



Rotich v Jingxi Zhongmei Engineering Construction Co. Ltd & another (Environment & Land Petition 5 of 2019) [2022] KEELC 3295 (KLR) (2 June 2022) (Judgment)

Neutral citation: [2022] KEELC 3295 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND PETITION 5 OF 2019
MC OUNDO, J
JUNE 2, 2022
IN THE MATTER OF ARTICLE 40 (1) OF THE CONSTITUTION OF KENYA 2010
AND
IN THE MATTER OF VIOLATION OF THE RIGHT TO A CLEAN AND
HEALTHY ENVIRONMENT UNDER ARTICLE 42, 69 AND 70(1) AND (2)
OF THE CONSTITUTION OF KENYA 2010

BETWEEN

JOYCE CHEPKORIR ROTICH PETITIONER

AND

JINGXI ZHONGMEI ENGINEERING CONSTRUCTION CO.

LTD 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

1. Before me for determination is a Petition dated September 23, 2019 which was supported by an Affidavit she swore on September 24, 2019 where the Petitioner's complaint is on the basis that she is the registered proprietor of a parcel of land known as Block 9/173 (Jagoror) 244 which had been made inhabitable by the 1st Respondent's actions which thus violated her Constitutional rights to a clean and healthy environment.
2. The Petitioner contends that on or about December 4, 2012, the 1st Respondent had been tasked by the Government of Kenya to undertake the rehabilitation and construction of Londiani-Fortenan Road C-35. That the 1st Respondent had applied the use of explosives to blast the rocks on the material site which was situated about 200 meters from her house. That the said blasting had caused serious structural defects to her three bed roomed residential house wherein there had been severe cracks caused



- on her floors and walls, the foundation of her house, the underground water tank as well as the pit latrine. That the roof of the house had not been spared either as it also started leaking.
3. That the Petitioner had brought this issue to the attention of the resident engineer, the Deputy County Commissioner Londiani Sub County through complaint letters and which complaints had been forwarded to the 1st Respondent seeking that he compensates her. The 1st Respondent had turned a deaf ear and/or ignored the same.
 4. Seeing that there was no forthcoming response from the 1st Respondent, the Petitioner had engaged the services of several engineers who had carried out assessments of the condition of the house and the extent of damage as per her filed reports herein annexed, wherein it had been concluded that the house was no longer fit for human habitation as the structural integrity had been severely destroyed. That the same could not withstand any further vibrations and thus it posed a risk to human life as it could collapse at any time.
 5. The Petitioner had also engaged the services of a contractor who had inspected the house and had come up with the cost of demolishing and putting up of another house as per the Bill of Quantities herein annexed to the Petition. The Petition therefore filed the Petition seeking costs of demolishing and construction of a new house, general damages costs of this suit and any other relief that the court deems fit to grant.
 6. In response to the Petition, whereas the 2nd Respondent filed their notice of Preliminary Objection dated October 13, 2020, the 1st Respondent filed their Grounds of Opposition dated November 16, 2010 which applications had both been dismissed by this court's ruling of October 7, 2021 for reason that they had not been based on pure points of law but on facts that had to be ascertained.
 7. Directions to the disposal of the main Petition was subsequently taken on November 18, 2021 to wit that the same be disposed of by way of written submissions.

Petitioner's submissions

8. The Petitioner, through their submissions dated February 7, 2022 reiterated the cause of action that led to the filing of the Petition and went on to submit that her evidence was clear and uncontroverted that the blasting by the 1st Respondent had caused serious damage to her residential house to wit that it had caused severe cracks on her lounge, bedroom walls and floor which in turn resulted into leakage of the roof, there had also been cracks on the foundation of the house, the pit latrine and the underground tank which had caused loss of water.
9. The Petitioner's submission was that despite several communications to the 1st Respondent through the resident engineer, County Commissioner Londiani, there had been no response and/or action taken to remedy the damages occasioned to her property.
10. That the Respondents' action had exposed her to various human rights violations including a threat of their rights to a safe and clean environment, a threat to their life and security because of the dilapidated and dangerous state of the house.
11. That through the provisions of Article 22 of the Constitution, the Petitioner sought a remedy for the various violations of her rights as stipulated under Article 23 of the Constitution.
12. That the allegations in the Petition on the breaches of her fundamental human rights had been unchallenged by the Respondents who had filed no defences, their applications on preliminary objections having been dismissed by the court. The Petitioner's submission was that there can never be a damage without a remedy (*ubi jus ibi remedium*)



13. She submitted that the Respondents had clearly violated various human rights as provided for in the Constitution, which rights included the right to property, the right to clean, healthy and robust environment, the right to own a house and so on which rights were universal, equal, indefeasible and intertwined.
14. That the 2nd Respondent was joined as the representative of the state with whose authority and permission the 1st Respondent undertook the rehabilitation and construction of the Londiani-Fortenan Road C35. That the violation by the 1st Respondent was thus commissioned by the Government of Kenya. That the Respondents therefore jointly violated, denied, infringed and continue to threaten the Petitioner's fundamental rights and freedoms.
15. That it was because the Petitioner had been denied her right to clean and safe environment whereby her right to life had been constantly threatened by the state of her house, she had therefore, pursuant to Rule 4(a) of the Mutunga rules, filed her Petition seeking redress.
16. That the destruction on her property had been quantified by experts to the tune of Ksh 2,900,000/= before the Petition had been lodged and therefore the said figure could have risen since then due to inflation.
17. The Petitioner further submitted that Article 40 of the Constitution provided that every individual had the rights to own property and the state had an obligation to protect this right. That the environmental degradation and damage caused by the 1st Respondent's explosives on her house violated her rights to own and enjoy her private property. That not only had there been physical damage, but the ambience, scenery and all the additional qualities that made the property a choice property for the Petitioner had been robbed off from her.
18. That Article 42 of the Constitution stipulated that the person shall have a right to a clean and healthy environment whereas Article 69(1) (g) mandated the state to eliminate processes and activities that were likely to endanger the environment. Article 69(2) mandated the citizens to co-operate with the state organs and other persons to protect and conserve the environment and to ensure ecologically sustainable development and use of natural resources.
19. That through the carelessness of the Respondents in using blasting agents near a residential area, and the failure to forbid the use of such agents due to its extensive destructive nature by failing to conduct an environmental impact assessment before permitting the works on the suit land, caused extensive damage to the Petitioners' house and the environment at large and therefore the court, pursuant to the provisions of section 13(7) of the Environment and Land Court Act, ought to grant the Petitioner the remedies as sought.
20. The Petitioner further relied on the decided case in *Livingstone vs Rawyards Coal Co* (1880) 5 App Cases 25 to seek for the demolition of her house and construction of a new house based on the Bill of Quantities prepared in the year 2014. The Petitioner also sought for general damages as she had suffered inconveniences after her rights had been violated. She further sought for her Petition to be allowed.

1st Respondent's submissions.

21. The 1st Respondent through their submission filed on March 23, 2022 submitted that indeed on December 4, 2012 they had been tasked to undertake the rehabilitation and construction of the Londiani-Fortenan Road C35 by the Government of Kenya. Subsequently the Petitioner via a letter dated December 4, 2012 had alleged that in the process of their work, the 1st Respondent had caused damages and/or cracks on the veranda of her house situate on parcel No Block 9/173 (Jagoror) 244.



- The first assessment report had then been prepared in January 2014 which was two years after the alleged damage.
22. That two years was a longtime and a lot may have happened on the said house which may not have been directly associated with the 1st Respondent's activity. Secondly, neither the Petitioner nor her assessor and explained how they had come to the conclusion that the said damages had been caused by the 1st Respondent's activities.
 23. That the second assessment had been conducted on June 18, 2018 which was the period of six years down the line and again, a lot of activities would have taken place that would have caused damage to the Petitioner's house. That if such a house ever existed or if it was ever damaged, that the damages were normal wear and tear owing to effluxion of time.
 24. The 1st Respondent's submission was that the Petitioner never had any house in the earliest year of 2012 for reasons that the Petitioner never attached any title to prove ownership of the house and/or the land parcel No Block 9/173 (Jagoror) 244, secondly although the Petitioner claimed that the house had been destroyed in the year 2012 yet her Bill of quantities clearly indicates that her house had been proposed for construction on April 23, 2014. In 2012 therefore, there was no house in existence. Lastly the 1st Respondent submitted that by submitting her claim after a period of seven years without any explanation for the delay, was evident enough that the Petitioner had tried to manufacture supporting documents in order to bring forth her fictitious and fraudulent claim to extort money from the 1st Respondent.
 25. The 1st Respondent further submitted that the Petitioner lacked the locus standi to sustain her claim against the 1st Respondent Company by virtue of the fact that she had not proved any association with the property described as parcel No Block 9/173 (Jagoror) 244 through proof of ownership. That Section 26 of the Land Registration Act clearly stipulated that the certificate of title was *prima facie* evidence of land ownership which could not be challenged except on grounds of fraud or where it was shown that the title was acquired illegally un-procedurally or through a corrupt scheme. That the provisions of Section 107 and 109 of the Evidence Act was explicit to the effect that the burden of proof lay on the person who wished for the court to believe in the existence of a fact.
 26. The 1st Respondent also submitted that based on the evidence adduced in the Petition as well as the time frame noted as herein above, it was clear that the Petition was on a fishing expedition and was merely attempting to use the court to extort money from the 1st Respondent and possibly build her dream house through fraudulent means which attempt was a clear abuse of the court process. That in this regard the Petitioner had not proved her case to the required standard to which she was not entitled to the orders sought. That the Petition ought to be dismissed with costs to the 1st Respondent.
 27. There were no submissions from the 2nd Respondent.

Determination

28. The Petitioner brings this Petition as the registered proprietor of parcel No Block 9/173 (Jagoror) 244 upon which she alleged to have built a three bed roomed residential permanent house. That on or about December 4, 2012, the 1st Respondent had been tasked by the Government of Kenya to undertake the rehabilitation and construction of Londiani-Fortenan Road C-35 wherein they had moved on the site which was about 200 meters from her house.
29. That the 1st Respondent had subsequently used explosives to blast materials on the site which explosives had caused extensive damage to her house which damage consisted of cracks on her walls, floor, foundation, underground water tank and the pit latrine. Her roof also started leaking and her



house had become inhabitable. That her efforts to reach out to the 1st Respondent to compensate her for the damage caused bore no fruits.

30. The Petitioner had then engaged the services of several engineers who carried out an assessment on the condition of the house and the extent of damage wherein via their reports it had been concluded that the house was no longer fit for human habitation as the structural integrity had been severely destroyed and as such it could not withstand any further vibrations this posing a risk to human life since the house could collapse at any time.
31. The Petitioner's contention is that her Constitution right to property, right to a clean and healthy environment had been violated by the 1st Respondent's action. That the 2nd Respondent had been joined the Petition as a representative of the state on whose authority and permission the 1st Respondent had undertaken to rehabilitate and construct the Londiani-Fortenan Road C-35. That the violation of her Constitutional right by the 1st Respondent had therefore been commissioned by the Government of Kenya.
32. In response to the Petition, whereas the 2nd Respondent filed their Notice of Preliminary Objection dated October 13, 2020, the 1st Respondent filed their Grounds of Opposition dated November 16, 2010 which applications had both been dismissed via this court's ruling of October 7, 2021 for reason that they were not based on pure points of law but on facts that had to be ascertained through a main hearing. Whereas the 1st Respondent then filed their submissions in compliance of the court directions, there were no submissions filed by the 2nd Respondent.
33. Although 1st Respondent conceded that indeed on December 4, 2012 they had been tasked to undertake rehabilitation and construction of the Londiani-Fortenan Road C35 by the Government of Kenya, yet they were not culpable of the violations as alleged by the Petitioner for reasons that the Bill of quantities clearly indicated that the Petitioner's house had been proposed for construction on April 23, 2014. In 2012 therefore, there had been no house in existence. Secondly whereas the first assessment report had been prepared in January 2014, two years after the alleged damage, the second assessment had been conducted on June 18 2018, a period of six years down the line. That in the intervening periods of these assessment, a lot of activities could have taken place that could have caused damage to the Petitioner's house, if it ever existed and/or if it was ever damaged, than the damages were normal wear and tear owing to effluxion of time. Lastly the 1st Respondent submitted that there has been no proof of ownership of the alleged house as no title deed had been produced of such ownership.
34. I therefore find that it was trite for the Petitioner to prove, on a balance of probabilities that her fundamental freedoms as protected by or under the Constitution had been violated, by not only clearly identifying the relevant and specific Articles of the Constitution that had been contravened, but by availing evidence, through affidavit or otherwise of such violation as per the required standard set out in respect of the Constitutional Petitions. Reference is made to the holding in the case of Anarita Katimi Njeru vs The Republic (196-1980) KLR 1272 where the court held 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.”

35. From the above captioned Petition, the Petitioner has alleged, by setting out with a reasonable degree of precision that her Constitutional rights envisaged under Articles 40(1) and Article 42 of the Constitution had been violated by the both the Respondents, the 2nd Respondent being the



representative of the state on whose authority and permission the 1st Respondent undertook the rehabilitation and construction of Londiani-Fortenan Road C-35 whereby they had used explosives to blast materials with the result that the vibrations had damaged her house.

36. It is based on this line of evidence and/or submission that I need to consider whether the Petition discloses a legal interest capable of protection under the law and whether the said legal interest was infringed.
37. Article 40 of the Constitution provides as follows
- (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 faith of land acquired under clause (3) 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 (emphasis added)
38. In the case of *R vs Chief Immigration Officer (1976) 3 AER 843* Lord Denning stated this regarding the Universal Declaration of Human Rights;

“... Among the important rights which individuals traditionally have enjoyed is the right to own property. This right is recognized in the Universal Declaration of Human Rights (1948). Article 17(1) which states that everyone has the right own property and Article 17(2) guarantees that "no one shall be deprived of his property"



39. The thrust of Article 40 of the Constitution is to protect proprietary rights under the law which rights are governed by statutes, for example, in this case, the Land Registration Act and Land Act which statutes are clear that that once a title is issued under the Act, the holder thereof acquires an indefeasible title which cannot be taken away except in accordance with the Constitution and the law as was held in the case of Wreck Motors Enterprises v The Commissioner of Lands and Others [1997] eKLR.
40. The Petitioner have alleged that the Respondents' actions caused damage to her house thus making it inhabitable thus violating their constitutional rights to property under Article 40 of the Constitution. In my humble view, I find that there has been no evidence disclosed on an arbitrarily deprivation of the Petitioners' interest over her land as alleged or that the Respondents action had denied her the constitutional rights to ownership of land and/or property. It must be kept in mind that the bill of rights are sacrosanct and should be safeguarded to be invoked only when it is extremely necessary to do so.
41. From the pleadings herein, the Petitioner has also attributed to the fact that alongside the violation of her economic and property rights, there had been a violation of her right to clean and safe environment which rights had been violated by the 1st Respondent backed by the state, the 2nd Respondent herein, by failing in its obligation to establish, monitor and audit systems of the Environmental Impact Assessment.
42. Article 42 of the Constitution provides as follows
- Every person has the right to a clean and healthy environment, which includes the right—
- (a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and
- (b) to have obligations relating to the environment fulfilled under Article 70.
43. Section 31 of the Environmental Management and Co-ordination Act provides for the establishment of Public Complaints Committee(s) which has the mandate under Section 32 of the act to investigate any allegations or complaints against any person or against the Authority in relation to the condition of the environment. Further, section 33 of the Act clothes a Public Complaints Committee with powers to summon any person to appear before it for examination concerning matters relevant to the investigation of any complaint under Section 32. The import of this provision of the law is that the Petitioner herein ought to have forwarded her complaint concerning any violation of the environment to the said committee. Although both the Environment Management and Co-ordination Act and the Environment and Land Court Act envisage a situation where any person alleging contravention of environment laws is allowed go come to court for redress, yet flowing from the herein above provisions of the law, it suffices to note the allegations made by the herein Plaintiff should have been first tabled before NEMA through its Public Complaints Committee so as to enable them conduct an in-depth investigation into the said allegations seeing that the Petitioner did not even annex any evidence of the Environmental Impact Assessment report to support her claim that her right to clean and healthy Environment had been violated.
44. I have further anxiously considered the documentary evidence as herein annexed to the Petitioner's Petition and of interest is the document marked as JCR1 which is a complaint letter dated December 4, 2012 from the Petitioner to the Resident road Engineers seeking that he visits the Petitioner's house to make an assessment of the damage caused therein.



45. JCR 4 are assessment reports by one Engineer P Mbuchi dated January 2014 and June 11, 2018 respectively recommending that as a result of the damage caused to the house by the vibration due to blasting, the house could not withstand any further vibrations in the near future and therefore the same ought to be demolished and reconstructed afresh and the underground tank and pit latrine be renovated.
46. I have also considered the fact that although the Petitioner herein claimed to be the proprietor of land parcel No Block 9/173 (Jagoror) 244 upon which her house stood, yet the Petitioner did not attach any registrable document to prove ownership as is provided for under Section 26 of the Land Registration Act. This notwithstanding, no photographic evidence was also attached to the Petition to confirm that indeed the alleged house had existed and the same was damaged. The photographs herein attached to the assessment reports are not explicit enough to demonstrate that indeed it had been the Petitioner's house that had been damaged. The said photos and neither here nor there.
47. Of more significance and what could be termed as "what broke the camel's back" is the Bill of Quantities herein annexed as JCR 5 for the erection and completion of the proposed residential development on plot Block No. 9 (Jagoror) 244 dated April 2014 and stamped the April 23, 2014. A Bill of Quantities, as defined by the *Business Dictionary* is:
- 'An itemized list of materials, parts and labour with their costs, required to undertake construction work. It can also be defined as a document compiled for construction projects in which all elements of material, labour, profits and contractors overheads, plant and equipment needed to construct are itemized and described in detail, quantified and priced according to an adopted standard method of measurement.'
48. A Bills of Quantities therefore is a list of work items which a Quantity Surveyor describes in detail and allocates a cost to it so as to undertake the construction of a building. The same is thus prepared before the construction can commence. The question therefore arises that if the Petitioner's Bill of Quantities was prepared in the year 2014, and in the absence of a prior Bill of Quantities of the condemned house, then it automatically means that in the year 2012, the alleged house was definitely not in existence. I say so because looking at JCR 5, the same does not allocate the cost for demolishing the condemned house which was the Petitioner's main prayer and point of argument and therefore this creates doubt in the mind of the court regarding the Petitioner's allegations as contained in her Petition.
49. The provisions of Sections 107, 108 and 109 of the Evidence Act are clear and explicit to the effect that:
- S. 107 -Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
- S. 108 -The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
- S. 109. -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.
50. In Halsbury's Laws of England 4th Ed at Para 662 (page 476) it is stated.
- "The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission



for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which the breach of duty a causal connection must be established.”

51. The cause of action as alleged occurred in the year 2012, yet this Petition was filed in on September 23, 2019 a period of 7 years later. Whereas there is no time limitation in respect of Constitutional Petitions, yet the delay must not be inordinate and there must be plausible explanation for the delay. Indeed the Court of Appeal in *Wellington Nzioka Kioko v Attorney General* [2018] eKLR held as follows:

“When a person suffers a wrong at the hands of another and feels the need to redress the wrong, it is reasonable to expect that redress will be sought before the claim gets stale. This enables a person to preserve and adduce the evidence that is necessary to support the claim. It also accords the purported wrong doer an opportunity to address the grievance and if possible remedy it. That way both parties are spared the agony of losing important evidence, or even witnesses. Memory is sometimes transient and it is important that a person adduces evidence when the memory of the incident complained of is still intact. There is also this idea of people moving on in life. If somebody wrongs you, you need to seek redress when the offending act still has an impact on your life, and when the evidence necessary to prove the wrong is still available. There is also the converse situation where the alleged wrongdoer should know that there is a claim against him which he needs to remedy. If a wrong is committed and then the person wronged waits for time on end before even notifying the other party, then a travesty of justice occurs because the claim might be made at a time when the offending party has forgotten about the incident and is no longer in a position to defend himself. There is of course a rebuttable presumption that if you don’t seek redress within a reasonable time, there is a possibility that you have not suffered any loss from the act complained of. That would explain the maxim that equity does not aid the indolent.”

52. In the case of *Godfrey Paul Okutoyi & others vs Habil Olaka & Another* (2018) eKLR Chacha , J held that:-

It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a court of law in the manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a statutory provision or where action is taken in breach of a statutory provision that should give rise to a Constitutional Petition. A party should only file a constitutional Petition for redress of a breach of the *Constitution* or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure.”

53. In the case of *Bernard Murage vs Fine Serve Africa Ltd & others* (2015) eKLR the Court held that:-

“Not each and every violation of the Law must be raised before the High Court as a constitutional issue. Where there exist an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first”.

54. It is the clear duty of the court is to arrive at a finding on the facts, however difficult the circumstances may be. In the present case owing to the fact that there has been a doubt created in the mind of the court as to whether the alleged house ever existed and if so, whether there was any damage caused to it at all and further whether the Petitioner had any vested interest in the same, I find that the inferences



from the primary facts herein adduced do not inevitably point that way. A party seeking justice must place before the court all material facts which considered in light of the law would enable the court to arrive at the decision as to whether the relief sought is available. Hence the legal dictum he who alleges must prove. That said and done, I find that the Petitioner herein has failed to discharge her case to the required standard. Her Petition dated September 23, 2019 is therefore dismissed with costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 2ND DAY OF JUNE 2022.

M C OUNDO

ENVIRONMENT & LAND – JUDGE

