



**REPUBLIC OF KENYA**

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

**ELC PETITION NO. 13 OF 2017**

**(FORMER PETITION NO. 5 OF 2015)**

**IN THE MATTER OF ARTICLE 22 (1) OF THE CONSTITUTION OF KENYA, 2010.**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND OR FUNDAMENTAL FREEDOMS UNDER ARTICLE 28, 40 AND 47 OF THE CONSTITUTION OF KENYA 2010.**

**AND**

**IN THE MATTER OF OPENING & WIDENING OF SHAMAKHOKHO-SHIVEMBE ROAD WITHOUT NOTICE AND OR COMPENSATION THE COUNTY GOVERNMENT OF VIHIGA ON 4<sup>TH</sup> JANUARY, 2015 AND 28<sup>TH</sup> MARCH, 2015.**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS AND ENFORCEMENT OF THE CONSTITUTION ( PRACTICE& PROCEDURE RULES, 2012**

**DR. EDGAR KADENYI.....PETITIONER**

**VERSUS**

**COUNTY GOVT. OF VIHIGA CHIEF ROAD ENGINEER,**

**VIHIGA COUNTY.....RESPONDENTS**

**RICHARD MUHIGA (COUNTY REP, SHAMAKHOKHO WARD**

**JUDGEMENT**

The humble petition of the petitioner is as follows:-

1. That the petitioner is the registered owner of freehold land parcel TIRIKI/SHAMAKHOKHO/158 measuring 1.7 hectares.
2. That the petitioner's address of service for the purpose of this petition is care of ONSANDO GETANDA & CO. ADVOCATES, ORANGE HOUSE, SUDI ROAD, P.O. BOX 1737-50100, KAKAMEGA (Email:- [e.getanda@yahoo.com](mailto:e.getanda@yahoo.com))
3. That consequently the 1<sup>st</sup> respondent through the supervision and directions of its officers, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have since initiated and embarked on opening up and widening Shamakhokho-ShivembeMurram road without giving notice to the petitioner herein whose land parcel TIRIKI/SHAMAKHOKHO/158 borders the said public road of access.
4. That the petitioner utilizes his land parcel for agricultural cultivation and for his permanent homestead.
5. That on the 4<sup>th</sup> January, 2015 and in the absence and without written notice to the petitioner herein, the respondents with their agents trespassed into the petitioner's land parcel TIRIKI/SHAMAKHOKHO/158 and purported to fix new boundary marks inside the petitioner's land by ignoring the original boundary that has been in existing since 1975.

6. That the respondents have curved off about 3 meters width along the petitioner's land which shall include the permanent steel gate with electrical lights to be pulled down.
7. That this was done in the absence of the petitioner and despite the petitioner's complaints to the respondents, no compensation has been done and now the respondents have brought bulldozers and or graders on the ground on 28<sup>th</sup> March, 2015 and have started excavating the road.
8. That the petitioner has a fence along the said road which is comprised of barbed wire, kei apple and a permanent steel gate which has been in existence since 1975 as correctly indicated on the survey map.
9. That the petitioner contends that his affected fence, permanent steel gate does not fall within the road reserve but are within his private land.
10. That the respondents now want to curve off part of the petitioner's substantial land without regard to the due process as set out in the Constitution of Kenya, 2010 and The Land Act 2012 in regard to part VIII (Compulsory Acquisition of Interests in land).
11. That the petitioner's interest as regards acreage in land parcel TIRIKI/SHAMAKHOKHO/158 measuring 1.7 Ha. is likely to be affected without compensation by the respondents.
12. That the petitioner is entitled to a fair administrative action that is lawful and reasonable in the circumstances as envisaged under Article 47 of the Constitution of Kenya 2010.
13. That the petitioner is aggrieved that his right to property under article 40 and 64 of the Constitution of Kenya 2010 is under threat of infringement as no prior arrangement has been made by the respondents to prompt payment in full, or any just compensation as to the damage to be caused or caused.
14. That the respondents are acting with impunity and without due regard to the law and procedures provided in law.
15. That the petitioner is also aggrieved that their rights to written reasons for the proposed opening and widening of the said Shamakhokho-Shivembe Road have infringed and hence contravention of provisions of Article 47 (2) of the Constitution of Kenya 2010.
16. That the illegal acts or omissions of the respondents have subjected the petitioner to indignity and suffering contrary to Article 28 of the Constitution.

The petitioner therefore humbly prays for:-

- a. A declaration that the respondents actions on the petitioner's parcel of land TIRIKI/SHAMAKHOKHO/158 are in contravention of article 28, 40 and 47 (2) of the Constitution of Kenya and are therefore illegal hence null and void.
- b. A declaration that the petitioner should be compensated for trespass, the damage and loss caused and or likely to be caused.
- c. A declaration that the respondents should jointly restore the petitioner's land, fence and permanent steel gate to its original state.
- d. Costs of this petition.
- e. Such other orders the court shall deem fit to grant to meet the ends of justice.

The petitioner submitted that, he is the registered owner of all that freehold parcel of land known as TIRIKI/SHAMAKHOKHO/158 (annexed copy of the title deed marked "EK 1"). That on or about the 4<sup>th</sup> January, 2015 and in the absence of the petitioner herein, the respondents with their agents trespassed into the petitioners private land parcel TIRIKI/SHAMAKHOKHO/158 and purported to fix a public road boundary in the petitioner's land parcel without due regard to existing boundary as indicated on the map since 1975. The said purported boundary marks fixed on the ground without notice and proper procedures being adhered to have now curved off about 3 meters width and about 100 meters length into the petitioner's land along the said road which portion of land is a great loss to the petitioner (attached are photographs indicating the marked edges EK2). That despite formal complaint and protest made to the respondents, the respondents have since kept quiet and not responded to his complaint (attached is a letter dated 9<sup>th</sup> January, 2015 marked EK3). That on 28<sup>th</sup> March, 2015 the respondents came on the site with graders and or bulldozers and have now embarked on excavating the said SHAMAKHOKHO-SHIVEMBE ROAD and have since brought down his neighbour's fence and he is apprehensive his fence, steel gate and his curved off land will be next (attached are photographs marked EK4). That he is likely to suffer irreparable loss and damage in view of the illegal trespass acts of the respondent who are determined to bring down his permanent steel gate and fence which has been there since 1975. That the said exercise of excavating and widening the said road is being supervised by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents with their other agents under instructions of the 1<sup>st</sup> respondent. That he is aware the Kenya Constitution 2010 together with the relevant legislations particularly the Land Act 2012 provide the procedures for compulsory acquisition of the private land for public use and no such procedures have been followed by the respondents in this case. That no written notice was ever given to him nor has he been compensated for the portion which is being, likely to be curved off from his land. That he has tried to seek audience with the respondents but to no avail. That he stands to suffer great loss and his homestead will be exposed to security risks if his fence and steel gate are brought down. That he now prays that this honourable court restrains the respondents from any continuous trespass into his land and destroying his fence and steel gate in the name of widening Shamakhokho-Shivembe road until proper prescribed procedures of law are complied with.

The answer to the petition is that, the 1<sup>st</sup> respondent is the County Government of Vihiga as established under article 176 (1) of The Constitution of Kenya. That pursuant to the fourth schedule to The Constitution of Kenya (2010) the 1<sup>st</sup> respondent is vested with the executive function (s) and/or powers to rehabilitate maintain and/or construct county and public roads with its boundaries. That in response to allegations above stated, the 1<sup>st</sup> and 2<sup>nd</sup> respondents aver that in its financial year 2014-2016, the 1<sup>st</sup> respondent, in compliance with the Public procurement and Disposal Act, tendered for services from contractors pre-qualified within Vihiga County for maintenance and/or construction of roads. That the 1<sup>st</sup> and 2<sup>nd</sup> respondent avers that successful bidders were lawfully awarded the respective tenders and formally contracted to undertake the said maintenance/construction works.

That the 1<sup>st</sup> respondent avers that M/s. Denamo Construction & General Suppliers Limited (the contractor) was formally contracted to execute the rehabilitation of 1.7 km of Shivembe-Kavai Shamakhokho road in Shamakhokho ward hereinafter referred to as "the project". That the 1<sup>st</sup> and 2<sup>nd</sup> respondents avers that as regards the conditions and/or terms and reference of the stated contract, the contractor was an independent contractor for all intents and purposes relating and confined to the execution of the contract. That the 1<sup>st</sup> and 2<sup>nd</sup> respondents avers that the contractor therefore was vested with the full mandate to execute the contract within the confines of the law and as such, was solely responsible for execution of the contract and any liabilities whatsoever arising therefrom. That the 1<sup>st</sup> and 2<sup>nd</sup> respondents further avers that the contractor is not an agent of the respondent as regards the execution of the contract and therefore, the respondent cannot be held legally liable for the actions and/or commissions of the contractor. The 1<sup>st</sup> and 2<sup>nd</sup> respondents acted lawfully within the provision of The Constitution of Kenya, the County Government's Act, The Public Procurement and Disposal Act and all other laws related to the subject matter. The 1<sup>st</sup> and 2<sup>nd</sup> respondents is not at all liable or guilty of infringement of any fundamental rights and/or freedoms of the petitioner as alleged and subjects the petitioner to strict proof thereof. The petitioner was legally mandated to seek legal redress (if any) as against the contractor as regards the execution of the respective contract and not against the respondent. The 1<sup>st</sup> and 2<sup>nd</sup> respondents cannot be held liable to compensate the petitioner as regards claims arising from alleged action (s) and/or commissions of an independent contractor.

That the 1<sup>st</sup> respondent further avers that neither did its employees nor agents participate in the execution of the contract and as such the respondent cannot be held vicariously liable for the actions/commissions of an independent contractor. That the 1<sup>st</sup> respondent further avers that the contractor is a limited liability company registered under the Companies Act with power to sue and be sued in its own name. That the 1<sup>st</sup> and 2<sup>nd</sup> respondents further avers that these proceedings are therefore defective in law, the petitioner having sued the wrong party. The 1<sup>st</sup> and 2<sup>nd</sup> respondents further avers that these proceedings are irregular since the facts in issue between the parties can only be determined by was of a suit commenced vide a plaint demanding a full trial. That the 1<sup>st</sup> and 2<sup>nd</sup> respondents aver that the reliefs sought by the petitioner are improper and/or untenable in law. The 1<sup>st</sup> and 2<sup>nd</sup> respondent s pray that the petition be dismissed with a finding for costs in favour of the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

They submit also that, the answer to petition filed by the respondents does not answer the allegations of the petitioner. The respondents are denying responsibility by shifting the blame to a contractor by name Denamo Construction & General Suppliers Limited who was formally contracted to them to rehabilitate the said alleged road. They submit the alleged contractor is an agent of the respondents whom they say they formally contracted. The respondents cannot run away from the acts and omissions of their agent.

They submit therefore that the respondents acted with impunity without due regard to the law and necessary procedures provided in law and by so doing subjected the petitioner to unfair treatment hence breached the provisions of Article 28, 40 and 47 (2) of the Constitution.

They pray for the following declaratory orders as prayed;

- a. "A declaration that the respondents actions on the petitioner's parcel of land Tiriki/Shamakhokho/158 are in contravention of Article 28, 40 and 47 (2) of the Constitution of Kenya and are therefore illegal hence null and void.
- b. A declaration that the petitioner should be compensated for trespass, the damage and loss caused.
- c. A declaration that the respondent should jointly restore the petitioner's land, fence and the permanent steel gate to its original state.
- d. Costs of this petition.
- e. Such other orders the court shall deem fit to grant to meet the ends of justice.

In mitigating prayer (b) above in compensating the petitioner, they urge the court to rely on the valuation report attached to the further affidavit sworn on 9<sup>th</sup> May, 2015 and seek that the respondents compensate the petitioner with a sub total of Ksh. 1,051,000/= whose breakdown is well set out at pages 4 and 5 of the said valuation report.

In support of our arguments they rely on the following case law:-**Nairobi HCC. Petition No. 495 of 2015. Kenya Human Rights Commission vs Non-Governmental Organizations Co-ordination Board.**

The respondents herein in submission rely upon the answer to the petition dated 13<sup>th</sup> of May, 2016 and filed herein on 15<sup>th</sup> of May, 2013. The 1<sup>st</sup> respondent herein is the County Government of Vihiga established under Article 176 (1) of The Constitution of Kenya and who pursuant to the 4<sup>th</sup> schedule to the Constitution of Kenya (2010) has powers to rehabilitate, maintain and or construct county and public road within the County of Vihiga. During the financial year of 2014/2016 the 1<sup>st</sup> respondent duly tendered for service from prequalified contractors to maintain and construct the Shivembe-Kavai Shamakhokho road in Shamakhokho Ward within Vihiga County in compliance with Public Procurement and Disposal Act. Consequently, one of the prequalified contractors M/s. Denamo Construction & General Suppliers Limited was formally contracted to rehabilitate 1.7 km of Shivembe-Kavai Shamakhokho road. A copy of the invitation to tender from the relevant

Ministry of Transport and Infrastructure was filed on 16<sup>th</sup> of May, 2016 in addition to the respondent's response herein. The written contract duly entered into between the 1<sup>st</sup> respondent and the said contractor on 9<sup>th</sup> of February, 2015 was also filed on 16<sup>th</sup> of May, 2016 and clearly spells out the terms and conditions of the works to be carried out. A copy of acceptance letter duly signed by the contractor and notification of award are also filed. The contract documents clearly show that the rehabilitation of Shivembe – Kawai Shamakhokho road was and is being carried out by an independent contractor. Under common law the 1<sup>st</sup> respondent cannot be held liable in damages for actions of an independent contractor. The petitioner alleges that a portion of his land comprised in land title NO. TIRIKI/SHAMAKHOKHO/158 has together with other properties valued at Ksh. 1,051,000/= been destroyed as a result of the actions of the independent contractor. The petitioner has not annexed a map or any survey report from the Government to support his claim. What his documents show is a title deed in his name and pictures of machines working on land. There is no proof that the machines in the pictures are working on his land depicted by the title deed. Under section 107 of the Evidence Act Cap 80, the burden of proof lies on the petitioner. Section 107 (1) of the said act provides:-

*“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.”*

Section 109 of the Evidence Act states that the burden of proof as to any particular fact lies on the person who wishes the court to believe its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person. The respondents submit that in light of the above provisions of the Law the petitioner has not proved his case to the required standards. The petitioner has not enjoined the said contractor to this suit. The failure by the petitioner to enjoin the said contractor is fatal to his case as already submitted the respondents cannot be held liable at common law for acts or omissions of an independent contractor. The skill applied and the works to be carried out are wholly attributed to the independent contractor and not the respondents. The petitioner therefore should have sued the said contractor. The evidence upon which the petitioner has relied to prove his case has not been subjected to cross examination. The valuation report remains a self serving document in the absence of an authentic map from the lands office to support the allegations of encroachment on property.

This court has carefully considered both the applicant's and the respondents' submissions and the annexures therein. The petitioner submitted that he is the registered proprietor of land parcel TIRIKI/SHAMAKHOKHO/158 and filed this petition dated 30<sup>th</sup> March, 2015 against the respondent seeking the reliefs asset out in paragraph 16 of the said petition. The petitioner also filed alongside the petition an application by Notice of Motion dated 30<sup>th</sup> March, 2015 seeking for a conservatory order restraining the respondent and their agents or servants from trespassing into the petitioner's land parcel Tiriki/Shamakhokho – Shivembe public road destroying the petitioner's fence, steel gate and curving off part of the petitioner's land until proper procedures as prescribed by law are followed. Interim conservatory orders were issued on 9<sup>th</sup> April, 2015 and were later confirmed on 11<sup>th</sup> February, 2016.

When the matter came up for hearing of the application on 23<sup>rd</sup> April, 2015, the respondents despite being aware of the interim orders, defied the said order and continued with their illegal acts and demolished the applicant's fence and gave prompting the petitioner to seek for leave to file a valuation report through a further affidavit sworn on 9<sup>th</sup> May, 2015 attaching the valuation report on one Norbert Kisanya and P.I. Khaoya (valuer) of Chrisca Real Estates.

It is not in dispute that the petitioner is the registered owner of land parcel Tiriki/Shamakhokho/158 measuring 1.7 Ha copy of land certificate of title marked as EK1 in the supporting affidavit of the petition.

The petitioner's contention is that on 4<sup>th</sup> January, 2015 in the absence of the petitioner, the respondents and their agents trespassed into the petitioner's private land parcel Tiriki/Shamakhokho/158 and purported to fix a public road boundary in the petitioner's land without due regard to the existing boundary as indicated on the map since 1975.

The said purported boundary fixed by the respondent curved off about 3 metres width and 100 metres length into the petitioner's land. The petitioner attached photographs marked EK2 showing the marks edged fixed by the respondent in the petitioner's land.

It is their humble submissions that it worthy to note that in the respondents responses filed in court, the respondents have not alleged as to whether the area curved out of the petitioner's land was a road reserve. The petitioner herein made a formal complaint to 1<sup>st</sup> respondent vide his letter dated 9<sup>th</sup> January, 2015 marked as Annexure EK3 but his complaint fell on deaf ears.

On the 28<sup>th</sup> March, 2015, the respondents without any further communications came on site with graders and bulldozers and started excavating the said Shamakhokho – Shivembe road and brought down the petitioner's fence, steel gate and further extended into the petitioner's land in the name of expanding the road. By so doing, the respondents encroached into the petitioner's land and curved off an area measuring 55 m by 2.5 m (0.0124 Ha) as per the valuation report filed in court. The valuer at pages 4 and 5 of the valuation report dated 28<sup>th</sup> April, 2015 has given the value of the affected area of 0.0124 Ha as Ksh. 300,000/=.

Now, were the respondents justified without Notice and following other procedures in doing what they did? Article 47 of the Constitution of Kenya, 2010 provides:-

1. “Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair”
2. “If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

In the instance petition, the applicant was never given any form of written Notice setting out reasons as to why it was necessary to acquire part of his land in expanding the said Shamakhokho-Shivembe road. Lawful and fair procedures firstly compensating the applicant/petitioner in view that his land acreage of land measuring 1.7 ha was now going to reduce.

It is their submissions that the petitioner has been arbitrary deprived part of his land measuring 0.122 Ha and has been arbitrary restricted from use and enjoyment of that land curved from his land in contravention of Article 40 and 64 of the Constitution of Kenya 2010.

They submit also that the respondents acted arbitrary by forcefully acquiring the petitioner's land without following the due process of compulsory acquisition of interest in and as provided under part VIII of the Land Act 2012 which law sets out the procedures to be followed as set out from sections 107, 108, 109, 111, 112, 113, 114, 115 and 118 of the Land Act. The respondents herein did not even involve the National Land Commission as required by the law.

I find that, the respondents acted with impunity without due regard to the law and necessary procedures provided in law and by so doing subjected the petitioner to unfair treatment hence breached the provisions of Article 28, 40 and 47 (2) of the Constitution. I therefore find that the petition is merited and I grant the following orders;

1. A declaration that the respondents actions on the petitioner's parcel of land TIRIKI/SHAMAKHOKHO/158 are in contravention of article 28, 40 and 47 (2) of the Constitution of Kenya and are therefore illegal hence null and void.
2. A declaration that the petitioner should be compensated for trespass, the damage and loss caused.
3. Costs of this petition to be borne by the respondents.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 15<sup>TH</sup> DAY OF MAY 2018.**

**N.A. MATHEKA**

**JUDGE**