



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT ELDORET**

**ELC PETITION NO. 6 OF 2020**

**IN THE MATTER OF THE CONTRAVENTION OF ARTICLES 22(1),  
23, 64, 165(3) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE RIGHT OF  
PROPERTY UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA 2010**

**AND**

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

**AND PRODUCER RULES 2013**

**BETWEEN**

**JOEL AMDANY & 90 OTHERS.....PETITIONERS**

**VERSUS**

**BARINGO COUNTY GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

**KENYA RURAL ROADS AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**BARINGO NORTH SUB-COUNTY COMMISSIONER.....3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

By a petition dated 5<sup>th</sup> May, 2020 the petitioners herein sued the respondents seeking for the following reliefs :

- a) A Declaration that the Petitioners' rights to property (indigenous land) have been violated by the Respondents' indiscriminate act of trespassing by constructing road reserve.
- b) A permanent Order of injunction to restrain the Respondents, their agents and /or servants from annexing further and constructing the road over their ancestral land.
- c) An order of injunction compelling the Respondents to immediately reinstate the Petitioners land to its original position before the construction of the road reserve.

d) A declaration that the Petitioners right to participate and air their views was never done or conducted.

e) A declaration that the Respondent's actions are illegal for failing to adhere to the requirements of conducting an Environmental Impact Assessment before commencing work.

f) An order of compensation, costs and interests from the date of filing of this petition and any other relief that the Honourable Court may deem fit to grant.

The petitioners canvassed the petition by way of written submissions which were duly filed.

### **PETITIONERS' CASE**

The petitioners claim that they are the residents of TUROKIN, YOOT, ROCHOMBO and YIBAT areas within Baringo North Sub County and have their ancestral lands within Kitibei and Kapnyekwel villages which are not demarcated but are ancestral. That there is a road which cuts through the ancestral farms of Chemltei family which comprises 20 households, Kibon Amdany family over 30 households and Barmeino family with over 20 households.

It is the petitioners case that the Respondents have created an illegal road through their parcels of land without consulting the residents and the beneficial owners of the said parcels.

The petitions aver that in November, 2019, a meeting was held at Kimugul Centre which was convened by area chief in the presence of the elders from Sokonin and Kitibei villages. The area leaders together with land owners proposed the route for the road to be constructed which could have benefited and/or connect the three villages.

That in the said meeting it was proposed and agreed that the road network was to start from KAPNG'ENANGEN through ELAIN to KABARMOSIS whereby works started and construction went for 20meters then it was suddenly stopped.

The petitioners claim that on 14<sup>th</sup> November, 2019, the Roads Engineer, Ward Administrator - SAIMO-KIPSARAMAN WARD, and SAIMO-KIPSARAMAN MCA supervised the road construction from KAPNGENANGEN through TUROKIN to KABARMOSIS which was against the earlier resolution reached by owners of the parcels.

It was the petitioners' averment that several letters of complaint were addressed to the Sub- County Commissioner against the newly constructed road but the same were never responded to. The petitioners claim that the parcels of land within TUROKIN area were adversely destroyed, trees and huge deposits of derelict soil/rocks left thereby degrading the arable farms.

The petitioners further claim that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not conduct an Environmental Impact Assessment (EIA) test before undertaking the said construction and are yet to furnish them with any report to that effect.

It was the petitioners case that their right to property has been violated and they risk losing their land which is their major source of livelihood. That the petitioners are apprehensive that they stand to suffer irreparable loss and damages since their lands shall be rendered a waste, unproductive, degraded, derelict and reduce in size infringing on their rights.

Counsel filed submissions and listed 2 issues for determination namely whether the petitioner's petition dated 5<sup>th</sup> May, 2020 meets the threshold of a petition and whether Petitioners are entitled to the orders sought of which he answered in the affirmative.

It was counsel's submission that the petitioners have specifically pointed out the provisions of the Constitution that the Respondents have violated namely ARTICLE 22 (1) of the 2010 Constitution 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.

#### ARTICLE 23.

(1) 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.

(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts 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.

(3) In any proceedings brought under Article 22, a court may grant appropriate relief including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) 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;

(e) an order for compensation;

Article 40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property — (a) of any description; and (b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good of land acquired under clause 13) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

Counsel also relied on the case of **MUMO MATEMU VS TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS [2013] eKLR and that of ANARITA KARIMI NJERU VS ATTORNEY GENERAL Petition 1 of 19791 KLR 154**, where the court held that;

*“A petitioner must be specific as to the rights violated and give particulars of it This serves the purpose of generating the issues for determination before court and assists the opposite party to prepare a comprehensive response, The constitution of Kenya (Protection of Rights and Procedure Rules. 2019 ,require in rule 10(2) that a constitutional petition shall contain the facts relied constitution provision violated; the nature of injury caused and the relief sought”.*

Counsel therefore submitted that the prayers sought by the petitioners were specifically pleaded under the constitutional. provisions and the threshold of a petition and merits the orders sought being granted by the court

On the second issue counsel submitted that the petitioners though not registered owners of land parcels situated at ELAIN, are the beneficial owners since the said properties are their ancestral land and therefore have "any interest" in them. That the respondents invaded the land and constructed the road without public participation.

The petitioners therefore urged the court to grant the orders as prayed.

### **1<sup>ST</sup> RESPONDENT'S CASE**

Counsel for the 1<sup>st</sup> respondent opposed the petition and submitted that the petitioners have failed to demonstrate proof of ownership of the parcels of land they claim to have been affected during the road construction.

Mr Kibii submitted that the petitioners herein are merely speculating for compensation and relied on the case of **Juma Ali Mangi & 23 others v Kenya Rural Roads Authority 2 others [2018]eKLR** where the court held;

*As it were the Petitioners have not placed any evidence before this Court to demonstrate that they provided any proof of ownership to the Government and that they were not compensated. Indeed, the 24 Petitioners before me have not provided to this Court any proof of ownership of the parcels of land on which the marked buildings stand. No title deeds or documents of ownerships, maps or survey plans were placed before this Court to enable me make a determination as to the ownership of the land. 39. As was stated in Patrick Musimba -vs- National Land Commission & 4 Others (2016) eKLR:-*

*a closer reading of Article 40(3) of the Constitution would reveal that the Constitution did not only intend to have the land owner who is divested of his property compensated or restituted for the loss of his property but sought to ensure that the public treasury from which compensation money is drawn is protected against improvidence. Just as the owner must be compensated, so too must the public coffers not be looted. It is that line of thought that, under Article 40(3) forms the basis for "prompt payment in full, of just compensation to the person" deprived of his property through compulsory acquisition."*

Counsel also submitted that the petitioners at paragraphs 3 and 6 of the supporting affidavit have expressly admitted that indeed the respondents engaged them in public participation in so far as the road construction of the subject of these proceedings is concerned which is buttressed by the minutes dated 3<sup>rd</sup> September 2019 and 10<sup>th</sup> October, 2019 annexed to the replying affidavit of Anthony Tanui and marked as annexure ATI& 2 respectively.

Further that one of the agenda in the meeting was opening up the road now in issue therefore this demonstrates that the 1<sup>st</sup> respondent indeed conducted public hearings and all the stakeholders including the petitioners were accorded an opportunity to ventilate their issues as demonstrated by annexures"AT1 2

Mr Kibii counsel for the respondents submitted that the petitioners are therefore asking the Honourable Court to re-reroute the road as per their wishes which is tantamount to usurping the mandate of the 2<sup>nd</sup> respondent to manage, develop, rehabilitate, maintain, design the roads.

Counsel relied on the case of **Isaiah Waweru Ngumi 2 others v Chairman National Land Commission 6 others [2017]eKLR** where the court held that:

*Third, no evidence other than the say-so of the Petitioners that the present design is unsafe and leads to more accidents than would happen if the design was changed. It is important to recall that the authority to determine the safety and economy of road designs resides in the 2nd Respondent. The Courts would not normally second-guess decisions made pursuant to the lawful exercise of that discretion or authority. To put the matter starkly, the Petitioners are asking the Court to substitute the 2nd opinions on road safety of the agency that has the expertise and authority to make those decisions with the Petitioners' opinions on the same.*

*d. Fourth, no evidence that the 2nd Respondent already has acquired alternative land for the road expansion was placed before the Court as proxy for the argument that the 2nd Respondent had ulterior motives in settling on the current design of NUTRIP A104 Road Expansion Project. Without this evidence, the Petitioner is merely asking the Court to proceed on a leap of faith. It is important to say that the 2nd Respondent is not susceptible to the arguments of flawed process in making its decision on the design of NUTRIP A104 Road Expansion Project that the 4th Respondent is guilty of (with respect to the decision not to recommend Sigona House for gazette). In the case of the 2nd Respondent, it is clear that it took deliberate steps to consult and involve all the stakeholders before settling on the Road Design. In particular, it emerged from the Court documents that the 2nd Respondents took the following steps:*

- a. It arranged for its consultant, Eser Consultant, to visit the site and meet with the management of OSEL.*
- b. Its officers had meetings and consultations with the 4th Respondent respecting the status of Sigona House as a Protected Building.*
- c. The 2nd Respondent organized for a public forum on 23/06/2015 to discuss with members of the public the NUTRIP A104 Road Expansion Design and heard views from the members of the public.*
- d. Upon receiving a petition from the Petitioners regarding the Road Design, the 2nd Respondent invited the Petitioners for a meeting on 13/11/2015 at their office in Nairobi and engaged them about the Road Design.*

*68. Given these undisputed facts, it is not possible to conclude that the 2nd Respondent failed to invite the participation of the public or the Petitioners in NUTRIP A104 Road Expansion Project. It is important to clarify that the 2nd Respondent is not obligated to accept the views of the Petitioners or any other stakeholders respecting the Road Expansion Design. The ultimate discretion resides in the 2nd Respondent and only it can make the final decision after considering all views received. Its obligation is to listen to the views of the Petitioners and the other stakeholders - not to adhere to them. Once the process is above reproach, the Petitioners can only challenge the substantive decision upon showing of one of the eight reasons enumerated above in paragraph 47. As I have found above, however, the Petitioners have not placed sufficient evidence before the Court to lead to a finding that any of those reasons have been found.*

*69. Consequently, I find and hold that the Petitioners have not demonstrated to the Court, to the required standard of proof that the 2nd Respondent acted improperly or failed to follow due process to a degree necessitating a finding that NUTRIP A104 Road Expansion Project Design violated the Constitutional rights of the Petitioners and should, therefore, be remedied. The 2nd Respondent, as the body clothed with mandate to manage, develop, rehabilitate and maintain national roads had the authority and discretion to design NUTRIP A104 Road Expansion Project and without a showing of anything procedurally or substantively improper in that design, the Court will not interfere with the exercise of that authority and discretion. The Petitioners' claim in this regard is, therefore, dismissed."*

Counsel also cited the case of **MUI COAL BASIN LOCAL COMMUNITY 15 OTHERS V PERMANENT SECRETARY MINISTRY OF ENERGY & 17 OTHERS [2015] eKLR** where the court at paragraph 97 (c) stated that;

- a. "Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya (JR Misc. App. No. 374 of 2012). In relevant portion, the Court stated:*

*"Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them."*

Mr. Kibii submitted that it is evident that the members of the public admitted in the petition that they are in dire need of the road which the petitioners are now seeking to stop. That the construction of the road is in public interest and the petitioners stand to benefit when the same is completed.

Counsel relied on the case **Juma Ali Mangi 23 others v Kenya Rural Roads Authority 2 others [2018]eKLR ( supra)** where Olola J. held that:As Nyamu J(as he then was) expressed himself in **Kenya Guards Allied Workers Union vs- Security Guards Services and 38 Others Nairobi H.C. Misc 1159 of 2003:-**

*"Where national or public interest is denied, the gates of hell open wide to give way to deforestation, pollution, environmental degradation, poverty, insecurity and instability. At the end of the day, we must remember those famous words of a famous Jurist- Justice is not a cloistered virtue. I must add that where justice is done and public interest upheld, it is acknowledged by the public at large, the sons and daughters of the land dance and sing, and the angels of heaven sing and dance and Heaven and Earth embrace. By upholding the public interest and treating it as twinned to the human rights we shall be able to do away with poverty eradication programmes and instead we shall have empowered our people to create real wealth for themselves. Public interest must be the engine of the millennium and it must where relevant occupy center stage in the Courts"*

Counsel therefore urged the court to dismiss the petition with costs to the respondents as it lacks merit.

## **2<sup>ND</sup> RESPONDENT'S CASE**

Kenya Rural Roads Authority's Deputy Director in charge of Baringo region Mr. E.K Cheserek swore the Replying Affidavit dated 22<sup>nd</sup> July, 2020 and averred that the 2<sup>nd</sup> Respondent was never notified of meeting allegedly held at Kapngengen on 6<sup>th</sup> November, 2019 and was not informed of the decision arrived at the said meeting.

Mr. Cheserek further stated that he knows of the road passing through Turokin all the way to Kabarmosis that is the subject of this is the subject of this suit does not fall within the mandate of the 2<sup>nd</sup> respondent and that the 2<sup>nd</sup> respondent was not party to the construction of the said road. He also averred that that the 2<sup>nd</sup> respondent is not liable for the violation of the petitioners right to property if any.

He finally stated that the petition as against the 2<sup>nd</sup> respondent is an abuse of court process and prayed that the same be dismissed with costs to the respondents.

## **3<sup>RD</sup> AND 4<sup>TH</sup> RESPONDENTS CASE**

The 3<sup>rd</sup> and the 4<sup>th</sup> respondents neither filed a response nor submissions but indicated that they associated themselves with the submissions of the 1<sup>st</sup> respondent.

## **ANALYSIS AND DETERMINATION**

The issues for determination are as to whether the petition meets the threshold of a petition, whether the petitioners' rights have been infringed and whether they are entitled to the orders sought.

The threshold for a constitutional petition was set out in the case of **Anarita Karimi Njeru v Republic [1979] eKLR** where the court held;

*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.*

The petitioners relied on articles 10, 22, 23, and 40 of the constitution where they concentrated on the right to public participation and right to property. 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 petitioner is under a duty to link up the article with the actual and specific violations with proof.

The Petitioners faulted the respondents for not consulting them vide public participation,

It is evident and confirmed by the petitioners at paragraphs 3 and 6 of the supporting affidavit where they admitted that indeed the respondents engaged them in public participation in so far as the road construction of the subject of these proceedings is concerned which is buttressed by the minutes dated 3<sup>rd</sup> September 2019 and 10<sup>th</sup> October, 2019 annexed to the replying affidavit of Anthony Tanui and marked as annexure ATI& 2 respectively.

Public participation is one of the national values and principles in the Constitution of Kenya 2010, which must be observed by all persons, state organs and public officers in the exercise of their responsibilities. Article 10 of the Constitution provides for public participation, among other principles, under national values and principles of governance as follows;

*(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all*

persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.

In the case of **Luo Council of Elders & 8 others V County Government of Bomet & 24 others [2018] eKLR**, the court held that;

*“75. What constitutes public participation has generated considerable judicial debate but there appears to be consensus that:- “What matters is that at the end of the day a reasonable opportunity is afforded to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.” This is what the court held in the case of Commission for the Implementation of the Constitution-vs-Parliament of Kenya & Another (Petition No. 454 of 2012) (unreported) where the court dealt with the constitutionality of the Leadership and Integrity Act No. 19 of 2012 which had been challenged on the basis, among others, that there was no public participation in its enactment.*

*76. It is our view, public participation cannot mean that every person must be heard and/or involved during the process of public hearings and/or that the views received during such public hearings must be accepted. It is sufficient that the views have been made and to the extent possible factored in the final report that will be implemented. If the position was that whenever there is an organized group or interested persons, who have voiced objection to a development project, the project should be stopped, there would be impediment to development as there will be no one project that will have one hundred percent approval rating. The courts, in the face of at times unwarranted objections have to consider and evaluate the objections having regard to the wider interest of the public. In the present matter, it is our view that the wider public interest in the project outweighs the interest of those opposed to the project.*

*77. On the basis of our evaluation of the evidence and the material placed before us we find and hold that there was adequate and sufficient public consultation and participation in regard to the issue of the EIA Licence approving the construction of Itare Water Supply Dam in Nakuru. The public and all stakeholders were afforded the opportunity to air their views and to participate in the process leading to the approval of the project. We hold the Petitioners and the interested parties had the opportunity to voice their concerns during the public forums and/or when the EISA report was published both in the Daily Newspapers and/or the Kenya Gazette.”*

The agenda of the minutes attached also confirms that the petitioners were consulted but were not happy with the outcome of the consultation. I find that there was public participation on the proposed construction of the road.

On the issue of right to property the petitioners claim that they have beneficial right to the property as it is ancestral land. In the case of **Serah Mweru Muhu v Commissioner of Lands & 2 others [2014] eKLR** the court determined that;

*In order to protect the right to property, a party must establish a proprietary right or interest in land as the Constitution does not itself create these rights or interests*

The petitioners claim a right to the land as ancestral land hence having beneficial ownership. It is trite that he who alleges must prove. It is incumbent upon the petitioners to establish their claim that they have proprietary interest on the parcel of land.

The petitioners further claimed that crops had been destroyed and debris deposited on their land causing them harm but have not taken steps to establish this to the court. I note from the petitioners’ submissions on record that they themselves have admitted that they are not registered owners of the parcels of land situated in ELANI but claim ancestral rights over the said properties. The petitioners herein have failed to discharge that duty as provided by **Section 109 of the Evidence Act**, which states as follows;

*“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.*

One cannot purport to assert ownership rights over any land without proof of ownership. Upon perusal of the petitioners’ documents on record, it clear that the petitioners herein have not furnished this Honourable Court with any title documents or ownership documents to demonstrate that they have beneficial interests over the parcels of land in question.

It should be noted that the construction of the road in issue will not only benefit the general public but future generations including the petitioners herein. In the case of Kenya Guards Allied Workers Union v Security Guards Services & 38 others, Misc. 1159 of 2003 where Justice Nyamu (as he then was) expressed himself as follows:

*“Where national or public interest is denied the gates of hell open wide to give way to deforestation, pollution, environmental degradation, poverty, insecurity and instability. At the end of the day, we must remember those famous words of a famous jurist- Justice is not a cloistered virtue. I must add that where justice is done and public interest upheld, it is acknowledged by the public at large, the sons and daughters of the land dance and sing, and the angels of heaven sing and dance and Heaven and Earth embrace. By upholding the public interest and treating it as twinned to the human rights we shall be able to do away with poverty eradication programmes and instead we shall have empowered our people to create real wealth for themselves. Public Interest must be the engine of the millennium and it must where relevant occupy centre stage in the courts...”*

Similarly, in the case of Veronica Waithira (Trustee of Inter Christian Churches and 3 Others) vs Kenya National Highways Authority [2014] e KLR, the learned Judge stated that;

*“The wider public good and interest would militate against the Court granting an injunction in favour of the Plaintiffs who only constitute a small segment of the public ...”*

It would be in the interest of justice that public interest takes a center stage in this petition for the larger good of the people to benefit from a road than individual selfish ego. The respondents have a mandate on construction and management of roads and they have the technical expertise on where and how the road should be constructed in consultation with the locals. Laymen cannot dictate where and how a road is to be constructed especially if the land is reserved for that purpose and in the other cases where the land is compulsorily acquired then prompt compensation is provided for.

From the facts of the petition herein, it is however not clear as to how the decision to construct the road in issue will negatively affect the petitioners. The petitioners have alleged that their lands were degraded, portions hived therefore reducing their sizes, deposits of sand and stones were left/deposited anyhow in their parcels and those adjacent to the constructed roads. There was no evidence brought before the court depicting how their parcels of land had suffered degradation.

From the evidence on record the petitioners have not proved how the construction of the road will adversely affect them, conversely, they are the ones to benefit from the road.

I have considered the petition and the respondents ‘submission and find that the petition lacks merit and is therefore dismissed with each party to bear their own costs.

**DATED AND DELIVERED AT ELDORET THIS 13TH DAY OF APRIL, 2021.**

**M. A. ODENY**

**JUDGE**