



REPUBLIC OF KENYA



**Moraro v General & 7 others (Petition 5 of 2021)  
[2023] KEELC 21239 (KLR) (2 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21239 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
PETITION 5 OF 2021  
M SILA, J  
NOVEMBER 2, 2023**

**BETWEEN**

**JOYCE MOSE MORARO ..... PETITIONER**

**AND**

**THE ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**PAULINE OKEMWA ..... 2<sup>ND</sup> RESPONDENT**

**YOBESH MORANGA MAKORI ..... 3<sup>RD</sup> RESPONDENT**

**EVANUS OENGA NYAMARI ..... 4<sup>TH</sup> RESPONDENT**

**SAMSON ONGAKI MAKORI ..... 5<sup>TH</sup> RESPONDENT**

**STEPHEN OBANGI ISAAC ..... 6<sup>TH</sup> RESPONDENT**

**THADIUS NTABO NYAKUNDI ..... 7<sup>TH</sup> RESPONDENT**

**JARED AMENYA RATEMO ..... 8<sup>TH</sup> RESPONDENT**

**RULING**

(Application to amend petition and seeking orders for a survey; application to amend allowed; on the survey, one does not need an order of court to engage a surveyor and no special circumstances shown which would invite the court to exercise its discretion in favour of the petitioner thus the prayer is declined)

1. The application before me is that dated 28 April 2023 filed by the petitioner. It seeks the following orders (paraphrased for brevity)
  - i. That leave be granted to amend the petition.
  - ii. That leave be granted to file and serve the amended petition.



- iii. That the petitioner be recalled to testify once the petition is amended.
  - iv. That the County Land Surveyor be ordered to visit the land parcel Nyaribari Chache/Keumbu/1526 now titled Nyaribari Chache/Keumbu/6245 to delineate its boundaries and determine whether there is a road reserve between the land parcel number Nyaribari Chache/Keumbu/1526 now titled Nyaribari Chache/Keumbu/6245 and LR No. Nyaribari Chache/Keumbu/1905.
  - v. That the County Land Surveyor be ordered to confirm whether or not the petitioner's parcel of land Nyaribari Chache/Keumbu/1526 now titled Nyaribari Chache/Keumbu/6245 is on a road reserve.
  - vi. That the County Surveyor to file his report within seven (7) days from the date of the visit.
  - vii. That costs be in the cause.
2. To put matters into context, this suit was commenced through a petition filed on 27 April 2021. The petitioner averred to be the registered proprietor of the land parcel Nyaribari Chache/Keumbu/1526. Her complaint was that around March 2021, the respondents unlawfully facilitated the creation of a road through her land without her consent and without any compensation. In the petition, she asked for orders inter alia for a declaration that her rights to property under Article 40 of *the Constitution* were violated and a further declaration that she is entitled to be compensated to the tune of KShs. 1, 178, 750/=. The 2<sup>nd</sup> – 8<sup>th</sup> respondents filed a replying affidavit where they opposed the petition and inter alia averred that the road was created by the Kenya Urban Roads Authority (KURA). The suit against the Attorney General (1<sup>st</sup> respondent) was withdrawn.
  3. Directions were taken for the matter to be heard through viva voce evidence and listed for hearing on 15 February 2023 when the petitioner testified. Significantly, despite the petitioner testifying that the road was created through her land, she did not bring any surveyor to confirm that allegation. The matter was adjourned to 4 May 2023 for further hearing, but before that date, this application was filed.
  4. I have already outlined the prayers sought in the application. The supporting affidavit is sworn by the petitioner herself. She has deposed inter alia that the land parcel Nyaribari Chache/Keumbu/1526 has been resurveyed and a new number issued to her, being Nyaribari Chache/Keumbu/6245. She avers that her claim relates to the parcel No. Nyaribari Chache/Keumbu/6245 and a parcel Nyaribari Chache/Keumbu/1905, and whether the road constructed trespassed through her land. She states that it is necessary for the County Surveyor to visit the land to determine its boundaries and whether there is encroachment to the road reserve. I directed that a draft amended petition be filed and one was filed through a supplementary affidavit filed on 11 July 2023.
  5. The respondents did not file anything to oppose the application and I have given it due consideration.
  6. I will start by saying that courts are generally liberal when it comes to allowing applications to amend pleadings.
  7. In this instance, the petitioner wishes to amend the land parcel number that is in issue. It will be recalled that she filed suit seeking orders over the land parcel No. Nyaribari Chache/Keumbu/1526. In this application, she avers that there was resurvey so that her land is now parcel No. Nyaribari Chache/Keumbu/ 6245. There is certainly no prejudice to any party in merely amending the parcel number and I have no issue giving the order to amend the petition.



8. The problem I have is with the prayers to direct the County Surveyor to proceed to the ground and make certain determinations. The petitioner came to court alleging that her land has been illegally dug up and a road created. The burden of proof is certainly on her. Nothing stopped her, and nothing stops her even at this moment, from proceeding to the office of the County Surveyor, or any other surveyor for that matter, in order to have a report to support her allegations. In fact a prudent litigant would first have sought the opinion of a surveyor before proceeding to rush to court to file such a suit. This is an exercise that she needed to undertake before filing suit, for how can she then allege that a road has been created through her land without any supporting survey documentation? I do not see why the court should be engaged in order to fact find on behalf of the petitioner.
9. In any case, one does not need a court order so as to engage a surveyor unless there are special circumstances for which the court's discretion needs to be invoked and I have not seen any special circumstances herein. It has not been shown to me that the County Surveyor, or other surveyors, are unable to proceed with survey, for one reason or another, which can only be remedied by a court order, and I wouldn't wish to set a precedent encouraging persons to inundate the court with applications seeking orders that are completely unnecessary. I am not aware of any law that says that you must have a court order in order to undertake a survey which you require to support your case; you simply proceed to engage one and pay for the service. Moreover, I note that within the application for survey, the petitioner has roped in another parcel of land that she does not own, i.e the parcel No. 1905. It is not said who the owner of this land is. I do not think that a court ought to issue orders of survey that may affect other land when the owner of that land has not been given a hearing.
10. I therefore regret my inability to grant the order to direct the County Surveyor to proceed to survey the petitioner's land and/or that of her neighbours, but as I have said, if the petitioner wants to privately engage the County Surveyor, or indeed any other surveyor, nothing stops her from doing so.
11. Thus, save for the order to amend the petition, the other prayers are declined. The petition may be amended and served with the next 14 days. The amendment to also reflect that the Attorney General is no longer party to this suit.
12. There will be no orders as to the costs of this application.
13. Orders accordingly.

**DATED AND DELIVERED AT KISII THIS 2ND DAY OF NOVEMBER 2023**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

**In the presence of: -**

**Mr. Bonuke for the petitioner/applicant**

**N/A on part of Mr. Nyang'acha for the 2<sup>nd</sup> – 8<sup>th</sup> respondents**

**Court Assistant: Mr. Lawrence Chomba**

