



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NYAHURURU**

**ELC CONSTITUTIONAL PETITION NO 4 OF 2019**

**IN THE MATTER OF CONSTITUTIONAL INTERPRETATION, PROTECTION, AND ENFORCEMENT OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 1, 10, 19, 20, 21, 23, 27, 33, 35, 162, 174, 201, AND 232 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE CONSTITUTIONAL INTERPRETATION AND THE ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLE**

**20, 21, 27, 33 AND 35 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF SECTION 4 AND 13 OF THE ENVIRONMENT AND LAND COURT ACT No. 19 OF 2011**

**AND**

**IN THE MATTER OF SECTIONS 6, 7, 8, 47 AND 65 OF THE KENYA ROADS ACT No. 2 OF 2007**

**AND**

**IN THE MATTER OF ROAD No. D 388 MAILI 4-C69 KARIAMU**

**AND**

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

**PRACTICE AND PROCEDURE RULES, 2013**

**BETWEEN**

**PETER THUITA KARIUKI.....1<sup>st</sup> PETITIONER**

**JACINTA NJERI SARONI.....2<sup>nd</sup> PETITIONER**

**ELIJAH WAINAINA NJIHIA.....3<sup>rd</sup> PETITIONER**

**HANNAH WAIRIMU GITHINJI.....4<sup>th</sup> PETITIONER**

**AND**

**KENYA RURAL ROADS AUTHORITY.....RESPONDENT**

**JUDGEMENT**

1. The Petitioners filed their Petition dated the 25<sup>th</sup> September 2019 on 26<sup>th</sup> September 2019 which Petition was supported by an Affidavit sworn by the 3<sup>rd</sup> Petitioner- Elija Wainaina Njihia on behalf of his co-Petitioners on the 25<sup>th</sup> September 2019, wherein he sought for the

following orders;

- a) A declaration that the Respondents action of diverting the route to be upgraded to Bitumen standards from D388 Maili Four – Maili Kumi-Gakoe–Olbolossat–Kaka –Kariamu Junction to Maili Kumi–Subuku-Sipala-Shamata–Kaka –Kariamu /Warukira-Shamata/Shamata town roads/access to Shamata Girls Secondary School roads is a violation of the Petitioners’ rights enshrined under Article 19, 20, 21, 23, 27, 33, 35, 47 and 50 of the Constitution.
- b) An order of prohibition against the Respondent prohibiting it from issuing the tender number RWC 567, for the upgrading to Bitumen standards at the performance base routine maintenance of Maili Kumi–Subuku-Sipala-Shamata–Kaka –Kariamu/Warukira-Shamata/Shamata town roads/access to Shamata Girls Secondary roads.
- c) In the alternative to (b) above, an order quashing the Respondent’s the decision to issue the tender number RWC 567, for the upgrading to Bitumen standards at the performance base routine maintenance of Maili Kumi–Subuku-Sipala-Shamata–Kaka–Kariamu/Warukira-Shamata/Shamata town roads/access to Shamata Girls Secondary roads.
- d) An order compelling the Respondent to upgrade to bitumen standards the classified road described as D388 Maili Four –Maili Kumi-Gakoe–Olbolossat–Kaka –Kariamu Junction
- e) Cost of the Petition.
- f) Any other relief that this honorable Court considers appropriate and just to grant.

2. The Petition was disposed of by way of written submissions pursuant to the Court’s directive of the 7<sup>th</sup> May 2020.

#### **Petitioners’ submissions.**

3. The Petitioners gave a brief background on the matter in question to the effect that they were citizens of the Republic of Kenya and residents of Nyandarua County, Ndaragua sub county, Muruai and Kirima locations and Githima and Olbolosat villages and that they had brought the Petition on their own behalf and on behalf of all residents of the aforementioned areas.

4. That they were users and beneficiaries of the road classified as D388 connecting Maili Four (4) to Kariamu C69 which road had been classified by the Respondent and year marked for upgrading to Bitumen standards. That for several years the said road had been listed under the schedule of Kenya Roads (Kenya Rural Roads Authority (vesting) Order legal Notice Number 195/2011 which road was classified to follow Maili Four –Maili Kumi-Gakoe–Olbolossat–Kaka –Kariamu Junction route.

5. That pursuant to its classification, the Respondent had even advertised various tenders for its upgrading including tender number RWC 479 advertised in 2017. This was however not to be for some time in June 2019 the Respondent instead placed an advertisement in the local dailies and other social media avenues seeking principal contractors for roadwork tenders including tender number RWC 567 for upgrading to Bitumen standards for the roads described as Maili Kumi–Subuku-Sipala-Shamata–Kaka–Kariamu/Warukira-Shamata/Shamata town roads/access to Shamata Girls Secondary roads.

6. On the issue of public participation, the Petitioners’ submission was that description of the route to be upgraded was a diversion of the upgrading of the road known as D388 and that the said diversion had been made without consulting the beneficiaries and users of the road known as D388, thus violating their Constitutional rights.

7. That public participation was one of the national values and principles in the Constitution which principles ought to be observed by all persons, state organs and public officers in the exercise of their responsibilities.

8. That by the Respondent inviting bids to upgrade Maili Kumi–Subuku-Sipala-Shamata–Kaka–Kariamu/Warukira-Shamata/Shamata town roads now known as D1322 RW567 thus diverting from the original plan to upgrade road known as D388 Maili 4-C69, the same violated the Petitioners’ Constitutional rights, as they were not consulted (no public participation) and their legitimate expectations was not met.

9. That by not undertaking any public participation, the Respondent undermined to the Petitioners’ sovereign power under Article 1(1) of the Constitution by failing to consult them on the diversion/changing of the route to be upgraded. That Article 10(2) a, b, and c of the Constitution provided for National value and principle of governance more importantly democracy and participation of the people, transparency and accountability was violated. That Article 201(1) and 232(1) of the Constitution was also violated in that there was no public participation in public financial matters and the involvement of people in the process of policy making respectively.

10. That by diverting of the route to be upgraded without informing and involving the Petitioners and further advertising the tender for upgrading of the diverted route amounted to unfair administrative practices/acts which ran afoul the provisions of Articles 27, 47 and 50 of the Constitution. The Petitioners relied on the decided case in **Kenya Human Rights Commission vs Attorney General & Another [2018] eKLR.**

11. The Petitioner’s submission on the issue of legitimate expectation was that they and the other residents of the same area had been users and beneficiaries of the road described as D388 for many years. That the road had been earmarked for upgrading to bitumen standards for several years and therefore their legitimate expectation was the upgrading of the same after the Respondent had approved its upgrading and even issued tenders and had also undertaken preliminary works on the road only for it (Respondent) to place advertisements in local dailies and other social media avenues inviting tenders, including tender No. RWC 567, for upgrading to Bitumen standards of another route. That the principles of legitimate expectation was discussed widely in the case of **Jane Kiongi & 15 Others vs Laikipia University & 6 Others**

**[2019] eKLR.**

12. The Petitioner further submitted that the Respondents' action constituted lack of fair administrative action and fair hearing to the effect that the administrative action was taken by the Respondent without hearing the residents of Muruai, Kirima, Githima and Olbolosat areas who were beneficiaries and users of D388 and who had learnt of the diversion/change of the road to be upgraded through the advertisement in the local dailies and other social media avenues. That their efforts in a bid to engage the Respondent to learn what formed the said decision was futile.

13. Their submission therefore was that their rights and freedoms as provided for under Article 33, 34, 47 and 50 of the Constitution had been grossly violated given the fact that the Respondent's decision was going to affect their rights and interests. Reliance was placed on the decided case in **Kenya Human Rights Commission vs Non-Governmental Organizations Co-ordination Board [2016] eKLR**.

14. Their submission in relation to the Respondent's grounds of opposition to the Petition through the Replying affidavit of one Engineer Willy Mburu was that it was full of contradictory averments and false-hoods for reason that it was not true that the whole area around Lake Olbolosat had been declared a protected wetland in 2018 but rather that what had been declared as such had been the area adjacent to the lake as per the Map annexed marked as 'EWNI' to their further Affidavit in their Petition. That the issue of the area being a wetland and thus requiring budgetary adjustment to tarmac D388 did not therefore arise. That the classification of the part of Olbolosat area as a wetland did not affect route D388.

15. The Petitioners further attacked the Respondent's averment that a decision to divert the route had been reached after a consultation with their area Member of Parliament. Their contention was that the Respondent was not candid with their explanation as to why there had been a diversion, whether it had been because of an environmental impact aspect despite there having been no Environmental Assessment Report, or whether it been as a result of the consultation with the area Member of Parliament.

16. That although the Respondent deponed that route D1322 served more people than route D388, yet there had been no data provided to support the said allegations and this was not a factor to consider while upgrading or building a road.

17. Finally the Petitioners submitted that the provisions of Articles 19, 20 and 22 of the Constitution bound all persons and organs of the state and obligated the Court to protect and enforce their rights and freedoms once they had been denied, violated, infringed or threatened. That they had met the requirements for filing a Constitutional Petition by outlining their complaint while setting out the infringed provisions of the Constitution and the manner in which they were violated in compliance with the decided case in **East Africa Pentecostal Churches Registered Trustees & 1754 Others vs Samwel Muguna Henry & 4 Others [2015] eKLR**. They sought for the Court to uphold their Petition.

**Respondents' submission.**

18. The Respondents' response and in opposition of the Petitioner's Petition is that it did not divert the construction of Maili Kumi–Olorossat Kariamu Junction D388 (C485) to Maili-Kumi-Subuku-Sipala-Shamata–Kaka–Kariamu /Warukira-Shamata/Shamata town roads/access to Shamata Girls Secondary School road. That the two roads were different and subject to two separate procurement processes with two (2) different outcomes.

19. The Respondent framed their issues for determination as follows;

- i. Whether or not the Petitioners proved their case to the required standard
- ii. Whether or not the Petitioners presented the case with the highest precision as required in Constitutional Petitions.
- iii. Whether or not the Petitioners were entitled to a grant of a prohibitory injunction
- iv. Whether or not the Petitioners (sic) entitled to a quashing order
- v. Whether or not the Petitioners satisfied the conditions for grant of mandatory injunctions
- vi. Respondent's response to the issues raised in the Petitioners' submissions.

20. On the first issue for determination, the Respondent submitted that the Petitioners had failed to support their allegations with any evidence demonstrating that the Respondent had diverted the construction of Maili Kumi–Olorossat Kariamu Junction D388 (C485) to Maili-Kumi-Subuku-Sipala-Shamata–Kaka–Kariamu /Warukira-Shamata/Shamata town roads/access to Shamata Girls Secondary School road thus violating their right or any other Constitutional provisions on which the Petition was based. They relied on the decided case in **John Githinji Wangonde & 6 Others vs Nyeri South Sub-County Co-operative Officer & 3 Others [2015] eKLR** where the Court had dismissed the Petition for not meeting the required standard of proof.

21. The Respondent further relied on the decided case in **Mumo Matemu vs Trusted Society of Human Right Alliance & 5 Others [2013] eKLR** where the Court held that *the evidentiary standard in Constitutional cases of this nature was a balance of probability. In cases involving heightened review on the intensely fact based inquiry as noted by the superior Court below, that balance requires a higher gradation which must be exercised judiciously.*

22. On the second issue for determination the Respondent submitted that the Petitioners had failed to set the case with the precision required of a Petition of this nature. That the allegation that the Respondent had diverted Maili Kumi–Olorossat Kariamu Junction D388 (C485) to

Maili-Kumi-Subuku-Sipala-Shamata-Kaka-Kariamu/Warukira-Shamata/Shamata town roads/access to Shamata Girls Secondary School road was uncertain. That the Petitioners had failed to indicate the time and manner in which the diversion was made by the Respondents and to clearly set out the Constitutional provisions that the Respondent had infringed and the manner in which these provisions had been infringed in context to the prayers sought. Reliance was placed on the case of **Anarita Karimi Njeru vs Republic [1979] eKLR** where the Court had held that *where a person sought redress from the High Court on a matter which involved a reference to the Constitution, that it would be important, if only to ensure that justice is done to his case, that he sets out with reasonable degree of precision that of which he complained, the provisions said to be infringed and the manner in which they were alleged infringed.*

23. On the issue as to whether or not the Petitioners were entitled to an order of prohibition it was the Respondent's submission that the procurement process of tender number RWC 567 had been concluded and the road works were about to begin therefore an order prohibiting them from issuing the tender No. RWC 567 to upgrade to bitumen standards Maili-Kumi-Subuku-Sipala-Shamata-Kaka-Kariamu/Warukira-Shamata/Shamata town roads/access to Shamata Girls Secondary School road had been overtaken by events. Reference was made to the case in **ESSO (K) Limited vs Matwata Okiya [1992] eKLR** to which the Court held *that an injunction was not to be granted if the event to be restrained had already taken place.* That further the Petitioners had failed to meet the requirements for grant of injunction and therefore not entitled to an order of prohibition.

24. That having failed to demonstrate any particular loss occasioned and/or to be occasioned by the Respondent, the Petitioners had failed to demonstrate any continuance or irreversible loss occasioned and/or to be occasioned and therefore the balance of convenience tilted towards not granting the orders sought by the Petitioners due to public interest as demonstrated in the Respondent's replying affidavit.

25. On whether or not the Petitioners were entitled to an order quashing the Respondent's the decision to issue the tender number RWC 567, for the upgrading to Bitumen standards at the performance base routine maintenance of Maili Kumi-Subuku-Sipala-Shamata-Kaka-Kariamu/Warukira-Shamata/Shamata town roads/access to Shamata Girls Secondary roads, the Respondent's submission was that the remedy of certiorari as sought by the Petitioner was a remedy which ordinarily lay in judicial review to which they had been denied a chance to properly reply to the same. That the order of certiorari was therefore not available to the Petitioners as was held in the case of **Benjamin Kipkoech Koskei vs Governor Nakuru County & 2 Others [2019] eKLR.**

26. On the last issue for determination, the Respondents submitted that the standard to be applied by Courts in granting the order of mandatory injunction was higher than that of prohibitory injunction. They relied on the decided case in **Kenya Breweries Limited & Another vs Washington O Okeyo [2002] eKLR** where the Court had relied on the case of **Locabail International Finance Limited vs Agroexport & Others [1986] 1 All ER 901** to lay out the test on whether or not to grant a mandatory injunction. That the Petitioners had failed to meet the threshold needed to be granted the mandatory injunction by failing to demonstrate through any factual evidence and specifically prove that any fundamental right had been or was to be infringed by the Respondent.

27. On the issue of public participation, legitimate expectations and lack of fair administrative action and fair hearing, the Respondent submitted that the Petitioners had failed to substantiate the need for public participation in the alleged diversion of the road. That both the roads were classified roads and had been earmarked for tarmacking and therefore there was no requirement for public participation in the event that the Respondent commenced the tarmacking. That further, there had been no decision to divert or any diversion whatsoever that required the public participation of the Petitioners and given this turn of events, the Petitioners had failed to demonstrate how the Respondent had executed any unfair administrative acts/practices or a violation of legitimate expectation as alleged. That authorities relied upon by the Petitioners were distinguishable and not applicable in the circumstance of this case.

28. The Respondent's submission was that the Petition was bad in law, was unsubstantiated and an abuse of the Court process and that the same ought to be dismissed with costs.

#### **Analyses and Determination.**

29. The Petitioners bring this Petition as residents of Muruai, Kirima Githima and Olbolossat villages and as beneficiaries and users of route D388 (C485). *Article 258* of the Constitution, provides that:

*(1)Every person has the right to institute Court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.*

*(2)In addition to a person acting in their own interest, Court proceedings under clause (1) may be instituted by—*

*a. a person acting on behalf of another person who cannot act in their own name;*

*b. a person acting as a member of, or in the interest of, a group or class of persons;*

*(c) a person acting in the public interest; or*

*(d)an association acting in the interest of one or more of its members.”*

30. Today, by dint of *Articles 22 and 258* of the Constitution, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest.

31. Pursuant to *Article 22 (3) of the Constitution*, the Chief Justice made rules vide Legal Notice No. 117 of the 28<sup>th</sup> June 2013 referred to as (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013 whose overriding objective is to facilitate access to justice for all persons.

32. Where a legal wrong or injury is caused or threatened to a person or class of persons by reason of violation of any Constitutional or legal right, and such person or group of persons is, by reason of poverty, helplessness, disability or socio-economic disadvantage, unable to approach the Court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Articles 22 and 258 of the Constitution. In filing this Petition, the Petitioners were acting not only on their behalf but on behalf of residents of Muruai, Kirima Githima and Olbolossat villages and as beneficiaries and users of route D388 (C485).

33. I have carefully considered the content of the Petitioners' Petition as well as their supporting affidavit. I have also considered the Respondents' replying affidavit and the submissions of Counsel as well as the relevant provisions of the law and authorities herein cited. I find that the issues arising herein for determination being as follows:-

- i. Whether the Petition discloses a legal interest capable of protection under the law.
- ii. Whether the Petitioners' rights under the Constitution had been infringed.
- iii. Whether the Petitioners were entitled to the orders sought in the Petition?

25. On the first issue for determination, it was incumbent of the Petitioners not only to clearly identify the relevant and specific Articles of the Constitution that had been violated, but also to avail evidence, through affidavit or otherwise of such violation as per the required standard set out in respect of the Constitutional Petitions as set out in the case of **Anarita Karimi Njeru vs The Republic (196-1980) KLR 1272** to wit:-

- i. Specifically set out the provisions in the Constitution that have been allegedly violated;
- ii. Provide the particulars of the alleged violations;
- iii. Provide particulars in which the Respondent has purportedly infringed their rights.

34. From the above captioned Petition, the Petitioners have alleged that their Constitutional rights envisaged under Articles 27, 33, 35, 47 50, 201 and 232 of the Constitution had been violated by the Respondent herein when they (Respondents) diverted the route to be upgraded to Bitumen standards from D388 (C485) Maili Four –Maili Kumi-Gakoe–Olbolossat–Kaka –Kariamu Junction to Maili Kumi–Subuku-Sipala-Shamata–Kaka –Kariamu /Warukira-Shamata/Shamata town roads/access to Shamata Girls Secondary School roads without public participation of residents of Muruai, Kirima, Githima and Olbolosat areas who were the beneficiaries and users of D388 Maili Four –Maili Kumi-Gakoe–Olbolossat–Kaka –Kariamu Junction.

35. The Respondent on the other hand has opposed the Petition stating that the upgrading of said road was based on two different road projects under two different contracts that had been subjected to two different procurement processes. That the procurement process for construction of D388 (C485) Maili Four –Maili Kumi-Gakoe–Olborossat–Kaka –Kariamu Junction was terminated after the area surrounding Lake Olbolossat had been declared a protected wetland area by the Cabinet Secretary for Environment and Natural Resources on the 14<sup>th</sup> July 2018 because this road was to cut through the said area thus affecting the ecosystem surrounding lake Olbolossat and hence would have required additional budget to undertake specialized measures to protect the wetlands, which budget the Respondent had not made provision for.

36. That following consultation with the local leadership from the area member of parliament, it had then been agreed that RWC 567(D1322) be tarmacked instead of D388 which would then the benefit of the people of Nyandarua County Ndaragua sub county, Murui and Kirima Locations, so that they would not lose out on the road development. The Respondent was categorical that the upgrading of RWC 567 was not a diversion of D388 (C485).

37. The Respondent's further contention was that the Petition did not raise any Constitutional question and further that there had been no violation of any provisions of the Constitution and therefore the Petitioners had no right to bring the present Petition.

38. *On the issue as to whether there had been any violation of the Petitioner's Constitutional rights, the Court finds that the Petitioners invoked various Articles of the Constitution but in essence their main concern was how the decision to divert D388 (C485) Maili Four –Maili Kumi-Gakoe–Olbolossat–Kaka –Kariamu Junction to Maili Kumi–Subuku-Sipala-Shamata–Kaka –Kariamu /Warukira-Shamata/Shamata town roads/access to Shamata Girls Secondary School roads was reached by the Respondents without their participation and/or dissemination of information to the residents of Muruai, Kirima, Githima and Olbolosat areas who were the beneficiaries and users of D388 Maili Four –Maili Kumi-Gakoe–Olbolossat–Kaka –Kariamu Junction. Their quarrel was that by not upgrading D388, the Respondent's conduct had amounted to unfair administrative practices and a violation of their Constitutional rights.*

39. The Respondent on the other hand has deponed that tarmacking of the Maili Kumi–Subuku-Sipala-Shamata–Kaka –Kariamu /Warukira-Shamata/Shamata town roads/access to Shamata Girls Secondary School roads was not a diversion of tarmacking the D388 (C485) Maili Four –Maili Kumi-Gakoe–Olbolossat–Kaka –Kariamu Junction for reasons that these were two different classified roads with different road projects and separate procurements. That further pursuant to the declaration of lake Olbolossat as a protected wetland area, the construction of D388 (C485) Maili Four –Maili Kumi-Gakoe–Olbolossat–Kaka –Kariamu Junction would have affected the ecosystem surrounding lake Olbolossat in that it would;

- i. Reduce the water quantity available to the residents within the area
- ii. Reduce the water quality thus affecting the utilization of the same in for example herding and fishing

iii. lead to reduction of flora and fauna in the area which has the possibility of occasioning long term negative effects on the environment.

iv. That it would lead to soil erosion which would reduce the wetlands ability to control floods during the rainy seasons thus making the area prone to flooding

40. 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 vouches for public participation, among other principles, under our 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.*

41. I have carefully searched for any evidence in support of the allegations by the Petitions to support the fact that the Respondents have breached the said provisions of the Constitution and could not find any in the Petition. They have pleaded that there had been no public participation in the decision to upgrade route No. RWC 567(D1322) to Bitumen status instead of D388, and therefore the Respondents contravened their rights.

42. The Respondent does not deny, that the Petitioner was not involved in any way in the decision to upgrade route No RWC 567(D1322) to Bitumen status but is categorical that development of route D388 (C485) Maili Four –Maili Kumi-Gakoe–Olbolossat–Kaka –Kariamu Junction was terminated after the area surrounding Lake Olbolossat had been declared a protected wetland area by the Cabinet Secretary for Environment and Natural Resources on the 14<sup>th</sup> July 2018 because this road was to cut through the said area thus affecting the ecosystem surrounding lake Olbolossat and hence would have required additional budget to undertake specialized measures to protect the wetlands, which budget the Respondent had not made provision for.

43. That following consultation with the local leadership from the area member of parliament, it had then been agreed that RWC 567(D1322) be tarmacked instead of D388 which would then the benefit of the people of Nyandarua County Ndaragua sub county, Murui and Kirima Locations, so that they would not lose out on the road development. The Respondent was categorical that the upgrading of RWC 567 was not a diversion of D388 (C485).

44. That the upgrading of the said road was done for public interest for apart from protecting the ecosystem round the Lake Olbolossat area, it would enhance mobility and accessibility within the area and would serve a wider population as compared to D 388 as was evidenced in the Map (annexed as LKK2) depicting the road network in the area.

45. In my view the consultation with the local leadership from the area Member of Parliament, was representative enough of the participation of the Petitioners and it was therefore a fundamental principle of law that the Petitioners bear the burden (or onus) of proof in respect of the propositions they had asserted that their Constitutional right had been violated by the Respondent. I have carefully considered the Petition before me and the response by the Respondents together with the submissions filed by both parties and I find that the Petitioners have failed to prove their case to the required standard. In fact, other than the allegations in the Petition and the Articles of the constitution being cited as having been violated, there is no supporting evidence or particulars at all to support the allegation.

46. On the issue of violation of the Petitioners' right of access to information guaranteed under Article 35 of the Constitution; I find that Article 35 guarantees the citizens the right to information. It provides as follows:

*“(1) Every citizen has the right of access to—*

*a) information held by the State; and*

*b) information held by another person and required for the exercise or protection of any right or fundamental freedom.”*

47. By the above provisions of the law, the Constitution grants the citizens the right to access information held by the state or information held by some other person but is required for purposes of exercising or protecting a right and fundamental freedoms. However there must be a request for information before a party entitled to that information can allege violation. A citizen is therefore entitled to seek information under Article 35(1) and is under an obligation to request for it. Only when this information is denied after such a request can a party approach the Court for relief. See **Kituo Cha Sheria & Another v Central Bank of Kenya & 8 Others [2014] eKLR**

48. In the present case, the Petitioners in their Affidavit in support of the Petition at paragraphs 15-17 deponed that after learning of the change in the road to be upgraded through advertisements in local dailies and other social media avenues, they, in the company of other residents of Muruai, Kirima, Githima and Olbolossot areas had tried to engage the Respondent in a bid to know how the decision to divert the route to be upgraded had been arrived at to no avail. That the Respondent had actually declined to provide them with any information, documents and/or data relating to the above roads despite the numerous requests.

49. In the case of **John Kamau Kenneth Mpapau –vs- City Council of Nairobi & 7 Others(2014) eKLR** the Court held as follows:-

*“...a reading of Article 35 shows that the right of access contains three key elements. Article 35(1)(entitles one) to information from the State or to information held by another person required for(the) exercise of Protection of a fundamental right and freedom. The Petitioners in moving the Court to enforce rights under Article 35(1) must set out what information was sought but not given.”*

50. As it were, there was nothing placed before me to indicate that the Petitioners requested for information relating to the alleged road diversion which request had been denied by the Respondent. In the circumstance therefore, I find that there was no violation of the right to information.

51. The Petitioners further contended that by the Respondent’s decision to divert the route to be upgraded without informing and involving them, and further advertising the tender for the said upgrading amounted to an unfair administrative practices and acts which ran afoul of their right pursuant to the provisions of Article 47 and 50 of the Constitution.

52. Article 47 of the Constitution provides that:

*(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.*

*(3)Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—*

*(a) provide for the review of administrative action by a Court or, if appropriate, an independent and impartial tribunal; and*

*(b) promote efficient administration.*

53. Article 50 of the Constitution provides that:

*(1) Every person has the right to have any dispute that can be resolved by the Application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body.*

54. **Article 47(1)** of the Constitution provides every person with the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. **Article 50(1)** grants every person the right to have any dispute that can be resolved by the Application of law decided in a fair and public hearing before a Court, or if appropriate, another independent and impartial tribunal or body.

55. The Court of Appeal in **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR** held that:-

*“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”*

56. **It must always be remembered that the Court is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself.** From the evidence tendered in this Petition, it is clear the Petitioners and the residents of Muruai, Kirima, Githima and Olbolossat villages through their member of parliament were engaged in the decision to upgrade to Bitumen status RWC 567(D1322) before route D388.

57. From the facts of the Petition herein, it is however not clear as to how the decision to upgrade route RWC 567(D1322) negatively affected the Petitioners and residents of Muruai, Kirima Githima and Olbolosat villages s there was no evidence brought before the court depicting how they had suffered any deprivation, loss and/or damage, I find instead and concur with the Respondent that the upgrading of RWC 567(D1322) was done in the public interest of the wider residents of the area as it enhanced a wider scope/area of mobility and

accessibility.

58. In the case in **Kenya Guards Allied Workers Union vs- Security Guards Services and 38 Others Nairobi H.C. Misc 1159 of 2003**, the Court held that:-

*“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....”*

59. For lack of evidence thereto I find that the Petitioners’ rights under Article 47 and 50 of the Constitution was not violated.

60. The Petitioners have sought for an order of prohibition against the Respondent prohibiting it from issuing the tender number RWC 567, for the upgrading to Bitumen standards at the performance base routine maintenance of Maili Kumi–Subuku-Sipala-Shamata–Kaka – Kariamu/Warukira-Shamata/Shamata town roads/access to Shamata Girls Secondary roads and in the alternative, an order quashing the Respondent’s the decision to issue the tender number RWC 567, for the upgrading to Bitumen standards at the performance base routine maintenance of Maili Kumi–Subuku-Sipala-Shamata–Kaka–Kariamu/Warukira-Shamata/Shamata town roads/access to Shamata Girls Secondary roads.

61. The Respondent’s response to the orders sought was that pursuant to the Petitioners’ failure to establish a prima facie case against them and obtaining injunctive orders thereto, the procurement process for tender number RWC 567 had been concluded and the road works were about to begin, therefore an order prohibiting them from issuing the tender No. RWC 567 to upgrade to bitumen standards Maili-Kumi-Subuku-Sipala-Shamata–Kaka–Kariamu/ Warukira-Shamata/ Shamata town roads/access to Shamata Girls Secondary School road, had been overtaken by events. This being the situation, I find the said prayer for seeking for orders of prohibition against the Respondent has been overtaken by events. This being a Court of equity, is not given to issuing orders in vain.

62. In totality thereof, I find that the Petition before me lacks merit, and the same is dismissed. Each party shall bear its own cost.

**Dated and delivered at Nyahururu this 29<sup>th</sup> day of September 2020**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**