



**Kamugi & 4 others v County Government of Nyeri & 2 others (Environment & Land
Petition 3 of 2018) [2022] KEELC 15662 (KLR) (3 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15662 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND PETITION 3 OF 2018**

JO OLOLA, J

NOVEMBER 3, 2022

**IN THE MATTER OF ARTICLES 10, 19, 20, 23, 40, 47, 165
(3) AND 258 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF RULES 3, 4, 10, 22 AND 20 OF THE CONSTITUTION
OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
OF THE INDIVIDUAL) PRACTICE AND PROCEDURE RULES, 2013**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE UNDER
ARTICLE 27 AND 40 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF PART VIII OF THE LAND ACT, ACT 6 OF 2012

BETWEEN

**JOHN MWANGI KAMUGI 1ST PETITIONER
ANNE WATETU KAMUGI 2ND PETITIONER
JANE WANJIRU KAMUGI 3RD PETITIONER
TIMOTHY TUMU MURAGURI 4TH PETITIONER
JOHN WANDERI 5TH PETITIONER**

AND

**COUNTY GOVERNMENT OF NYERI 1ST RESPONDENT
CABINET SECRETARY MINISTRY OF ROADS AND
INFRASTRUCTURE 2ND RESPONDENT**



JUDGMENT

1. By their petition dated May 31, 2018 as filed herein on June 1, 2008, the five (5) petitioners herein pray for:
 - (a) A declaration that the act of trespassing onto the petitioners property and the threatened forceful acquisition of the petitioners properties or part of their parcels of land, Tetu/Ihururu/718, 719,720, 471 and 473 is a gross violation of the petitioners constitutional right to private property and infringement of the protection afforded by article 40 of the Constitution.
 - (b) A declaration that the respondents have no right in law to interfere with the petitioners private properties without following due process of law in compulsory acquisition as set out in article 40(3) of the Constitution and part VIII of the Land Act No 6 of 2012.
 - (c) Damages for trespassing onto the petitioners properties and interfering with the petitioners right to quiet and peaceful enjoyment of their properties registered as Tetu/Ihururu/718, 719, 720, 471 and 473 and for preventing the petitioners from accessing and using their properties;
 - (d) A declaration that the respondents are liable to compensate the petitioners for the unlawful destruction of the Petitioners property which include crops, trees, metallic gates, walls among other properties as per attached report;
 - (e) Liquidated damages as follows:
 - (i) 1st petitioner's Tetu/Ihururu/718 Kshs 16,500/-
 - (ii) 2nd petitioner's Tetu/Ihururu/719 Kshs 139,000/-
 - (iii) 3rd petitioner's Tetu/Ihururu/720 Kshs 43,000/-
 - (iv) 3rd & 4th petitioner's Tetu/Ihururu 471 Kshs 12,600/-
 - (v) Tetu/Ihururu/473 Kshs 87,700/-
 - (f) A conservatory order restraining the respondents whether by themselves, their agents, employees and/or servants from interfering with the petitioners quiet and peaceful enjoyment, possession, use and/or any dealing of the properties Tetu/Ihururu/718, 719, 720, 471 and 473;
 - (g) Costs of and incidental to this Petition;
 - (h) Interest on (c), (e) and (h) above;
 - (i) Any other relief that this court may deem just to grant.
2. The prayers are premised on the petitioners contention that on or about May 21, 2018, the respondents' tractors, bulldozers and excavators invaded their parcels of land clearing the same for purposes of widening an adjacent public road. It is the petitioners case that the said operation occasioned extensive damage to their land, trees and infrastructure. It resulted in the uprooting of Kei-apple hedge, steel gates, houses and fruit trees and left unprotected homesteads and heaps of soil and garbage.



3. The petitioners assert that no notice was given to them regarding the operation that was to affect their properties and that they were not given an opportunity to be heard and raise their concerns in regard to the project.
4. The County Government of Nyeri (the 1st respondent) is opposed to the grant of the orders sought. By their grounds of opposition dated October 19, 2018 filed in response to both the petition and the notice of motion filed by the petitioners dated May 31, 2018, the 1st respondent asserts that the road works were undertaken by exclusively authorized state corporations known in law with capacity to sue and be sued and that hence the 1st respondent cannot be sued on behalf of those entities.
5. The 1st respondent further states that the injunctive relief sought against itself cannot stand as the 1st respondent did not carry out any expansion of any road and there is no iota of evidence tabled by the petitioners to prove any wrongdoing on its part.
6. The Cabinet Secretary Ministry of Roads and Infrastructure (the 2nd respondent) and the Attorney General (the 3rd respondent) are equally opposed to the orders sought in the Petition. In a replying affidavit sworn on their behalf by the 2nd respondent's Regional Mechanical Engineer Central Region Ethan Murigu Karingithi, the 2nd and 3rd respondents aver that the construction and maintenance of County roads is a devolved function within the mandate of the 1st Respondent and that on March 17, 2018, the 1st respondent hired various construction equipments and machines from them to enable them undertake various road construction project within Nyeri County.
7. The 2nd and 3rd respondents further aver that they did not sanction, authorize, permit, supervise and/or oversee any operations relating to the 1st respondent's activities which were subsequently carried out on a public road at Ihururu area using the hired equipment and machinery. It is therefore their case that they are not liable for the alleged loss and damage caused by the construction equipment and machines as the same were then solely under the use, management and control of the 1st respondent.
8. The petition was disposed of by way of written submissions following directions issued herein on July 15, 2020. I have accordingly carefully perused and considered the pleadings filed herein by the disputants as well as the written submissions and authorities placed before the court by the learned counsels acting for the parties.
9. The five (5) petitioners have urged the court to declare that the respondents' acts of trespassing onto their property and threatening forceful acquisition thereof is a gross violation of their constitutional right to private property. They ask the court to declare that the respondents have no right to interfere with their private property without following due process of law in compulsory acquisition as set out under article 40 (3) of the *Constitution* and part VII of the *Land Act* No 6 of 2012.
10. The petitioners further pray for general and liquidated damages as well as a declaration that the respondents are liable to compensate them for the unlawful destruction of their properties. In addition, the petitioners desire a conservative order restraining the respondents from interfering with their quiet and peaceful enjoyment, possession and use of the suit properties described as Tetu/Ihururu/718, 719, 720, 471 and 473.
11. In support of their case, the petitioners told the court that on or about May 21, 2018, without their knowledge, consent and/or authority, the respondents herein in a bid to widen a public road adjacent to their parcels of land did cause extensive damage to their properties when they deployed tractors, bull dozers and excavators that proceeded to uproot their fences, gates, fruit trees and even houses on the suit properties. The petitioners further accuse the petitioners of dumping the excavated soil on their land thereby destroying food crops and soiling their water tanks.



12. The petitioners told the court that the respondents actions were in contravention of their right to equal protection and enjoyment of the property and the right to acquire and own private property as enshrined in the Constitution. It is their case that as the lawfully registered owners of the suit properties they were entitled to peaceful and quiet possession thereof and that they ought to have been consulted and compensated before the said properties were acquired by the respondents in accordance with the law.
13. Both the 1st respondent on the one part and the 2nd and 3rd respondent on the other, are opposed to the orders sought by the petitioners. At paragraph 23 of the replying affidavit sworn on their behalf by the Regional Mechanical Engineer, Central Region, one Ethan Murigu Karingithi, the 2nd and 3rd respondents aver as follows:

“ 23. That I am further advised by the state counsel on record for the 2nd and 3rd respondents, advice which I verily believe to be true that the petition is improperly before this honourable court for want of jurisdiction as it offends section 18(2) of the Land Registration Act, 2012 since the cause of action is a boundary dispute between the petitioners and the 1st Respondent which ought to be adjudicated upon by the County Land Registrar, Nyeri.”
14. On the basis of that position, the 2nd and 3rd respondents have submitted at length as to how this petition is premature and improperly before the court given the fact that the boundaries of the suit properties and the public road had not been appropriately determined by the Land Registrar as required under section 18(2) of the Land Registration Act, 2012.
15. I was however unable to find the basis for the position taken by the 2nd and 3rd respondents. Neither the 1st respondent nor the 2nd and 3rd respondents have exhibited anything before this court in support of that contention. I did not hear any of the parties herein laying claim to a portion or portions of the other party’s parcel of land and the idea that this was a boundary dispute between the petitioners and the County Government of Nyeri was rather far-fetched and without any basis. It follows therefore that I was not persuaded that this court lacked the requisite jurisdiction to entertain this suit.
16. In their petition herein, the petitioners among other things urge the court to declare that the threatened forceful acquisition of their said properties or parts thereof amounted to a violation of their constitutional right to private property under article 40 of the Constitution. They also pray for a declaration that the respondents have no right in law to interfere with their private properties without following the due process of law in compulsory acquisition of land as set out in article 40(3) of the Constitution and in part VII of the Land Act No 6 of 2012.
17. Again, from the material placed before me, I was at a loss as to how the petitioners got the impression that the respondents had any intention of compulsorily acquiring their parcels of land. While this court was being asked to declare the threatened forceful acquisition of the suit properties to be in violation of the Constitution, there was absolutely no evidence of any threatened acquisition of the land placed before the court.
18. What was clear was that some time on May 21, 2018, some overzealous employees were deployed on the Ihururu-Kagumo road for purposes of its repair and expansion. The aftermath of their activities on the said day was the reported destruction of the Petitioners’ various properties and dumping of soil and debris on the suit properties.
19. In their response to the petition, the County Government of Nyeri (the 1st respondent) denies responsibility for those actions. According to the County Government, the said road works were



- undertaken by exclusively authorised state corporations that are known in law and it cannot therefore be sued on behalf of those known entities. In their grounds of opposition dated October 19, 2018, the County Government asserts that it did not carry out any expansion of any road and it is its case that there is no iota of evidence tabled by the petitioners to prove any wrongdoing on its part.
20. While it may as well be true that the petitioners were uncertain as to who between the County and the National Government were responsible for the road works, the denials by the County Government were laid bare by the response to the petition by the 2nd and 3rd respondents representing the National Government herein.
 21. It was not only clear from the 2nd and 3rd respondents replying affidavit to the petition that the construction and maintenance of County Roads is a devolved function within the mandate of the 1st respondent pursuant to the fourth schedule of the *Constitution of Kenya 2010* but also that it was the 1st respondent herein that had hired equipment and was responsible for the impugned road works.
 22. In support of their case that they were not responsible for the said project, the 2nd and 3rd respondents have clearly demonstrated through annexures to the affidavit that it was the 1st respondent that had hired equipment and machinery from themselves on the relevant dates and that the equipment and machinery were deployed by the 1st respondent in the Ihururu area during the concerned period in time. It follows therefore that the 1st respondent was solely responsible for the acts of trespass and destruction wrought upon the Petitioners properties.
 23. In their bare grounds of opposition herein, the 1st respondent did not provide any justifiable reason for the intrusion into the petitioners' parcels of land. As was stated in *Park Towers Limited v John Mithamo Njika & Others* (2014) eKLR:

“... where trespass is proved, a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of the case.”
 24. It has been held that the measure of damages for trespass is the difference in the value of the plaintiff's property immediately after the trespass or the costs of the restoration, whichever is less. In the manner in which this matter proceeded, the petitioners did not adduce any evidence as to the state of their properties before and after the trespass. Looking at all the circumstances herein and taking into account the fact that the 1st respondent had otherwise good intentions in expanding the public road in the area, I am of the considered view that a global sum of Kshs 1 million will be sufficient compensation to be shared equally amongst the 5 Petitioners.
 25. The petitioners have also particularized and demonstrated the liquidated damages suffered by each of them in the destruction of their individual properties and I am satisfied that they deserve compensation from the 1st respondent for the same.
 26. Accordingly, judgment is hereby entered for the petitioners as against the 1st respondent as follows:
 - (a) A declaration is hereby issued to the effect that the acts of the 1st respondent in trespassing upon the petitioners properties or parts of their parcels of land being Tetu/Ihururu/718, 719, 720, 471 and 473 amounted to a gross violation of the petitioners' right to private property and was an infringement of the protection accorded to the petitioners under article 40 of the *Constitution*.
 - (b) Kshs 1,000,000/- is hereby awarded as damages for trespass.



- (c) A declaration is hereby made that the 1st respondent is liable to compensate the petitioners for the unlawful destruction of the petitioners properties.
- (d) Liquidated damages are hereby awarded to the petitioners as follows:
 - (i) 1st petitioner (718) Kshs 16,500
 - (ii) 2nd petitioner (719) Kshs 139,000/-
 - (iii) 3rd petitioner (720) Kshs 43,000/-
 - (iv) 3rd and 4th petitioners (471) Kshs 12,600/-
 - (v) Tetu/Ihururu/473 Kshs 87,700/-
- (e) A conservatory order is hereby issued restraining the 1st respondent, whether by itself, its agents or employees and/or servants from interfering with the petitioners quiet and peaceful enjoyment, possession, use and/or any dealing of the properties known as Tetu/Ihururu/718, 719, 720, 471 and 473.
- (f) The 1st respondent shall pay the costs of this petition.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THIS 3RD DAY OF NOVEMBER, 2022.**

In the presence of:

Mr. Kebuka Wachira for the Petitioners

Mr. Oyando for the 1st Respondent

No appearance for the 2nd and 3rd Respondents

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J. O. Olola

JUDGE

