

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KISII

PETITION NO. 5 OF 2021

JOYCE MOSE MORARO PETITIONER

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

PAULINE OKEMWA 2ND RESPONDENT

YOBESH MORANGA MAKORI 3RD RESPONDENT

EVANUS OENGA NYAMARI 4TH RESPONDENT

SAMSON ONGAKI MAKORI 5TH RESPONDENT

STEPHEN OBANGI ISAAC 6TH RESPONDENT

THADIUS NTABO NYAKUNDI 7TH RESPONDENT

JARED AMENYA RATEMO 8TH RESPONDENT

JUDGMENT

1. This suit was commenced through a petition filed on 27 April 2021 and which was amended on 15 November 2023. When initially filed, the petitioner had sued the Attorney General as the 1st respondent but she withdrew the suit against the Attorney General leaving the 2nd – 8th respondents as the only respondents. The 2nd respondent is sued as the Assistant Chief of Nyosia sub-location whereas the 3rd to 8th respondents are individuals who are sued because the petitioner contends that they were active participants in the construction of a road through her land parcel Nyaribari Chache/Keumbu/6245 (the suit land). In the petition, she has pleaded that on 12 March 2021, the 2nd respondent summoned members of the community, including the petitioner, to her office to inform them that the Kisii County Government intends to construct a road that would pass

through their parcels of land. She has pleaded that during that meeting, she raised issues regarding the process and notified the 2nd respondent that the road is not surveyed, and the map does not indicate any road passing through their parcels of land. She avers that she was shocked since no compulsory acquisition had been undertaken under Article 40 (3) of the Constitution. She claims that she raised the issue of how they will be compensated and the 2nd respondent informed her that the Government does not need to buy any land from an individual and insisted that she would call a baraza if the petitioner does not allow them to proceed with the construction. She avers that without regard to her concerns, the 2nd respondent proceeded to conduct a baraza and that a community member tried to convince the 2nd respondent to stop the project but she could not hear any of it. She pleads that her advocate wrote a letter dated 15 March 2021 to the 2nd respondent informing her that the road construction will be undertaken through private property hence need for acquisition and compensation but the 2nd respondent did not act. She pleads that on 2 April 2021, she got a report that people had trespassed into her land, were cutting trees, and destroying her plants. When she arrived, she found several people, including the 3rd to 8th respondents who threatened her and she reported at Keumbu Police Station. Not much came out of her report and the road was constructed through her land.

2. The petitioner contends that the actions of the respondents infringed her rights under Articles 40 (1), 40 (3)(b) (i) , 47, 27 (1) and 64 of the Constitution. She also claims violation of Sections 107 and 109 and 155 of the Land Act, 2012.
3. In the petition, she seeks the following orders :
 - (a) A declaration that her fundamental rights and freedoms as enshrined in Article 40 of the Constitution, and specifically the right to property has been contravened by the respondents.

- (b) A declaration that the actions of the respondents of encroaching, trespassing, and acquiring the suit land is illegal, unconstitutional, null and void.
 - (c) A declaration that she is entitled to prompt, just and adequate compensation in full within Article 40 (3) (b) (i) of the constitution in the sum of Kshs. 1, 178,750/= for the illegal compulsory acquisition of her proprietary interest in the suit land.
 - (d) General, exemplary, and aggravated damages under Article 23 (3) of the constitution, for the unconstitutional conduct of the respondents.
 - (e) Any other appropriate orders and reliefs deemed fit.
 - (f) Costs of the petition.
4. The 2nd to 8th respondents entered appearance and filed a replying affidavit sworn by Yobesh Morang'a Makori, the 3rd respondent. Inter alia, he deposed that the road construction was undertaken and authorized by the Kenya Urban Roads Authority (KURA), thus constructed under the authority of the national government. He added that road construction is within the purview of the Kenya National Highways Authority (KENHA), Kenya Urban Roads Authority, Kenya Rural Roads Authority (KERRA), and the County Governments, and they cannot exercise powers to construct a road as alleged by the petitioner. He avers that they do not have power to compulsorily acquire land. He otherwise denied that they had trespassed into her land and violated her constitutional rights.
5. The case was conducted through viva voce evidence.
6. In her evidence, the petitioner testified that on 12 March 2021, the 3rd, 4th and 7th respondents came to her home with a letter that she was being called to a meeting by the 2nd respondent regarding construction of a road. She sent her husband to attend. She claims that her husband protested that the road was not on the map but the 2nd respondent

proceeded to call a baraza so as to inform the public of its construction. She did not attend the baraza. On 15 March 2021, she instructed her advocate to write a letter to stop the construction but it was not responded to. On 2 April 2021, she found the 3rd – 8th respondents working on her land and she reported to the police but she was not assisted. She contended that there was no road in the map passing through her land. Cross-examined, she yielded that she did not go to the offices of KURA or KERRA to confirm whether there was a Government project to create the road and she was not aware that the road was being made by the national government through KERRA and CDF. She confirmed that she did not attend the meetings that were called but it was her husband.

7. PW – 2 was David Lemaiyan, a Land Surveyor working with the Ministry of Lands in Kisii. He produced a report dated 18 March 2023 after visiting the ground. He found that there was no road in the Registry Index Map (the map) passing through the petitioner's land but on the ground the road had existed for a long time (over 30 years) and was being used by the community. What transpired in this instance is that the road was cleared and improved. He elaborated that the road is 5 metres wide and all land owners have developed their properties with this road in mind. He added that even when the neighbouring parcels were subdivided, they acknowledged the existence of this road. He explained that this road joins the other road networks in the map to allow for access. According to him the whole community save for the petitioner have no issue with the road as they all use it. He stated that even the petitioner uses this road and it is the same road they used to access the suit land.

8. The 2nd – 8th respondents called the 3rd respondent as their witness. His evidence was that the road was made by KERRA and that there was public participation before the construction. They made no personal contribution to the works that went to the road. He testified that this road has been there for a long time and the works entailed clearing the

bushes and slashing grass along it. He explained that they were working under a government contract. He stated that if at all the road was not in the map then it is due to an error as the road has always been there and was even used by the petitioner when she bought the land and was developing it.

9. With that evidence, the respondents closed their case.
10. I invited counsel to file submissions and I have taken note of the submissions filed.
11. The case of the petitioner is that the 2nd – 8th respondents trespassed into her land and illegally created a road through it while the map does not recognize the existence of a road through her land. She inter alia claims that their actions violated her constitutional right to property and contends that the 2nd – 8th respondents need to compensate her. The 2nd – 8th respondents contend that this road has been there for a very long time and is what the community has been using. They add that they were engaged to undertake the works vide a government project undertaken by KERRA.
12. Whereas it is true that there is actually no road on the map, the evidence is overwhelming that this road has been used by the community since time immemorial. Mr. Lemaiyan, the surveyor, gave an elaborate account of how this road networks with the other roads that are noted in the map so that the whole area becomes properly accessible. Other land owners have also subdivided and used their parcels of land acknowledging the presence of this road. It is not even the petitioner alone who is affected by this road. The same road, despite not being in the map, also traverses the land parcels No. 830, 3031, and the immediate plot that neighbours the land of the petitioner. There is consensus that nobody has ever complained about this road including the petitioner who has even been using it from the time that she bought the suit land.

13. In his submissions, Mr. Nyambati, learned counsel for the 2nd – 8th respondents, submitted that the respondents rely on the doctrine of prescription while Mr. Bonuke in his submissions was of opinion that the issue of prescription was an afterthought as it was not pleaded. On this issue I will agree with Mr. Bonuke, for the issue of prescription or easement was not pleaded and it may be imprudent to make a certain determination on it. But this does not take away the fact that the road has been there and the impact of that finding is that it is not true, as claimed by the petitioner, that the 2nd – 8th respondents trespassed into her land, acquired it, and converted it into a road. They could not possibly have managed to do that because the road was always there. What they did was simply improve it to make it be of better utility.

14. And while I am on this issue, we all know that roads in Kenya are managed by either the County and/or national governments and we have parastatals in charge of roads, being KURA, KERRA or KENHA. I think it behoved the petitioner to first confirm that the road agencies were not at all involved in the construction of the road and that the 2nd – 8th respondents were acting on a frolic of their own before suing them. The petitioner has not demonstrated that she sought advice from the road agencies, that is KURA, KERRA, or KENHA as to whether they recognise the road and whether they were involved in its improvement as asserted by the 2nd – 8th respondents. I would not in absence of communication from these road agencies, wish away the defence of the 2nd – 8th respondents that the improvement was undertaken by the road agencies.

15. My view of the matter is that the map has an error and it would be against public interest to allow the petitioner take advantage of that error in order to deny the community a road of access. In case I am wrong in that conclusion and assuming that the map truly has no error, and further that the petitioner deserves to be compensated for the use of her land as a road, then the petitioner is chasing compensation from the wrong parties. If it is the case

of the petitioner that she needs to be compensated for the public to use the road, then she has sued the wrong parties. The 2nd – 8th respondents are mere individuals who are not involved in the process of compulsory acquisition of land and are not the agencies to involve in conversion of private to public land. If the petitioner feels that she needs to be compensated then she needs to seek compensation from either the national and/or county government and involve the National Land Commission in the process. I do not see how the 2nd – 8th respondents can be held liable for compulsory acquisition or liable to compensate the petitioner in the event that the community uses part of the petitioner's land as a road.

16. For the foregoing reasons, I do not find merit in this petition and it is hereby dismissed.

The parties are close community members and come from the same village and in those circumstances I make no orders as to costs.

17. Judgment accordingly.

DATED AND DELIVERED THIS 5TH DAY OF MARCH 2026

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Ngala for the petitioner

No appearance for the respondents

Court Assistant – Michael Oyuko