



**Nderitu & 23 others v Attorney General & 2 others (Constitutional
Petition 29 of 2012) [2014] KEHC 7528 (KLR) (7 February 2014) (Ruling)**

Joseph K. Nderitu & 23 others v Attorney General & 2 others [2014] eKLR

Neutral citation: [2014] KEHC 7528 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CONSTITUTIONAL PETITION 29 OF 2012**

MJA EMUKULE, J

FEBRUARY 7, 2014

IN THE MATTER OF ARTICLE 40(3), 47 AND 64 OF THE CONSTITUTION

AND

**IN THE MATTER OF FUNDAMENTAL RIGHTS OF FREEDOM
FROM TORTURE AS IN ARTICLE 25 OF THE CONSTITUTION**

AND

**IN THE MATTER OF ACCESS TO INFORMATION
UNDER ARTICLE 35 OF THE CONSTITUTION**

AND

**IN THE MATTER OF THE FAIR ADMINISTRATION
ACTION UNDER ARTICLE 47 OF THE CONSTITUTION**

AND

IN THE MATTER OF NAKURU MUNICIPALITY BLOCK 23 KNOWN AS NAKA ESTATE

AND

**IN THE MATTER OF PROTECTION AND PARCEL OF
LAND UNDER ARTICLE 64 OF THE CONSTITUTION**

BETWEEN

JOSEPH K. NDERITU & 23 OTHERS PETITIONER

AND

HON ATTORNEY GENERAL 1ST RESPONDENT

MINISTER FOR ROADS 2ND RESPONDENT

PERMANENT SECRETARY MINISTRY FOR ROADS 3RD RESPONDENT



Notice is mandatory before commencement of compulsory acquisition.

Reported by Teddy Musiga & Getrude Serem

***Constitutional Law** - fundamental Rights and freedoms - right to property - limitation to right to property - compulsory acquisition as a limitation to right to property - claim where the respondents failed to give notice before commencing compulsory acquisition proceedings - Constitution of Kenya, 2010, article 40(3); Land Act, 2012 Part viii.*

***Constitutional Law** fundamental rights and freedoms - right to privacy - where the Respondents invaded the Petitioner's homes with police men - where failure to give notice was regarded as trespass - whether the State had a duty to give notice to property owners before conducting feasibility studies with a view to commencing compulsory acquisition proceedings - Constitution of Kenya, 2010, article 31.*

Brief facts

The petitioners were property owners in Nakuru County where they had built palatial homes therein. They were alarmed when the respondents in the company of administrative police and with no courtesy to them, entered their land and started to erect beacons across their parcels of land. They contended that the respondents had intended to acquire the said parcels of land compulsorily. The petitioners argued that they were neither consulted nor given any notice before the process began hence infringing on their right to property and privacy. They also contended that the use of policemen amounted to intimidation and consequently torture, degrading and inhuman treatment. The respondents on the other hand claimed that they were only carrying out a feasibility study with a view to identifying the properties before commencing compulsory acquisition process.

Issues

- I. Whether the State has a duty to give notice to property owners before conducting feasibility studies with a view to commencing compulsory acquisition proceedings.
- II. Whether the conduct of feasibility study without notice to the affected persons infringes/ violates on the right to property.
- III. Whether the failure to provide notice amounts to torture, degradation and inhumane treatment.

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 40(3)

(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.*

Held

1. Article 40 of the Constitution guaranteed every person the right to property and protected a person from being arbitrarily deprived of his property by the state or any person. However, that right could be limited by compulsory acquisition.
2. Before commencing compulsory acquisition processes, the state had to demonstrate that the acquisition was for public purpose or in public interest. It had to be done in accordance with Part viii of the Land Act, 2012.
3. Acquisition of land was a process that commenced when a request was made by the National or County Government to compulsorily acquire land and be approved by the Commissioner under section 107(3) of the Land Act. Hence the conduct of feasibility study could not be said not to be part of the compulsory acquisition of land.



4. It was incumbent upon the Respondents to inform the Petitioners both individually and generally of the intended Feasibility Study which could ultimately affect them all or some of them.
5. There could be no assumption that erection of beacons in the Petitioner's parcels of land was merely a reconnaissance exercise without notice to them, or their consent. The exercise of that nature was not preliminary in the eyes of the Constitution. Failure to give the affected persons adequate notice led to credible threats under article 22 of the Constitution to infringement of the Petitioners rights to protection of home and property and to the privacy of their persons and homes. They were denied information envisaged under article 35 and participation under article 10 of the Constitution.
6. The Respondents failed to define the public interest by not obtaining the consent of the Petitioners before entering into their lands and failing to serve upon them a notice of not less than seven days of their intention to enter into their premises to carry out the feasibility studies under section 108(2) of the Land Act. Thus their actions amounted to trespass.
7. By trespassing the Petitioners' land, the action of the police amounted to torture, degrading and inhuman treatment. It was clear that the Petitioners were sufficiently frightened, intimidated and humiliated by the action of the respondents. Though none of them was said to have suffered any physical abuse, there was no doubt that they were subjected to degrading treatment. Every such treatment was inhuman, in the sense of lacking humane feelings and understanding.
8. There was a flagrant violation of the Petitioners' rights to privacy, and to the protection of their person and property under the law as guaranteed by the Constitution. The Respondents ignored the law and the Constitution and therefore failed in that regard.

Petition allowed.

Orders

Injunction issued for 120 days to allow the respondents to engage the petitioners before commencing the process.

Citations

East Africa

1. *Morjajia, Vijay v Harris Horn Junior & another* Civil Case No 285 of 2004 - (Explained)
2. *Republic v Commissioner of Lands & another ex parte Kuria* Judicial Review No 44 of 2011 - (Followed)

Statutes

East Africa

1. Constitution of Kenya, 2010 articles 1,10 ,22,22 (1) ; 24,31,35,40,40(3); 47; 50; 60; 67; 156; 259(3) - (Interpreted)
2. Government Proceedings (cap 40) section 12 - (Interpreted)
3. Land Act, 2012 (Act No 6 of 2012) Part VIII - (Interpreted)
4. Land Act, 2012 (Act No 6 of 2012) section 105(7); 107(3); 108(2) - (Interpreted)
5. Penal Code (cap 63) section 136 - (Interpreted)

RULING

1. By an Amended Petition dated 13th August 2012, and filed on 14th August 2012, the Petitioners sought the following orders -
 1. Conservatory orders restraining the Respondents by themselves, their agents, consultants, servants, employees or any other person(s) acting on their instructions and/or direction from erecting beacons, surveying, demolishing houses, entering, remaining, visiting, constructing



bypass or any other manner whatsoever dealing with any land in Nakuru Municipality Block 23.

2. A Declaration that the creation and/or re-routing or any attempt to re-route the Nakuru by-pass from its original design to pass through Nakuru Municipality Block 23 is unlawful, unfair and unjust decision,
 3. A Declaration that the purported creation and/or rerouting of Nakuru Southern By-pass to pass through Nakuru Municipality Block 23 and/or surveying going on in Nakuru Municipality Block 23 violates articles 64 and 67 of the *Constitution*.
 4. A Declaration that failure by the Respondents to disclose to the Petitioners their vision on creation and/or rerouting the Nakuru Southern By-pass is a violation of the Petitioner's rights to information, notice and participation,
 5. A Declaration that the erection of the beacons in or around the Petitioners land and use of Administration Police in the process amount to torture, degrading and inhuman treatment,
 6. A perpetual injunction to restrain the Respondents either by themselves, their agents, consultants, employees or any other person(s) acting on their behalf from erecting beacons, demolishing houses entering remaining, erecting and/or re- routing the Southern By-pass through Nakuru Municipality Block 23 also known as Naka Estate and/or in any way dealing with any land within Nakuru Municipality Block 23.
 7. General damages
 8. Cost.
2. Together with the Petition, the Petitioners also filed a Chamber Summons of even date therewith in which they sought conservatory orders in terms of prayer 1 of the Petition. The Chamber Summons was the subject of my Ruling delivered on 29th June 2012, and in which I granted conservatory orders pending the hearing and determination of the Petition.

The Respondents

3. The Respondents herein are the Attorney General who is sued as the principal legal adviser of the Government in terms of Article 156 of the *Constitution* of Kenya 2010, and section 12 of the *Government Proceedings Act*, [cap 40, Laws of Kenya], as first Respondent. The Second and Third Respondents are respectively the Cabinet Secretary and Principal Secretary (formerly known respectively as the Minister and Permanent Secretary) responsible for matters relating to roads. The Fourth Respondent is the Kenya Urban Roads Authority, the government agency responsible for the planning, design and construction of urban roads.
4. In an Affidavit entitled Affidavit in Support of Request for Urgent Disposition, sworn on 15th November, 2012, the fourth Respondent urged the Court to allocate time and expeditiously dispose of the Petition, or in the alternative, the stay orders, be varied to allow the consultant proceed with the Feasibility Study on the understanding that no demolitions or forced evictions shall be undertaken as per the fear expressed in the Petition, pending the hearing and determination thereof.
5. In the event, the conservatory orders were extended by orders of court made on 25th April 2013 pending this Ruling.



The Petitioners' Documents

6. The Petitioners were represented by Messers LM Karanja and B Kipkoech while the Respondents were represented by Mr EN Njuguna Senior Principal Litigation Counsel. The Petitioners' Counsel relied upon the following documents.
 1. the Amended Petition aforesaid,
 2. the Supporting Affidavits Paul M. Gachoka, sworn on 28th June 2012, and the Supplementary Affidavit of the said Paul M. Gachoka. (the 3rd Petitioner) sworn on 13th August 2013.
 3. the Petitioners' Advocates Submissions dated 2nd May 2013 and filed on 3rd May 2013.

The Respondents' Documents

7. These were -
 1. The Replying Affidavit of Eng Daniel Githiria Muchiri, the Regional Manager, South Rift Region of the 4th Respondent sworn and filed on 25th July 2012.
 2. The Affidavit of Peter Ogamba Bosire (in support of a request for urgent Disposition of the Petition), sworn on 19th November 2012 and filed on 13th December 2012.
 3. The Attorney-General's submissions dated 4th November, 2013, and filed on 7th November 2013.
8. I will in the subsequent paragraphs of this Ruling consider the case of the Petitioners and the Respondents respectively, along with their submissions and the authorities cited to me, and thereafter draw my findings before making my final conclusions and subsequent orders.

The Facts

9. The facts as narrated per the respective Affidavits of the Petitioners and the Respondents are not in dispute.
10. The Petitioners are all registered owners of parcels of land measuring about 0.25 of acre, all within a parcel of land known as Nakuru Municipality Block 23, and known as Naka Estate. Historically the land was known and was owned by Baharini Limited and comprised approximately 244 acres. It was sold by Baharini Limited to Nakuru Farm Limited which proceeded to sub-divide it into quarter (0.25) acre plots and sold those plots to the Petitioners among others. The Petitioners have built and have attached to their Supporting Affidavits pictures of palatial homes they each have erected on those plots of land, and were alarmed when they saw agents of the Respondents practically invade their homes in the company of armed Administration Police Officers and started to erect beacons across their plots, without as much as notice or other courtesy extended to them. The Petitioners therefore came and obtained temporary umbrella of court by way of conservatory orders as stated above, to restrain the Respondents agents from invading their homes pending the determination of their Petition. The petitioners say that the actions of the Respondents and their agents are in violation of their rights to information as guaranteed by article 35 of the *Constitution*, to security of their property (as guaranteed by articles 40 and 64) of the said *Constitution*, to fair administrative action (as guaranteed by article 47), and due process as guaranteed by articles 40(3) and 67 of the *Constitution*.
11. The Petitioners say that as long ago as the 1970s that is, more than four decades ago, a Strategic Structure Plan had been muted for Nakuru Town. That plan was the subject of further study



sponsored by the Government of Kenya, UNCAS (Habitat) and the Belgian Development Agency. The Report called Nakuru Strategic Structure Plan July 1999 (SSP) following that study was ratified by the then Director of Physical Planning on 23/3/2000 and was subsequently approved by the Minister for Lands and Settlement on 4/4/2000.

12. The SSP as it was referred to in Annexures Pg 7(b) of the Petitioners' Supplementary Affidavit, proposed -

that the Nakuru transport "veins" be bundled alongside the Mombasa Uganda Transafrica Highway. These would include the Railway, the A104 dual carriage road, Oginga Odinga Avenue and a proposed elevated road (by-pass) above the A104 for heavy carriage transport.

13. In addition Petitioners argue that there was no participation by the residents of Nakuru on revival of the by-pass through Lake Nakuru National Park. (LNNP). Besides the Petitioners argue that a by-pass through LNNP would present serious environment risks should a lorry carrying dangerous chemicals overturn and spill its contents into the lake, particularly as the northern area of the park (LNNP) has a strong slope towards the lake.

14. The Petitioners also say that as affected residents of the area, they were never accorded an opportunity to comment on the project contrary to article 10 of the Constitution, that they were shocked when they learned from their then Member of Parliament and Assistant Minister (Hon Lee Kinyanjui) that a decision had already been made to construct the By-pass through their lands and homes and that they would be compensated. The Petitioners were disappointed when the Minister posted in his facebook -

"Greetings to the people of NAKA, it was great sharing time with you this evening and also getting your concern over the proposed by-pass. "I hope you were able to get my situation. I appreciate emotions are high but if solution is to be found, it must come from all of us. No amount of game will solve the problem. God bless"

15. Arising from the Respondents action, the Petitioners have concluded that their rights to fair, lawful and just administrative action by Government have been violated, and any decision to demolish their houses remains unlawful, and contrary to Part 8 of the Land Act 2012, and therefore unconstitutional under article 67 of the Constitution.

For those reasons, the Petitioners urge the Court to grant and issue the orders first above referred to.

The Respondents

16. The Respondents case is well set out in the Replying Affidavit of Eng Daniel Githiria Muchiri, the 4th Respondent's Regional Manager, sworn and filed on 25th July 2012, and reiterated by counsel for the Respondents.

17. According to the said Affidavit, 4th Respondent was currently overseeing the undertaking of a Feasibility Study, Environment and Social Impact Assessment, Preliminary and detailed Engineering Design for the proposed Nakuru by-pass.

18. For the purpose thereof, the 4th Respondent procured the services of M/s CAS Consultants Limited. (The consultants) whose duties per the terms of reference include -

- Feasibility Study,
- Route Identification,
- Reconnaissance Survey,



- Topographical Survey,
- Material Investigations,
- Traffic Flow, Study and
- Social-Economic and Environment Study all for the purposes inter alia of -
 - ascertaining Plot Boundaries, and establishing Traverse points and Temporary Benchmarks,
 - assessing the technical viability of the proposed road corridor,
 - establishing the most suitable route for the proposed road corridor to accommodate traffic to meet the national standards, and
 - ultimately determining and/or reaching a rational decision as to whether or not the construction of a road in a certain area is possible, practical and viable.

19. The Respondents through their Counsel urged the Court to find that the compulsory acquisition process referred to by the Petitioners cannot precede the feasibility study and that the Government shall initiate the compulsory acquisition process as stipulated in Part VIII of the *Land Act* 2012, article 40(3) and article 67 of the *Constitution* upon identification of the properties affected by the construction of the proposed road. The Respondents consequently deny the Petitioners contention that they, the Respondents have violated any of the Petitioners rights.

Opinion

20. I have considered the respective submissions by the Petitioners and the Attorney General on behalf of the Respondents, and set out my opinion in the following paragraphs of this Ruling. There are two critical constitutional issues for the court to determine in this Petition, and these are whether-

- (a) The Respondents violated the Petitioners' rights to property
- (b) such violation amounted to torture, degrading and inhuman treatment
- (c) what are the consequences of such violation

21. Infrastructure (in this Petition - the construction of roads, urban as well as trunk roads connecting this country's counties, cities, towns as well as rural villages and homes) to the regional capitals of neighbouring trading partners, is a key plank for the Country's Vision 2030 Development Plan. The Municipality of Nakuru, within the County of Nakuru is among the centres of that vision particularly as it is reputed to be fastest growing metropolis in East Africa and perhaps beyond. This growth in both human settlement and its requirements of facilities, such as schools, hospitals recreation and other amenities was perhaps not expected to be so rapid by the original planners, and their successors in the last forty (40) or so years. The situation has caught up with us, in particular with the phenomenal increase in motor vehicular travel both intra and transit. There is therefore urgent need to open transit veins away from the centre of the town. This is what the Respondents are trying to do. The Petitioners are not intrinsically opposed to this development. The Petitioners say, they the Respondents are trying to do so in contravention of both Petitioners interests and in violation of their rights under the *Constitution*.

22. According to the SSP the Nakuru By-pass was initially to be constructed on the buffer land between Lake Nakuru National Park and NAKA Estate. There was however resistance and objection from both the LNNP authorities and environmentalists who also waded into the debate. The LNNP



consequently altered its boundaries and occupied the buffer land. The Respondents in their search of the proper route(s) moved into the area, and in the process and through their consultants entered into the Petitioners' private residences, carried out surveys, and in some homes, erected beacons on their parcels of land, under escort of armed Administration Police.

23. The Petitioners argue that there is a machinery and procedure for the National Government to acquire land compulsorily under Part VIII of the Land Act 2012, and that articles 22 and 40 of the Constitution confer upon the Petitioners a continuum of fundamental rights, and that where there is a procedure then that procedure ought to be followed.
24. The Respondents acknowledge the right of ownership of the land by the Petitioners as guaranteed under article 40 of the Constitution, and the protection of that right of ownership under article 40(3). The argument by the Respondents' counsel that no right is absolute is not entirely correct, and these are the reasons why that argument is not so correct.
25. Constitutional rights are not absolute and are subject to the qualification set out under article 24 of the Constitution which provides-
 1. A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
 - (a) the nature of the right or fundamental freedom;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
 - (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose,
 2. The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.
26. Article 40 of the Constitution guarantees every person the right to property. It protects a person from being arbitrarily deprived of his property by the state or a person. This right is not absolute and is qualified by sub-article (3) thereof which recognizes that a person may be deprived of his land by the state only where such 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.
27. Thus where the state is exercising its right to acquire property under article 40(3) it must meet the threshold set out under article 24 for it to be deemed constitutional and the onus lies on the person



- who wants to limit it to show reason why it should be limited, and until such reason is shown, that right subsists. This was the holding of this Court in HCCC No 285 of 2004 *Vijay Morjajia v Harris Hornjunior & another (U/R)* where the Court discussing the question of the constitutionality of committal of a judgment debtor to civil jail under section 38 of the Constitution held that such a limitation on the right to liberty of a person could only be justified and reasonable under article 24 of the Constitution where it was demonstrated that the law had been followed that is there were no other less intrusive means for the decree-holder to satisfy the decree and the person sought to be committed to civil jail had been issued with a notice to show cause why he should not be committed to civil jail.
27. Firstly, the state must demonstrate that such acquisition is for a public purpose or in the public interest. It was contended by the Respondents that the Government is charged with the provision of infrastructure facilities throughout the country for the public good and interest which overrides private interests. The Government designed a by-pass south of Nakuru to ease transport congestion within the town back in 1970. That was certainly a purpose in the public interest.
 28. Secondly, that act must be done in accordance with the Constitution and the law limiting the right, that is Part VIII of the Land Act 2012. On their part, the Respondents argue that they are aware of the procedure of compulsory acquisition of land, and that the study stage is only preliminary.
 29. I accept the Respondents' argument, that feasibility study is a process of ascertainment of the basic ground facts of where the by-pass would pass if construction were approved. Whereas this argument is at face value reasonable, it is however not satisfactory at all. In my view, acquisition of land is a process that commences when a request is made by the National or County Government to compulsorily acquire land and approved by the Commissioner under section 107(3) of the Land Act. I say this because once the request is approved the body wishing to acquire the land is allowed under the Land Act to enter into a person's land. Consequently, it cannot be said that the right to property exists only upon the making of a decision to compulsorily acquire land and not for purposes of the feasibility study.
 30. Further section 105(7) of the Land Act provides that upon approval of a request under subsection (1) the Commissioner shall publish a notice to that effect in the Kenya Gazette and County Gazette, and shall deliver a copy of the notice to the Registrar and every person who appears to the Commission to be interested in the land. By this provision, the Petitioners are entitled to be informed of the intention of the State to acquire their land. The Respondents have not demonstrated that there was any notice served upon the Petitioners or published in the Kenya and County Gazettes.
 31. It was however argued that the matter of construction of the bypass was general information in the public domain. In addition, the consultancy firms put an advertisement in the newspapers before moving to the site that one of the corridors of the intended bypass would pass through the Petitioners' land and that parties who enquired of the purpose of the persons being on site from the Works Office were provided with information. It was the Respondents' submission therefore that the Petitioners' claim that their right to information was infringed is not sincere.
 32. Section 105(7) of the Land Act, quoted above clearly provides for the mode in which information is to be relayed to persons who have interest in land. The notices must be published in the Kenya and County Gazettes and served upon the persons with interest in land personally.
 33. It was therefore incumbent upon the Respondents to inform the Petitioners both individually and generally of the Feasibility Study which might ultimately affect them all or some of them. This becomes even more urgent when in fact the Consultants descended upon the Petitioners homes without as much as any notice and proceeded to erect beacons or traverse points. It is immaterial that the beacons are said to be temporary after the event. The Petitioners concern was urgent, more so, having been



- informed in “Twitter/ Facebook” by their then Hon Member of Parliament (who is supposed to champion and defend their rights) that there was no room for emotions, what was to be, was to be.
34. While there is no gainsaying the fact that the National Government is mandated with the responsibility and duty of providing infrastructure, and while it is universally acknowledged that public interest counter-weights private interest, in my view however, public interest and public policy are an unruly horse which must be reined in.
 35. Public interest and public policy must be clearly defined. That is the social contract encapsulated in the various provisions of the Constitution, (the right to participation (article 10), the right to information (article 35, etc). In Republic v Commissioner of Lands & another ex parte Carolizanne Gathoni Kuria [2013] eKLR the Court held that it would be against the rules of natural justice and articles 47 and 50 of the Constitution to cancel a registered proprietor’s title to land without first according him a hearing. By not being issued a notice the Petitioners were not only denied the chance to be heard on why their properties should not be acquired but also to participate in governance by challenging the soundness of the decision. Though known and necessary, the Respondents failed to define and inform the Petitioners of the public interest being pursued and undertaken by the Consultants under the Feasibility Study. To say that it was a matter in the public domain is not notice to a land or property owner that his property may be affected, and may therefore be visited for the purposes of the study.
 36. To say that land ownership and matters affecting land in Kenya are sensitive is not merely a cliché - but is an understatement. It is a matter for judicial notice that in Kenya, a neighbour, let alone, a stranger, is most likely to be ejected forcibly if he is found digging up holes in his neighbour’s land without notice or permission of the neighbour or caretaker.
 37. The Respondents also failed to define the public interest by failing to obtain the consent of the Petitioners before entering into their lands and failing to serve upon them a notice of not less than seven days of their intention to enter into their premises to carry out the feasibility studies under section 108(2) of the Land Act. Thus their actions amounted to trespass.
 38. In some jurisdictions “trespass” is both a crime and a tort. Other than trespass on burial grounds or sepulchres under section 136 of the Penal Code (cap 63, Laws of Kenya), trespass is not a crime under Kenyan law. It is however, a tort. A tort of trespass is committed when a person enters on land in the open air and, he still commits a trespass, in relation to a lawful activity, which a person may be engaged in or are about to engage in on that or adjoining land in the open air and does there anything which is intended by him or them to have the effect of intimidating those persons or to deter them from engaging in that activity.
 39. The situation was aggravated where the act of trespass (“for that is what it was”) was aided and abetted by the presence of the coercive elements of State (armed Police Officers) whose presence was clear - “fanya fujo uone” (“make trouble and you will see trouble or trouble will visit you”), This is intimidation and reeks of complete and utter disregard of the law and the Constitution apart from common decency and courtesy by a stranger to say “hodi” to this house and state the purpose of his visit, even if that stranger is an agent of the all powerful government. This was no ordinary visitation. It demands more than the customary “hodi” and “karibu” courtesies. It boded more. It had the potential to take away the Petitioners’ homes and property. Their Member of Parliament had warned them. They would be compensated. But that was in the future.
 40. On the question of whether the Respondents’ actions amounted to torture, degrading and inhuman treatment, the expression “torture” means infliction of either physical or mental pain, or to give mental anguish. The verb “degrade” means inter alia “to reduce in worth, character, to disgrace. The adjective “degrading” means “causing humiliation, debasing”. The Respondents invaded the Petitioners’ homes



and though it is alleged that one home owner ran away from her home out of extreme fear of strangers, there was no Affidavit from such owner. It is however clear that the Petitioners were sufficiently frightened and intimidated and humiliated. Though none of them is said to have suffered any physical abuse, there is no doubt that they were subjected to degrading treatment. Every such treatment is inhuman, in the sense of lacking humane feelings and understanding.

41. As a common citizen has no power to fight against an all powerful state or individual backed by the coercive power of the State, the Police, it is the occupier's duty to take such steps as common humanity or common sense would dictate so as to exclude, reduce or avert a danger of confrontation. The common and remedy guaranteed to such citizen under article 23 of the Constitution, is an action in court.
42. The Respondents' agents the consultants were no more than what the old common law called trespasser ab initio though performing a lawful duty, abused their power by entering the Petitioners' homes without as much notice to them. Even the providers of water and power are polite enough these days to find out if they would have access to read the water and electric meters to establish a home owner's consumption of those products for a particular period. Common decency dictates the same even where the exercise is undertaken for the public or what is called the "public interest" envisaged under article 40(3) of the Constitution. The acknowledged principle of public interest and public policy as so envisaged is that an official in the person of the Respondents can lawfully do that which has a tendency to be injurious to the public, or against the public good.
43. There was a flagrant violation of the Petitioners' rights to privacy, and to the protection of their person and property under the law as guaranteed by the Constitution. The Respondents ignored the law and the Constitution and therefore failed in this regard.
44. The Respondents' Counsel decried the wastage of public funds by the Conservatory orders which had led to stoppage of the exercise, when it is clear to the parties, and by implication, the Court, that the Bypass when constructed would benefit every person, and that there was no question of discrimination against the residents of NAKA Estate or the Petitioners, that the Petition was pre-mature as the study was purely preliminary in nature and was not completed.
45. It is the duty of the Court to consider the application in relation to the law and Constitution, and will grant conservatory orders where the Applicants, like the Petitioners in this case establish a prima facie case that their rights were being infringed or were threatened with infringement. That is the test under article 22 of the Constitution. The Respondents are deemed to know the law and the Constitution and are bound to take it into account when designing their projects, including Feasibility Studies. The rights are a continuum, as stated elsewhere in this Ruling, and are not subject to preliminary and completion stages. That is neither the law nor the Constitution. It is both the responsibility and duty of the project initiator, KURA and the consultant the implementor, to ensure that all and every aspect of the law, and in particular, the rights of the people affected or to be affected are safeguarded. The delays and costs arising out of such conservatory orders are safeguarded by proper planning and prior participation of the people. Where there is failure, it does not help to look for the soft target, the Judiciary for issuing conservatory orders or at times injunctions.
46. Counsel for the Respondents also asked the court to pronounce itself on the question of abuse of the court process, or excessive use of the courts on what are regarded as straightforward issues - such as public interest vi-as-vis private interest or rights and public policy. There are two answers to this submission. Firstly, what is "abuse of process". There are several meanings of abuse of process, depending on the context. In this context, it inter aliam means - "improper use of the legal process for some purpose other than that for which it was designed"



47. The obvious question here is whether the Petition here is for a purpose other than that for which it is instituted” To hold so, the Respondents must demonstrate that the Petitioners have no right to their properties, and consequently have no legitimate expectation that the Respondents would consult or at very least, inform them of the impending study which would or might affect them, or some of them. The Petitioners have ably demonstrated both in their Petition, the Affidavits and submissions of their Counsel, that they have a legitimate cause of action upon which they require judicial adjudication.
48. Secondly in light of the Respondents’ submissions, that the Feasibility Study includes “detailed engineering design” which connotes considerable element of finality, as opposed to “preliminary” (which connotes liable “to change”), the survey, which included one hundred meters wide path, within the Petitioners residences, there is legitimate expectation that the Respondents or their agents would not only notify the Petitioners individually (they have individual titles), but also generally, of the proposed study, purpose and duration thereof. That is the import of article 35 of the Constitution, and not merely to demand for, but also have access to information, in the sense of being provided with the information affecting their rights.
49. The Petitioners are entitled under article 31 of the Constitution to the privacy of their homes. The invasion of their houses or residences in the guise of carrying out a feasibility study for the public good or interest without notice to them, is an invasion of their privacy and is unconstitutional. Their fear is well placed that their homes may be secretly compulsorily acquired without due process as envisaged under article 40(3) of the Constitution. It is correct that rights under article 40 do not extend to property said to have been unlawfully acquired. Even if any of the Petitioners’ properties were illegally acquired, the fact of the illegality of acquisition must itself be established and until so established the Petitioners are entitled to protection of their property as envisaged by the Constitution and have an unqualified right to commence action for conservatory and other appropriate reliefs.
50. It is therefore not an abuse of the court process for the Petitioners to file a Petition or action to safeguard their rights to property. That is their inherent and right under article (1) (defence of the Constitution), article 22(1) every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, infringed or threatened, and article 47 (the right of access to justice). The Petitioners are, as acknowledged by the Respondents registered land owners or have interests in land known as Nakuru Municipality Block 23 an area affected by the Respondents’ Feasibility Study.
51. Article 10 of the Constitution sets out the national values and principles of governance and which include the provision that any person who makes or implements public policy decisions is bound to consider participation of the people as a cardinal principle of governance. Again, that principle applies throughout the life of the project, its formulation, implementation and completion.
52. If it were otherwise, the revolution brought about by the inclusion in the Constitution of the national values and principles of governance under article 10 of the Constitution would be rendered sterile and impotent and incapable of fertilizing and bearing the seed of full implementation of the rights and fundamental freedoms of the people in the Bill of Rights, [chapter V of the Constitution]. If otherwise it would also be contrary to the interpretation under article 259(3) that the Constitution is speaking all the time.
53. From the foregoing analysis, there is no doubt in my mind that the Respondents through the actions of their agents violated the Petitioners rights to the security of their homes and property. By deploying armed Police Officers while carrying out the reconnaissance, and placing beacons (even if temporary) upon any of the Petitioners’ property, the Respondents threatened the quiet enjoyment of the Petitioners homes as envisaged under article 31 of the Constitution.



54. The construction of the Southern by-pass is vital for the residents of Nakuru Town, including the Petitioners. The antecedents to its construction such as the Feasibility Study which gave rise to these proceedings needs to be undertaken in strict accord with the law of the Constitution, and due process.
55. There must be no assumption that this was merely a reconnaissance exercise which ended with beacons in the Petitioners homes without notice to them, or their consent. The exercise of that nature is not “preliminary” in the eyes of the Constitution. It led to credible threats under article 22 of the Constitution to infringement of the Petitioners rights to protection of home and property and to the privacy of their persons and homes. They were denied information envisaged under article 35 and participation under article 10 of the Constitution. The Petitioners had a legitimate expectation that they and each of them would be accorded those rights.
56. For all those reasons I find and declare that -
- (1) failure by the Respondents to disclose to the Petitioners their action on creation and or re-routing the Nakuru Southern By-pass is a violation of the Petitioners rights to information and participation.
 - (2) the erection of beacons in or around the Petitioners land and use of Administration Police in the process amounts to a violation of the Petitioners rights to privacy and protection of their person;
 - (3) the creation of and re-routing or any attempt to reroute the Nakuru Southern By-pass through Nakuru Municipality Block 23 without due process is a violation of article 40 of the Constitution, is unlawful, unfair and unjust.
 - (4) the erection of beacons in or around the Petitioners land and use of Administration Police in the process amounts to mental torture and therefore degrading and inhuman treatment.
57. In light of both Constitutional and Statutory power conferred upon the Respondents to compulsorily acquire land, it would be unconstitutional and unlawful to issue any perpetual injunction. I decline to do so.
58. I also decline to address the issue of damages as it was not canvassed in Counsels’ submissions.
59. There shall however, issue an injunction for period of one hundred and twenty days (120) days to enable the Respondents to engage with the Petitioners in terms of article 40(3) of the Constitution; and Part VIII of the Land Act, 2012.
60. This being public interest litigation, I direct that each party shall bear its own costs.
61. There shall be orders accordingly.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 7TH DAY OF FEBRUARY, 2014

M. J. ANYARA EMUKULE

JUDGE

