



**REPUBLIC OF KENYA.**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC PETITION CASE NO. 8 OF 2016**

**IN THE MATTER OF ARTICLES 22, 23, 27, 40, 47 & 50 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE BILL OF RIGHTS**

**AND**

**IN THE MATTER OF THE FUNDAMENTAL RIGHT TO PROPERTY**

**BETWEEN**

**JAMES SHIKWATI SHIKUKU.....PETITIONER**

**VERSUS**

**COUNTY GOVERNMENT OF KAKAMEGA.....1<sup>ST</sup> RESPONDENT**

**THE KAKAMEGA COUNTY EXECUTIVE MEMBER**

**OF TRANSPORT INFRACTURCTURE**

**PUBLIC WORKS & ENERGY.....2<sup>ND</sup> RESPONDENT**

**MIDLAND CONSTRUCTION COMPANY LTD.....3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**ISAAC SHIVACHI MUTOKA.....1<sup>ST</sup> INTERESTED PARTY**

**CHARLES AMEYO.....2<sup>ND</sup> INTERESTED PARTY**

**ISAAC OTENYO.....3<sup>RD</sup> INTERESTED PARTY**

**JUDGEMENT**

It is the Petitioner's submissions that, Article 22 of the Constitution vests the Petitioner with the right to institute proceedings for the enforcement of the Bill of rights including protection of his right to property. Article 50 (1) of the constitution provides that 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. Article 162 (2) (b) read with section 13 of the Environment and Land Court Act No. 19 of 2011 vests authority in this honourable court to hear and determine all disputes relating to land. Article 27 (1) provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. Article 47 bestows on the petitioner the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and where his rights or fundamental freedoms have been or are likely to be adversely affected by administrative action, the petitioner has the right to be given written reasons for the action. In accordance to Article 65 of the constitution, the petitioner has the right to acquire and own property and any deprivation of such property can only be undertaken in accordance with the Constitution and statutory provisions requiring prompt

payment in full, of just compensation to the petitioner.

The petitioner submitted that, he is the registered absolute proprietor of all that parcel of land known as Marama/Inaya/1165 within Marama North Ward within Kakamega County and initially specifically adjacent to Sigalagala road D260 and Elikaka-Mishilongo path. The petitioner has a title deed as proof of ownership of the said property. On or about April, 2016, the petitioner avers that he was alerted of trespass and willful damage to a portion of his property, cutting of trees on the portion and destruction of his fence by the 3<sup>rd</sup> respondent at the behest and/or acquiescence of the 1<sup>st</sup>, and 2<sup>nd</sup> respondents by purporting to commence construction of a road thereon purportedly for the purpose of expanding the Elukaka-Mushilongo path. The encroachment and trespass was done in contravention of the petitioner's right to equal protection and enjoyment of the law (Article 27 (1) of the constitution), right to acquire and own private property (Article 40 of the constitution), right to fair administrative action (Article 47 of the Constitution) and right to a fair hearing (Article 50 of the constitution of Kenya), Due Process and the Rules of Natural Justice). Indeed the respondents' actions and omissions have contravened the provisions of the Land Act and the Constitution of Kenya on trespass, possession and compulsory acquisition of land. As the lawfully registered owner of all that property known as Marama/Inaya/1165, the petitioner is entitled, as provided for in the Constitution of Kenya, 2010 and the Land Act, to peaceful and quiet possession of the property and to be consulted and compensated before acquisition of his property in accordance with the law. However, the petitioner was never consulted nor compensated for the trespass and ongoing construction on the suit property.

He further submitted that, on 11<sup>th</sup> June, 2016, the defendants/respondents, through their servants/agents/employees, in flagrant breach of court order dated 11<sup>th</sup> May, 2016, proceeded to demolish the petitioner's fence under the escort and heavy guard of the local administration police from Lunza A.P. Post. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents employed government machinery in form of Administration Police from Lunza police post to intimidate the petitioner and his family as they carry out their illegal and unlawful acts at the expense of the petitioner's constitutional rights. As a result of the said encroachment on the petitioner's property, he has suffered and continues to suffer damage. The petitioner prays for judgment against the respondents for:-

1. A declaration that the petitioner's protected right to property has been violated by the respondent's acts of encroachment onto, trespass upon and damage to the petitioner's property.
2. A declaration that the encroachment onto, trespass upon and expropriation of the petitioner's property known as MARAMA/INAYA/1165 by the respondents for the expansion of the Elukaka-Mushilongo path without consultation of the petitioner is illegal, null and void.
3. An order of permanent injunction restraining the respondents from further encroachment onto, trespass upon and damage to the petitioner's property.
4. An order of immediate restitution to the petitioner of all the portion of land comprised in plot number MARA/INAYA/1165 illegally and unlawfully encroached onto and expropriated by the respondents ostensibly for the construction of a road.
5. An order compelling the respondents to pay damages to the petitioner for the loss and damage suffered.
6. Costs of this petition.

The interested parties submitted that they were eyewitnesses of the machines that were used to trespass on to the private property, the subject pieces of land that in this petition are owned and/or lawfully occupied by the interested parties. The petitioner and interested parties, by bringing this petition in the court, are seeking justice in view of the offending and unlawful actions perpetrated against them by the respondents. They support the petitioner's case and the prayers sought in addition to full compensation for the property damaged which belonged to the interested parties. They submitted that their properties were trespassed onto, parts hived off allegedly to expand the Lukaka – Shironge and Bukura - Shikwata to a road. They annexed a list of persons offended and their respective land portions that were trespassed onto and property damaged.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that public interest supersedes private claims of an individual in the words of Nyamu J (as he was then) in Kenya guards & Allied Workers Union vs. Security Guards Services and 38 others (IP) HC. Misc. No. 1159 of 2003. Further, in the case of Kenya Bus Services Ltd & 2 others vs. Attorney General & Another Misc. Civil Suit No.413 of 2005 court held that the enjoyment of fundamental rights and freedoms contemplates respect for the rule of law including the protection of the rights of others and for the public interest.

They further submit that, petitioner has not shown any infringement by the 1<sup>st</sup> and 2<sup>nd</sup> respondent on land parcel number Marama/Inaya/1165 as the surveyor's report is not conclusive and it failed to ascertain whether the 1<sup>st</sup> and 2<sup>nd</sup> respondent had trespassed onto the private land of the petitioner. That the petitioner's claim raises no constitutional issue and that the issues being raised are civil in nature and pertain to the boundaries between the petitioner's property and the road reserve. The land parcel in question that is in dispute is a boundaries matter which cannot be remedied by way of a constitutional petition. The land dispute ought to be dealt with vide a civil suit and not vide a constitutional petition. A case in point is that of David Ramogi & 4 others vs. C.S. Ministry of Energy & petroleum & 7 others (2017) e KLR where the court held that a constitutional petition is meant to deal with clear constitutional matters. It is to be applied in clear cases where the facts can be ascertained, where there is need for further facts then the petitioner ought to revert to a civil claim.

It is their submission that the petition is simply a private law civil claim couched as a constitutional claim in order to avoid the rigours of the provisions of section 16 of the Government Proceedings Act, and the petitioner ought to file a civil claim in which witnesses including expert witnesses will be called and the site in dispute visited by the court. That these channels ought to be first explored and exhausted before the intervention of the constitution court is sought. The petitioner's complaint falls within the jurisdiction of the Environment and Land Court which has the jurisdiction to hear and determine the issues being raised by the petitioner. They relied on the case of David Ramogi & 4 others vs. C.S. Ministry of energy & Petroleum & 7 others (2017) e KLR.

That a surveyor's report was presented by the petitioner before this honourable court where a surveyor by the name Steward M. Bitonye prepared the report. The said surveyor attached a copy to his report which seems to be a valuation report. The report cannot be applicable to this petition as the said was prepared by an unqualified person who is not a valuer but a surveyor. The valuation ought to be independently prepared by a qualified and licensed valuer who visits the land in question to ascertain the value of damage caused which assists in preparing a valuation report. In this case the surveyor did not visit the suit land with a qualified and licensed valuer to ascertain the value of the damage caused. The surveyor's report is not conclusive as it does report to which extent did the 1<sup>st</sup> and 2<sup>nd</sup> respondent encroaches on the petitioner's land as opposed to the public access route.

The 1<sup>st</sup> and 2<sup>nd</sup> respondent are not disputing that indeed an access road was created and therefore since the road was opened and it continues to serve the public the petitioner's petition is overtaken by events. In the case of *Rodgers Muema Nzioka vs. Attorney General* the learned Judge stated that; where a party deliberately avoided to pursue the statutory remedies for compensation or any other remedy and instead purported to invoke the constitution, then such a move constituted abuse of the court process and also trivialized the constitutional jurisdiction.

The 4<sup>th</sup> Respondent submitted that the petition is fatally defective as against the 4<sup>th</sup> Respondent. It does not disclose any constitutional violations of fundamental rights and freedoms of the Petitioner by the 4<sup>th</sup> Respondent. The orders sought are not grantable against the 4<sup>th</sup> Respondent.

This court has carefully considered the petition, submissions and authorities cited herein. The petitioner brought a constitutional petition before this honourable court for alleged contravention of fundamental rights and freedoms under articles 22, 23, 27, 40, 47 and 50 of the constitution of Kenya, 2010 vide an amended notice of motion dated 21<sup>st</sup> November, 2016. In the application the petitioner was seeking an interim injunction restraining the respondents from further encroachment onto, trespass upon and or damage to the whole or part of the petitioner's property comprised in plot number Marama/Inaya/1165 situated within Marama North Ward within Kakamega County. The 1<sup>st</sup> and 2<sup>nd</sup> respondents are not disputing that indeed an access road was created and therefore since the road was opened and it continues to serve the public the petitioner's petition is overtaken by events. This to me seems to be a case of compulsory acquisition of land. As was stated by Mutungi, J in the case of *Virendra Ramji Gudka & 3 Others -v- Attorney General (2014)eKLR*,

*“Rights of compulsory acquisition are conferred by specific provisions of the law being Article 40 of the Constitution and Sections 107 to 133 of the Land Act, No. 6 of 2012 which replaced the provisions previously contained in the Land Acquisition Act”.*

The meaning and intent of the Article 40 (3) of the Constitution. Article 40, reads in part as follows:

40. (1) *Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—*
- (a) of any description; and*
  - (b) in any part of Kenya.*
- (2) *Parliament shall not enact a law that permits the State or any person—*
- (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or*
  - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).*
- (3) *The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the 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.*

The Land Acquisition Act (now repealed) provided for the procedure to be followed in the compulsory acquisition of property by the Government of Kenya. When the compulsory acquisition herein began, the Land Acquisition Act Cap 295 Laws of Kenya, Section 3 of the Land Acquisition Act provided as follows:-

*“Whenever the Minister is satisfied that the need is likely to arise for the acquisition of some particular land under section 6, the Commissioner may cause notice thereof to be published in the Gazette, and shall deliver a copy of the notice to every person who appears to him to be interested in the land.”*

The Universal Declaration of Human Rights has the force of law in Kenya. In the case of R vs Chief Immigration Officer (1976) 3 AER 843 Lord Denning stated thus regarding the Universal Declaration of Human Rights;

*"... Among the important rights which individuals traditionally have enjoyed is the right to own property. This right is recognised in the Universal Declaration of Human Rights (1948). Article 17(1) which states that everyone has the right to own property and Article 17(2) guarantees that "no one shall be deprived of his property" The contention of the State counsel negates this right. An intention to provide for arbitrary infringement of human rights cannot be attributed to the legislature unless such intention is unequivocally manifest. When Parliament is enacting a statute, the court will assume that it had regard to the Universal Declaration of Human Rights and intended to make the enactment accord with the Declaration and will interpret it accordingly..."*

And Justice G.V. Odunga in Republic v Council of Legal Education Ex-parte Nyabira Oguta (2016) eKLR, phrased it thus:

*Our Constitution embodies the values of the Kenyan Society, as well as the aspirations, dreams and fears of our nation as espoused in Article 10. It is not focused on presenting an organisation of Government, but rather is a value system itself hence not concerned only with defining human rights and duties of individuals and state organs, but goes further to find values and goals in the Constitution and to transform them into reality."*

As was stated by Scott L.J, in relation to compulsory acquisition, in the case of Horn-v- Sunderland Corporation (1941) 2 KB 26,40:

*"The word "compensation" almost of itself carries the corollary that the loss to the seller must be completely made up to him, on the ground that unless he receives a price that fully equaled his pecuniary detriment, the compensation would not be equivalent to the compulsory sacrifice".*

In that regard, in the case of Raticliffe vs Evans (1892) QB 524 with regard to damages, the Court stated that;

*"...The character of the acts themselves which produce the damages and the circumstances under which those acts are done must regulate the degree of certainty and particularity with which the damages done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage as is reasonable having regard to the circumstances and to the nature of the acts themselves by which the damage is done to relax old and intelligent principles, to insist upon more would be the vainest pendency..."*

In the case of Commissioner of Lands & Another vs. Coastal Aquaculture Ltd Civil Appeal No. 252 of 1996 KLR (E&L 264) the Court of Appeal held that in cases of compulsory acquisition the government is required to strictly adhere to the provisions of the Constitution and the Land Acquisition Act (now repealed). In Arnacherry Limited v Attorney General (2014) eKLR the court held that;

*"This is indeed a sad and distressing Petition. It is not expected that the State, in this age and time and with a robust Constitution such as ours, can actively participate in acts of impunity such as the forceful take-over of personal property without due compensation. The take-over has lasted 30 years and that makes the said action all the more disturbing."*

If land is so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined. This is in line with the Constitutional requirement under Article 40(3) of the Constitution that no person shall be deprived of his property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation.

From my above observations, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have not proved in any way how their actions are in accordance with the law hence their actions are illegal. The Respondent's actions are in contradiction with Sections 2, 2(4), 3, 10, 40 and 47 of the Constitution of Kenya. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents also did not produced any Environmental Impact Assessment Report to prove that their actions do not infringe the rights of the Petitioners accrued under article 42 of the Constitution of Kenya. The law as discussed above, provides for compensation in cases of compulsory acquisition hence they have a right to compensation. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents are yet to comply or even make an inquiry. The order for injunction has been overtaken by events as the road is already in existence. Hon. Justice J.L Onguto in the case of Patrick Musimba vs. The National Land Commission and 5 Others Petition No. 613 of 2014 stated in the judgment that,

*"If land is so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined; see section III of the Land Act. This is in line with the constitutional requirement under Article 40 (3) of the constitution that no person shall be deprived of his property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation".*

The surveyor's report on record has ascertained that there has been encroachment on land parcel number Marama/Inaya/1165 belonging to the Petitioner. The Petitioners and Interested Parties have a right to be compensated and the orders below will apply to both once the Interested Parties establish proof of ownership of the land said to be compulsorily acquired. However, it has not been established how the 3<sup>rd</sup> and 4<sup>th</sup> Respondents have infringed on the petitioners right and the orders will not be against them. I find that the petition is merited and I grant the following orders;

1. A declaration that the Petitioner's protected right to property has been violated by the respondent's acts of encroachment onto, trespass upon and damage to the petitioner's property.
2. A declaration that the encroachment onto, trespass upon and expropriation of the petitioner's property known as MARAMA/INAYA/1165 by the respondents for the expansion of the Elukaka-Mushilongo path without consultation of the petitioner is illegal and unconstitutional.

3. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents are ordered to adequately compensate the petitioners and interested parties for compulsorily acquiring their parcels.

4. Cost of the petition to be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 20<sup>TH</sup> DAY OF MARCH 2019.**

**N.A. MATHEKA**

**JUDGE**