

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ELC PETITION NO. E002 OF 2025

BENARD KIBET YEGO

(As the Administrator of the Estate of the late

JOHN

CHEROP

YEGO)-----PETITIONER

VERSUS

**COUNTY GOVERNMENT OF TRANS NZOIA-----1ST
RESPONDENT**

**COUNTY SURVEYOR, TRANS NZOIA COUNTY-----2ND
RESPONDENT**

**COUNTY COMMISSIONER, TRANS NZOIA COUNTY-----3RD
RESPONDENT**

**LAKE VICTORIA NORTH WATER WORKS
DEVELOPMENT AGENCY (LVNWWDA)-----4TH
RESPONDENT**

**AREA CHIEF, KIPTOROR LOCATION-----5TH
RESPONDENT**

**ENOCH TOROITICH-----6TH
RESPONDENT**

**REUBEN TOROITICH-----7TH
RESPONDENT**

JONAH TOROITICH-----8TH

RESPONDENT

JUDGMENT

1. The petition before the court is dated **3/3/2025**. The petitioner seeks:

(1) Declaration that the actions of the respondents violated his constitutional rights under Articles 40, 47, and 50 of the Constitution.

(2) An order restoring the suit property to its original state before the commencement of construction of the road, including the original boundary between Plot Nos. 193 and 194.

(3) In the alternative, an order directing the respondents to compensate him for 1.34 acres of land destroyed or annexed through the unlawful boundary alteration, calculated at the current market rate.

(4) Permanent injunction restraining the respondents, their agents, or any other person acting under their authority from further interfering with the suit property.

2. The basis of the petitioner's claim is that he is the legal administrator of the estate of the late John Cherop Yego, and a resident of Cherangany Sub-county, Trans Nzoia, who was the registered owner of Title **No. Chepsiro/Kiptoi Block 2/Kapsimotwo/193**, where the 1st respondent's officers unlawfully marked a portion of it as part of a feeder road project.

- 3.** The petitioner avers that on **17/10/2024**, he received a letter from the 5th respondent, an area chief, instructing him to comply with the requirements related to the acquisition of the road reserve, by moving his fence and any crops or trees within the marked areas off the land for purposes of road opening to the water intake, which was to commence on **22/10/2022**.
- 4.** The petitioner avers that despite objection, he received a letter from the 2nd respondent dated **14/11/2024**, saying that the County Commissioner's office does not have authority to handle land disputes, hence he should appeal to the County Land Registrar for review, since it was a boundary dispute, and or pursue the matter in court.
- 5.** Equally, the petitioner avers that the 5th defendant wrote to the Land Registrar for urgent intervention since the project had already started, since it was a boundary dispute between plot **Nos. 193** and **194**, which was never the case between his plot **No. 193** and the 6th, 7th, and 8th respondents' **Block 194**.
- 6.** The petitioner avers that despite his concerns and objections, the road construction proceeded by digging into his suit land, destroying **1.34 acres** thereof, and rendering the land unusable. The petitioner avers that the road construction was carried out contrary to the

boundaries shown on the official map, without his consent and without following due process for compulsory acquisition of land.

7. The petitioner avers that the acts of the respondents violated his:

(a) *Right to property by unlawfully and without compensation, and altering its boundary with plot **No. 194.***

(b) *Right to administrative action for failing to act fairly, expeditiously, and or reasonably in addressing his objections.*

(c) *Right to a fair hearing, as they did not provide him with a fair hearing before interfering with his land.*

(d) *Rights as set out in **Sections 10 to 112** of the Land Act, which provides a clear framework for compulsory acquisition of private property by public authorities, to ensure that the rights of property owners are protected by issuing a notice to acquire, survey, and inspection, and the taking of possession after the payment of compensation.*

8. In support of the petition, the petitioner swore an affidavit on **3/3/2025**, attaching a copy of the grant of letters of administration ad litem, a title deed, a map, the chief's letter dated **17/10/2024**, protest letter dated

17/10/2024, the current map of **Kipsimotwo 193**, and photographs as annexures marked **MKY-1-6**, respectively.

- 9.** The 3rd respondent opposed the petition through a replying affidavit of Elizabeth Kiasyo Ngala, sworn on **29/7/2025**. It is disposed that the 3rd respondent is among the nine water works development agencies established under the Water Act, through **L.N. No. 28 of 26/4/2019**, as part of a reform, which sought to improve governance and service provision of the water sector in Kwanza as per annexure marked **EKN-1**.
- 10.** The 3rd respondent deposes that its mandate includes undertaking the development, maintenance, and management of public water works infrastructure within its area of jurisdiction, which covers six counties, among them Trans Nzoia County. The 3rd respondent deposes that water, being a devolved function under the **4th Schedule** of the Constitution, means that County Governments are also mandated to provide services related to water and sanitation.
- 11.** The 3rd respondent deposes that the petition demonstrates no sufficient interest or nexus by enjoining it or by specifying which water project is in question or the extent of the 4th respondent's involvement in the

alleged water project, for it could be a project under the 1st respondent. The 3rd respondent denies any involvement in any road construction, which does not, in any event, fall within its mandate under the Water Act **2016**, attached as **EKN-2**.

- 12.** Further, the 3rd respondent denies the alleged breach of **Articles 40, 47, and 50** of the Constitution, on a petition based on an alleged road construction, all hinged on and incidental to the construction of a road, which is not one of its core mandates under the law. The 3rd respondent terms the petition as based on hearsay, a fishing expedition, frivolous, vexatious, and an abuse of the court process.
- 13.** The 1st respondent did not file any response. Though the 2nd and 4th respondents filed a memorandum of appearance, there is no evidence that they filed any response to the petition.
- 14.** The petition is opposed by the 6th, 7th, and 8th respondents through a replying affidavit of Jonah Kipkorir Toroitich, sworn on **30/7/2025**, for not meeting the constitutional threshold, lacking merits, and with no supporting evidence to demonstrate any violation of the alleged fundamental rights and freedoms. The 6th - 8th respondents deposed that they have been in quiet,

continuous, and uninterrupted possession of parcel **No. Chepsiro/Kiptoi Block 2/Kapsimotwo/193** are separated by an access road connecting the 4th respondent's water project to the main road.

15. The 6th - 8th respondents deposed that it is the petitioner who had blocked the access or encroached on the 6th respondent's land parcel, to which the officers of the 1st - 4th respondents visited the site on **2/10/2024**, re-opened the access road, and during which the 1st respondent established the correct boundaries regarding parcels **Nos. Chepsiro/Kiptoi Block 2/Kapsimotwo/193, 194, 204, 205, and 374.**

16. The 6th - 8th respondents denied that a portion of the petitioner's land was allocated or added to either of them or to the access road as alleged or at all; otherwise, the petition is a veiled attempt to appeal the administrative reopening of the road, disguised as a constitutional petition. The 6th - 8th respondents termed the petition as vexatious, malicious, and an abuse of the court process.

17. Equally, the 6th - 8th respondents term the matter as a simple civil suit whose forum to determine is not before a constitutional court and which is not supported by any evidence to show the alleged violation of any constitutional rights and freedoms. The 6th - 8th

respondents deny that there was any administrative action taken by them or an administrative action or decision-making process, calling for their involvement in this petition.

- 18.** Further, the 6th - 8th respondents depose that they do not work with any of the named respondents; hence, the reliefs sought are ominous in nature and prejudicial to them. The 6th - 8th respondents aver that the petition seeks to circumvent the clear provisions on administration of the deceased's estate and the proper transfer of land, and that the petitioner ought to have exhausted the proper legal channels before attempting to use the constitutional forum for a land dispute.
- 19.** The 6th - 8th respondents attached copies of the identification card, authority to plead, map, and the chief's letter dated **17/10/2024** as **ET 1**.
- 20.** The petition was canvassed by written submissions due by **30/8/2025**. The petitioner relies on written submissions dated **30/8/2025**, isolating seven issues for the court's determination. It is submitted that due process was not followed in acquiring and entering the petitioner's land as per the Land Act. Reliance is placed on **Carlisle Development Co. -vs- National Land Commission [2025] KELAT 75 KLR.**

- 21.** The petitioner submits that as a result, his right to property under **Article 40** of the Constitution was violated. Reliance is placed on **Christopher T. Lilungu - vs- The County Government of Kakamega [2019] KEELC 3863 [KLR]**. The petitioner submits that the designated land, as per the map, lay elsewhere; the respondents unlawfully abandoned it and entered into the petitioner's portion, destroying **1.34** acres, without notice, a valuation report, or payment of compensation.
- 22.** The petitioner submits that although the road works were connected to a public water project, the manner of taking the land was unlawful, and the alleged justification to justify the invasion, as a boundary dispute, is untenable; otherwise, road construction on private land requires compliance with statutory and constitutional requirements.
- 23.** Further, the petitioner submits that his right to fair administrative action and fair hearing were violated, since despite the letter by the area chief to comply, there was no consultation, and he was not accorded a fair hearing before the directives. The petitioner further submits that, by the time the 5th respondent wrote the letter dated **5/11/2024**, works had already commenced, as confirmed by the Land Registrar, despite his objection. Reliance was

placed on **Suchan Investments Ltd -vs- Ministry of National Heritage & Culture & Others [2016] KECA 729 [KLR].**

- 24.** The petitioner submits that the defenses by the respondents are not valid or merited, since a public body cannot escape responsibility by hiding behind mandates when their project triggers rights violations, as stated by the chief's letter in the supplementary list of documents. The petitioner submits that there is no evidence by the 6th - 8th respondents that he had encroached on the access road on the 6th respondent's land, and even if such were the case, compulsory acquisition of his land had to follow mandatory statutory provisions.
- 25.** The petitioner submits that the 6th - 8th respondents are properly before court, for the dispute arises from road works allegedly linked to the 4th respondent, which administer the water project, as shown in the chief's letter, whereof the opening of the road to enable the water project, leaves no doubt as to the nexus between the 4th respondent and the road works.
- 26.** On the other hand, the petitioner submits that the 6th - 8th respondents admit that the access road had been allegedly blocked by him or separates them from their parcel **Nos. 194** and his **193**, hence, clearly squarely

joining them in the boundary and the dispute. The petitioner submits that the 6th - 8th respondents are necessary parties to the petition for the restoration of the boundary between parcels **Nos. 193** and **194**, which would directly affect their land rights.

27. The 6th - 8th respondents rely on written submissions dated **30/7/2025**. They submit that the instant petition is fatally flawed for failing to disclose any specific or actionable constitutional breach committed by the 6th - 8th respondents. It rests on a vague and unsupported invocation of **Articles 40, 47, and 50** of the Constitution, without demonstrating how these provisions have been violated or how their actions amount to constitutional infractions. The allegations are sweeping, imprecise, and entirely devoid of factual grounding. They rely on the authority of **Anarita Karimi Njeru -vs- Republic (No. 1) [1979] KLR 154** and reaffirmed in **Mumo Matemu -vs- Trusted Society of Human Rights Alliance & 5 others [2013] eKLR,**

28. The 6th - 8th respondents submit that the petition centers on allegations of encroachment, land boundaries, and occupation, matters that are squarely within the Court's

ordinary jurisdiction under **Section 13** of the Environment and Land Court Act, 2011, which empowers this court to adjudicate disputes relating to title, boundaries, and occupation of land.

- 29.** The 6th - 8th respondents submit that the 6th respondent is the registered proprietor of Land Title Number Chepsiro/Kiptoi Block 2/Kapsimotwo/194, which he has occupied peacefully and continuously. The petitioner owns an adjacent parcel, Title Number Chepsiro/Kiptoi Block 2/Kapsimotwo/193, the two parcels being distinctly separated by a public access road connecting the 4th respondent to the main road. The access road is a long-existing feature captured in official survey maps and is not a creation or encroachment by the respondents.
- 30.** The Petitioner unlawfully blocked the public access road and proceeded to encroach onto the 6th respondent's land, thereby interfering not only with the 6th respondent's rights but also with essential public infrastructure operated by the 4th respondent. They rely on **Ernest CO Muga -vs- Attorney General [2018] eKLR, cited in the case of Ntongai -vs- Kaberia & 3 others (Constitutional Petition 3 of 2019) [2023] KEHC 508 (KLR)(2 February 2023) (Judgment) and Bernard Murage -vs- Fine Serve Africa Ltd & others**

(2015) eKLR; J Godfrey Paul Okutoyi & others -vs- Habil Olaka & Another (2018) eKLR; And in Mutungi J's in Grays Jepkemoi Kiplagat -vs- Zakayo Chepkoga Cheruiyot [2021] eKLR.

- 31.** Accordingly, the 6th - 8th respondents submit that the petition is incurably defective for improperly enjoining the 6th - 8th respondents, who have no administrative or public law mandate, while simultaneously seeking constitutional reliefs that are plainly directed at state organs. The petitioner has sued public authorities and private individuals, without making the critical legal distinction between administrative action and proprietary rights.
- 32.** The 6th - 8th respondents submit that the petition amounts to a blatant abuse of the court's constitutional jurisdiction. It is a vexatious attempt to dislodge the respondents from land they lawfully own and occupy, disguised as a constitutional grievance. The petitioner has failed to establish even a prima facie case against the 6th - 8th respondents.
- 33.** The issues calling for my determination are:
- (1) If the petition meets the constitutional threshold.***

(2) Whether the petitioner has pleaded and proved breach of his constitutional rights and freedoms.

(3) Whether the petitioner is entitled to the reliefs sought.

(4) Whether the 6th - 8th respondents are properly joined in this petition.

(5) What is the order as to costs?

34. What the petitioner is complaining about is an alleged living off of his land to form part of an access road between his land and plots **No. 193** and **194**, belonging to the 6th - 8th respondents, contrary to his rights under **Articles 40, 47, and 50** of the Constitution.

35. He blames the 1st respondent for abandoning the designated road and unlawfully/unconstitutionally encroaching onto his land, as evidenced by annexure marked **BKY-3** to his supporting affidavit, a map for **Chepsiro/Kiptoi Block 2/Kapsimotwo**, that shows the correct road alignment to the river. The petitioner avers that the County Surveyor's action in marking his land, the insufficient notice dated **17/10/2024** to remove the fence, and crops, the failure to review the boundary mapping as requested in his letter, the destruction of approximately **1.34 acres** of his land without consent or compensation, and the construction of the road on his

land as contrary to the due process set out in the statutes and the Constitution.

36. On the other hand, the respondents deny the alleged encroachment. On the contrary, they aver that the petitioner had blocked and or encroached on the access road, which the 2nd respondent reopened and showed him the correct boundary. Therefore, the dispute, if any, does not amount to a constitutional petition, and or call for any reliefs as pleaded for, since none of the petitioners' constitutional rights or freedoms were breached, violated, or threatened with breach.

37. In **Kenya Wildlife Services -vs- Sea Star Malindi Ltd, Petition EO22 of 2025 (2025) KESC 42 KLR (27th June 2025) (Judgment)**, the court cited Tony Honoré “Responsibility and Fault” (Hart Publishing, 1999) at page 101, that the imposition of liability in civil suits requires a judicial determination that the defendant’s conduct falls within legally recognized categories of fault applicable to that specific cause of action. The court held that it is a fundamental principle of justice that each cause of action must be determined on evidence and legal principles applicable to the specific cause of action. The court further held that the determination of liability is a

- necessary precursor to resolving other consequential issues, such as the assessment and amount of damages.
- 38.** The procedural and substantive law on constitutional petitions is governed by **Articles 19, 20, 21, 22, 23, 159, 259, and 260** of the Constitution as read together with the Constitution of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules **2013**, (hereinafter Mutunga Rules), **Rules 4, 5, 8, 9, 10, 11, and 14** as provided for the particulars of the petitioner, capacity rights or freedoms violated, breached or infringed, manner, nature and extent of violation, past and present disputes touching on the issue, signature and address.
- 39.** A petition must be pleaded with a reasonable degree of precision. In **Mumo Matemu -vs- Trusted Society of Human Rights Alliance & Others [2014] eKLR**, the court said that due process, substantive justice, and the exercise of jurisdiction are functions based on precise legal and factual claims that help resolve the issues in litigation.
- 40.** The respondents term the petition as an ordinary civil suit, which should not be elevated into a constitutional petition, for it does not raise constitutional questions or issues that have been subject to litigation. In **Republic -**

vs- Paul Kihara Kariuki, Attorney General & Others Ex parte Law Society of Kenya [2021] eKLR, the court held that it should adhere to the practice of raising or converting every issue into a constitutional question or the filing of a suit disguised as a constitutional petition, where it does not fall anywhere close to violation of constitutional rights and freedoms.

41. Constitutional questions or issues arise where the existence of a remedy depends on or lies with the Constitution and not a statute. It also arises where, in arriving at the remedy, the constitutional rights, or freedoms, or the role of a state organ, or its value or functions have to be considered through the lenses of the Constitution, but as a statute. See **Gabriel Mutava & Others -vs- M.D. Kenya Ports Authority & Another [2016] eKLR**. In **Communications Commission of Kenya & Others -vs- Royal Media Services & Others [2014] eKLR**, the court observed that there must be a link between the aggrieved party, the provisions of the Constitution alleged to have been infringed, and the manifestation of the contravention.

42. The petition is based on a cause of action stemming out of an alleged exercise of statutory duties or obligations by the 2nd respondent in identifying boundaries, re-opening

an access road, and or allowing the respondents to construct and or dig a road, which encroached onto, took away, destroyed and or annexed part of the petitioner's land without due process and in violation of his constitutional rights to property, fair hearing, and fair administrative action.

43. Section 28(a) of the Land Registration Act **2012** provides that all registered land shall be subject to overriding interests, among them rights of way. Determination of boundaries falls within the jurisdiction of a Land Registrar and a Land Surveyor, as provided in **Section 19** of the Land Registration Act. Under **Section 18(2)** thereof, a court of law may not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land that have been determined under the Act. If there is uncertainty on the boundary, the same should be done as stipulated in the Survey Act.

44. The applicable law regarding boundaries, creation, and erection of access roads is the Public Road and Roads of Access Act, **Cap 399. Section 3** of the said Act establishes the District Road Board, whereas the creation of public roads is governed by **Sections 8** and **9** thereof.

45. In this petition, the petitioner pleads that the 2nd respondent ignored the area map annexed as **BKY-5**,

which shows the correct designated road and its alignment to the river.

46. He terms the marking of the access road on his land as against the due process prescribed by the statute and the Constitution. **Annexures BKY-3** and **5** are not published maps by the Director of Surveys under the Survey Act. In **M'Liria -vs- Land Adjudication Officer Amung'enti 'A' Adjudication & Settlement Section & Others E & Land Petition E003 of 2021 [2023] KEELC 879 [KLR] (15th February 2023) (Judgment)**, this court cited **Uhuru Muigai Kenyatta -vs- Nairobi Star Publication Ltd [2013] eKLR**, on what amounts to a constitutional controversy and or question. The court held that it will not consider a constitutional question where the remedy is available to an applicant under some legislation, or some other basis whether factual or legal, and may decline to determine it, whether there has been in addition to a breach of the constitutional rights just like in the instant case, the petitioner had alleged that his right to property under **Article 40** of the Constitution had been violated by the respondents who had purported to impose and erect a public road of access across his properties, without following an already existing public road on the ground. The respondents had alleged that they were simply

exercising their statutory duties and obligations under the law, allowing them to create public rights of way.

47. Unlike in this case, the respondents had failed to allow the petitioner to protest, lodge an objection, or apply for review, and had not given him a justification as to why a public road of access was going to be effected on his parcels of land.

48. In the replying affidavit before this court, the Land Surveyor has categorically stated that the petitioner had blocked an access road, which he reopened after showing the petitioner and the 6th - 8th respondents the correct boundaries. An aggrieved party to a boundary determination or regarding trespass has to file an ordinary civil suit based on a tort of trespass. Evidence by way of deed plans, RIM, Land Registrar or Surveyor's reports, and survey map, must be availed by the petitioner to show that there is no road of access through the suit land. See **CCK Estate [1973] Ltd -vs- County Government of Kiambu & Another ELC 96 of 2020 [2022] KEELC 14859 [KLR] (17th November 2022) (Judgment)**.

49. In my view, the issues as to whether or not there exists a road of access, and if the boundary as determined by the 2nd respondent aggrieved the petitioner, and whether the

rest of the respondents were justified or involved in constructing the road of access, as shown by the 2nd respondent raise no constitutional questions, but are matters that can be brought to court in the normal manner.

50. The petitioner pleads that the acts of the respondents amounted to compulsory acquisition of his land without notice, and due process. **Part V111** of the Land Act **2012**, and **Sections 107, 108, 109, 111, 112, 113, 114, 145,** and **118** thereof, govern compulsory land acquisition.

51. It is a trite law that he who avers must prove. The respondents have pleaded that the issue was on fixing a boundary and the reopening of a blocked access road. The 6th - 8th respondents are neighbours of the petitioner. They allege that he is the one who had blocked the access road. The petitioner has neither denied the alleged blockage nor demonstrated how the issue is not an ordinary case of boundary dispute between neighbours, calling for the fixing and unblocking of an access road by the Land Surveyor or Registrar under **Sections 14 - 21** of the Land Registration Act.

52. The petitioner has not pleaded that, contrary to an existing designated access road between the two parcels

of land, there was an expansion and or re-establishment of a new access road largely on his land against the existing survey maps, or RIM. In the absence of this evidence, I still find that the petitioner has not disclosed any breach of his constitutional rights to warrant this court to find that there are no constitutional questions or controversies.

53. Courts have held that a constitutional court should not be trivialized by all manner of cases touching on statutory breaches. The petitioner's case falls under that category. Evidence to show how the property right, the right to fair hearing, and fair administrative action were breached or violated is lacking.

54. A constitutional petition must be supported by tangible and cogent evidence. See **CCK & Others -vs- Royal Media Services & Others [2014] eKLR**. The petitioner has not produced any evidence on the extent of encroachment by way of a valuation report, certified survey maps, or evidence by either the Land Surveyor, the Registrar, or the road department to show that he

appealed to the District Roads Board. Equally, there is no evidence that the petitioner wrote to the National Land Commission, and the Roads Department of both the National Government and the County Government, as a condition precedent of approaching the Land Acquisition Tribunal.

55. The upshot is that the petition offends the doctrine of exhaustion, raises no constitutional questions, and therefore lacks merit. It is dismissed with no orders as to costs.

56. Orders accordingly.

Judgment dated, signed, and delivered via Microsoft Teams/Open Court at Kitale on this 1st day of October 2025.

In the presence of:

Court Assistant - Dennis

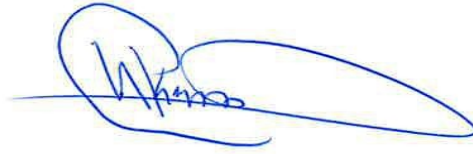
Teti for 6th - 8th respondents present

Miss Keya for the Petitioner present

1st respondent absent

Attorney General for 2nd, 3rd, and 4th respondents absent

Miss Biwott for 4th respondent present



**HON. C.K. NZILI
JUDGE, ELC KITALE.**

ORIGINAL