



REPUBLIC OF KENYA.

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC MISC. CASE NO. 2 OF 2017

IN THE MATTER OF THE KENYA CONSTITUTION

AND

IN THE MATTER OF FAIR ADMINISTRATION

AND

IN THE MATTER OF COMPENSATION AND VIOLATION OF CONSTITUTIONAL RIGHTS

AND

IN THE MATTER OF COUNTY GOVERNMENT ACT

BETWEEN

CHRISTOPHER T. LILUNGU.....APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF

KAKAMEGA.....RESPONDENT

JUDGEMENT

The application is by Christopher Tawai Lilungu who claims his constitutional rights under article 40 of the constitution have been violated by the respondent for the determination of the following questions;

1. Whether the court can issue a declaration that the appellant's fundamental rights under article 40 of the constitution of Kenya have been contravened and grossly violated by the respondent whose contractors, employees, and agents constructed a road on his land parcel number Kakamega/Malava/1450 on 15/12/2016.
2. Whether further, the court can declare that applicant is entitled to special damages incurred as a result of the violation amounting to Ksh. 332,701.50.
3. Whether in addition to the special damages the plaintiff can be paid general damages assessed by this court.
4. Any further orders, writs, directions the honourable court may consider appropriate.
5. Costs of the suit and interest.

The summons are based on the fact that the applicant's rights to own property and enjoy his property have been violated by the respondent's employees agents and contractors. PW1 testified that, he is the proprietor of land parcel number Kakamega/Malava/1450. His land has no public road passing through it or bordering his land. That the road from Bisunu Primary School which connects with Shibunga market does not pass through his parcel of land. That the contractors made a non-existent road into his land measuring 134 metres by 8 metres. PEx3 is a copy of a survey done by Mali survey services showing the extent of the trespass. That due to the trespass his trees were destroyed which trees value was assessed at Ksh. 43,916.50. PEx2 is a copy of Forestor's report dated 5th January, 2017. That the damage caused by the respondent is captured in the valuation report of Basmerk valuers PEx1. That due to the damage caused by the respondent he suffered special

damages in form of expenses i.e. 30,000/= for workers to put a fence on the damaged portion. That he paid 2,196/= to the forest service, 10,000/= to Mali surveyors, Ksh. 3450 for fencing wire and 10,000/= to prepare a valuation. All these are costs he incurred because of the respondent's illegal acts. That in total the respondent caused him to spend a total of Ksh. 55,746. That the actual loss arising from the respondent's exercise is as follows:-

(a) Land (0.0563HA)	= Ksh. 198,675.00
(b) Barbed wire fencing	= Ksh. 66,330.00
(c) Gate	= Ksh. 20,000.00
(d) Trees	= Ksh. 43,916.50
(e) Crops	= <u>Ksh. 3,700.00</u>
Total	= Ksh. 332,701.50

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That the respondents violated his constitutional rights as granted under Article 40 of the constitution of Kenya. That he has suffered loss and he prays that the respondent compensates him for the actual loss suffered and do grant him general damages for the violation of his constitutional rights. PW2 and PW3 corroborated the applicant's evidence as regards the damage occasioned.

The respondent offered no defence and submitted that, this originating summons should be struck out as matters of compensation should have been brought by way of a petition. The court cannot determine issues touching on constitutional rights which were in allege violation of the applicant's constitutional rights as there was no constitutional petition. They relied inter alia on the case of Godfrey Paul Okutoyi vs. Habil Olaka & Central Bank of Kenya Petition No. 457 of 2015. If it is a case of special damages then it should be by way of a plaint and specifically pleaded. Hence the application is incompetent in law and should be struck out.

The preliminary issue for determination is whether the suit should be struck out for being brought as an originating summons and not as a petition. The suit was filed on 10th January 2017 by way of an originating summons and not a petition as envisaged by the provision of Article 20, 21, 22, 27 of the Constitution. I find that the procedure adopted by the petitioners is contrary to the provisions of *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules)* which were gazetted through Legal Notice No. 117 of 28 June 2013 .

Rule 4(1) provides that where any right or fundamental freedom provided for in the constitution is allegedly denied, violated or infringed or threatened, a person so affected, May make an application to the High court in accordance to the rules.

Rule 10(1) provides that an application under rule 4 shall be by way of petition as set out in Form A in the schedule with such alterations as may be necessary.

Be that as it may, Article 22 of the Constitution which provides that;

“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, violated or infringed, or is threatened.

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

(a) a person acting on behalf of another person who cannot act in their own name;

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

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

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

(3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that-

(a) the rights of standing provided for in clause (2) are fully facilitated;

(b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;

(c) no fee may be charged for commencing the proceedings;

(d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and

(e) an organization or individual with particular expertise may, with the leave of the court, appear as a friend of the court.

4. The absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by a court.”

The meaning of this article in our opinion is that one does not need to comply with the provisions of the Civil Procedure Act for the commencement of a matter under Article 22 of the Constitution of Kenya. Moreover that the court should not put undue regard to procedural technicalities such as the mode of a petitioner coming to court for redress. I do find that the petitioners are properly before court for redress and that they have demonstrated sufficient interest. Consequently, in the interest of justice and the provisions of *Article 22 (3) d of the Constitution of Kenya*, while observing rules of natural justice the court shall not be unreasonably restricted by procedural technicalities, and in view of *Article 159 of the Constitution*, the court should not put undue regard on procedure but should endeavour to find substantive justice and therefore the originating summons should be considered on merit for substantive justice. It is well established that lapses in procedure ought not hinder the determination of the underlying dispute. Article 159(2) (d) of the Constitution asks courts to “**administer justice without undue regard to procedural technicalities**”. Therefore notwithstanding the procedural lapses this court will consider and determine the issues raised by the applicant.

Being constitutional petition by way of originating summons the instant case must meet the minimum threshold for a constitutional petition. In **Anarita Karimi Njeru vs The Republic (1976 -1980) KRR 1272** the court held that where a person is seeking redress from the High Court for an alleged violation of his constitutional rights, he must set out with a reasonable degree of precision that of which he complains, the provisions said to have been infringed and the manner of that infringement. This principle was restated by the Court of Appeal in the case of **Mumo matemu vs Trusted Society of Human Rights Alliance and 5 Others (2013) eKLR** where the court held that the pleadings in a constitutional petition must contain sufficient particulars to enable the other party understand the case against him and respond to it. It must also state with specificity the reliefs being sought from the court.

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 40 of the constitution. PW1 testified that, he is the proprietor of land parcel number Kakamega/Malava/1450. That respondents made a road into through his land measuring 134 metres by 8 metres. PEx3 is a copy of a survey done by Mali survey services showing the extent of the trespass. That due to the trespass he has suffered damages to the tune of Ksh. 332,701.50. He produced the valuation report Kenya forest service report and survey report as PEx 1, 2 and 3. PW2 the Valuer, PW3 the Forest Service Officer and PW4 the Surveyor all corroborated the plaintiff’s evidence. I find that the pleadings in this case contain sufficient particulars to enable the respondent understand the case against them and respond to it. It has also stated with specifically the reliefs being sought from the court. The respondents called no witnesses to rebut this evidence adduced by the applicant. Having said that the instant case is 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 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 the above observations, the Respondent has 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 Article 40 of the Constitution of Kenya. The Respondent did not produced any Environmental Impact Assessment report to prove that their actions do not infringe the rights of the Petitioners accrued under article 40 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 Respondent is yet to comply or even make an inquiry. 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 Kakamega/Malava/1450 belonging to the petitioner. The Petitioners has a right to be compensated. However, general damages have not been proved and the same will not be awarded. I find that the petition is merited and I grant the following orders;

1. A declaration that the applicant's fundamental rights under article 40 of the constitution of Kenya have been contravened and violated by the respondent whose contractors, employees, and agents constructed a road on his land parcel number Kakamega/Malava/1450 on 15/12/2016.

2. The Respondents is ordered to adequately compensate the petitioner for compulsorily acquiring his land.

3. The Applicant is entitled to special damages incurred as a result of the violation amounting to Ksh. 332,701.50.

4. Cost of the petition to be borne by the Respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 19TH DAY OF MARCH 2019.

N.A. MATHEKA

JUDGE