Petition is categorized as a County Road.
74. I am inclined to believe that the 1<sup>st</sup> Respondent has jurisdiction over the impugned public as they themselves have called it a residential access road. Therefore, long story short, I am convinced that the Petitioners’ rights under Articles 42, 60, 62, 68 and 70 of *the Constitution*.
75. Before I finish up on the right to a clean and healthy environment, it is important to note that the right to economic and social rights falls under Article 43 and not 42 as contended by the Petitioners. The Petitioners case was that Article 42 provide for economic rights which have been disregarded by the use of the adjoining road leading to a degradation of our residential apartments. That is not the case. On the rights to economic and social rights under Article 43 of *the Constitution* as has been contended by the Petitioners, if at all they intended to rely on the same, the Court finds that the Petitioners have not precisely demonstrated how this right was affected by actions of the Respondents. In support of this finding I reiterate the dictum in Anarita Karimi Njeru (supra) 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 a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”
76. The Petitioners aver that further to their right to protect their property they suffer economically due to the loss of the value of their property contrary to article 43 of *the constitution* of Kenya. With all due respect to the petitioners’ argument, my humble view is that there is no proof that they have suffered economically due to loss of value. To be honest, the ONLY evidence that links the Petitioners to the suit property are the various lease agreements attached in the supporting affidavit which only demonstrate that the Petitioners are tenants at Waterfront Waiyaki Way Apartments. I therefore find and hold that the Petitioners have not precisely pleaded their case on the infringement of their rights under Article 43 of *the Constitution* and I cannot therefore find in their favour in respect of the alleged violation of this constitutional right.

### **Right to fair administrative action and access to justice**

77. Turning to the issue of whether or not the petitioners’ rights to fair administrative action and access to justice under Articles 47 and 48 of *the Constitution* was violated, Article 47 of *the Constitution* provides for the right to fair administrative action to which everybody is entitled to when one’s right



- or fundamental freedom has been or is likely to be adversely affected by such action. In such a case he or she is supposed to be given a fair hearing. This upholds the principles of the administrative action, which is supposed to be expeditious, efficient, lawful, reasonable, and procedurally fair.
78. The parent law that now governs how when a government agency wishes to take steps in decisions such as the ones relevant to acquisition of land by the state is the Fair Administrative Act of 2015. Section 4 (4) of the Act clarifies that every person must be accorded fair administrative action.
79. The Petitioners have not established how their right under Article 47 of *the Constitution* were violated.
80. Article 48 of *the Constitution* provides that: “the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”
81. The Petitioners are already in Court and thus the Petitioners have not shown how their access to justice has been hindered.
82. The Court finds that the Constitutional rights of the Petitioners were not violated under this head. Therefore, the Petitioners’ right to a fair administrative action and hearing Article 47 and 48 of *the Constitution* does not arise since the Petitioners have failed to demonstrate the same.
83. I have had an opportunity to look at the Petition and indeed it is clear to me that apart from citing the omnibus provisions of *the Constitution*, the Petition has provided some particulars of the alleged complaints and the manner of the alleged infringement as demonstrated above. It is now an established principle of law as enunciated in the above-mentioned cases, that anyone who wishes the Court to grant a relief for violation of a right or fundamental freedom, must plead in a precise manner the constitutional provisions said to have been violated or infringed, the manner of infringement and the jurisdictional basis for it.
84. I find from a cursory look at the Petition and supporting affidavit as well as the manner of pleading therein, there is some semblance of a constitutional petition pleading breach of known constitutional provisions or violation of and or infringement of rights and fundamental freedoms. Notwithstanding the inclusion of unnecessary provisions in the Articles of *the Constitution*, the instant Petition has demonstrated violations of Articles 42, 60, 62, 68 and 70 of *the Constitution*. For the foregoing reasons this court is of the opinion that the petition before it has met the threshold required of a constitutional petition.

#### **What reliefs is the Petitioner entitled to in this Petition?**

85. The Court having found that the Petitioner’s constitutional rights were infringed, the question that remains to be answered is whether the Petitioners are entitled to all or any of the reliefs sought. As regards relief, under Article 23 of *the Constitution* the court may grant appropriate relief to indicate the right so infringed. The Petitioners have met the threshold required of a constitutional petition and are therefore entitled to some of the prayers sought.
86. The Court notes that the prayer against the 5<sup>th</sup> and 6<sup>th</sup> Respondents cannot be issued as they were struck out of the suit on 7/12/2021 and 6/10/2022 respectively.
87. I also note that the 10-meter-wide public road has not been disputed. The survey map produced reflects the 10-meter-wide public road and the map has also not been disputed.
88. The Petitioner has sought for various declarations and orders in their Petition. The Court has already held above that the instant Petition has demonstrated violations of Articles 42, 60, 62, 68 and 70 of *the Constitution*. The Court therefore finds that the declaratory orders prayed for by the Petitioners are merited.



89. With regard to prayer (vi), The principles that guide the court in granting an order of injunction are set out in the celebrated case of Giella V Cassman Brown & Company Limited 1973. E.A 358 as follows:

“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”

90. From the Petitioners’ evidence stated above, it is my finding that they have met the threshold for the grant of an injunction.

91. Although the Petitioners prayed for special damages, it was not demonstrated in any way that any special damages are payable. It is trite law that special damages require to be specifically pleaded and proved. In this Petition, the Petitioners have not pleaded nor proved this claim and consequently I will not grant that prayer.

92. As for the costs of this suit, this being a suit brought in public interest, each party shall bear their own costs.

93. In the circumstances and upon considering the facts of this Petition, the Court finds and holds that the Petition herein dated 13/08/2021 is merited and the same is allowed in part in terms of prayers no. (i), (ii), (iii), (iv), (vi) and (vii). Each party to bear its own costs.

94. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 9<sup>TH</sup> DAY OF MARCH, 2023.**

**MOGENI J.**

**JUDGE**

In the presence of

.....Petitioners

.....1<sup>st</sup>, 2<sup>nd</sup> 4<sup>th</sup> and 7<sup>th</sup> Respondents

.....3<sup>rd</sup> Respondents

Ms. Caroline Sagina - Court Assistant.

