

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ELC PETITION NO. 3 OF 2023

IN THE MATTER OF ARTICLES 22 AND OF THE CONSTITUTION OF KENYA,

AND

IN THE MATTER OF VIOLATION AND THREATENED VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 10(a) (b), 19(2), 20 (3)(b), 21(1), 22(1), 23(1), 23(1) (3) (a-e), 24, 25(a), 27, 31(b), 40(1) (a-b) 3(a-b), 43(c), 47(1-3), 48, 57(c), 159, 160, 258 AND 259 (a) (b) (c) (d) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF CONTRAVENTION OF THE CONSTITUTION AT ARTICLES 10, 47 (1) (f) AND CONSTITUTIONAL RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 43 (1) (f) and 47 (1) (2) OF THE CONSTITUTION OF KENYA

BETWEEN

CHARLES OGUTU MADUMA.....1ST
PETITIONER

ABEDNEGO OOKO MADUMA.....2ND
PETITIONER

NILO ONYANGO MADUMA.....3RD
PETITIONER

VERSUS

COUNTY GOVERNMENT OF MIGORI.....
.....RESPONDENT

JUDGMENT

1. The Petitioner brings the Petition dated 4th October, 2023 against the Respondent, in which it prays for the following:

- a) **A declaration be and is hereby issued that the action of the respondent to destroy trees and food crop belonging to the petitioner and create a road on LR NO Kamagambo/Kanyajuok/411 is in violation of the Fair Administrative Actions Act, Constitution of Kenya 2010 and therefore illegal.**
 - b) **An order for compensation be and is hereby issued against the respondent to the petitioner for the two houses demolished.**
 - c) **Exemplary damages to the petitioner.**
 - d) **Costs of the petition**
 - e) **Any other relief and/or orders the Honourable Court deems appropriate, just and fit to grant.**
2. The Petition is supported by the grounds on its face and the Petitioner's Supporting Affidavit sworn on the same day. In response thereto, the Respondent filed its Replying Affidavit sworn on 3rd December, 2024.

Petitioner's case

3. The 1st Petitioner contends that together with his co-petitioners, they are jointly registered as the owners of Kamagambo/Kanyajuok/411 the suit property where they have grown different crops and trees.
4. He further contends that in November, 2022, the Respondent forcefully destroyed their crops and trees and created a nine-

meter road. He added that the said destruction of the crops and trees was their only source of income.

5. The 1st Petitioner contends that they later engaged a surveyor to ascertain the extent of the Respondent's trespass onto their land. He added that they also engaged the valuers to value the damaged land for purposes of seeking compensation.
6. The 1st Petitioner contends that the Respondent had assured them that they would be compensated immediately the funds were received from Nairobi but to date they are yet to receive the same. It was his contention that the government, including the Respondent, could only acquire private property compulsorily where there is adequate and prompt compensation to the owner.
7. He contends that it was in the interest of justice that the Respondent be ordered by this Court to compensate them. He urged the court to grant them the prayers sought in the petition.

Respondent's case

8. The Respondent filed its Replying Affidavit sworn on 2nd December, 2024 by one Elphas Omollo, the Director in charge of Migori County Public Works, Roads and Transport.
9. He averred that the Respondent never engaged any contractor to grade or excavate a public road on the suit parcel. He added that the Respondent was unaware of the said allegations by the Petitioner. He averred further that the Respondent never

advertised nor commissioned work for creation of a road on the suit land. He added that the Petition lacked specific factual basis and that the supporting affidavit did not disclose any evidence that the Petitioner's crops and trees were destroyed by the Respondent.

- 10.** He added that the Petition offends the provisions of **Order 2 Rule 1(1)** of the **Civil Procedure Rules** as it fails to disclose the Respondent's departments and officers concerned. It was his averment that the Petitioners failed to disclose any material infringement or violation of their constitutional rights. He also averred that the Petition lacked basis for breach of the Petitioners right to fair administrative action or decision capable of being challenged.
- 11.** He averred further that the Petitioner failed to disclose the legal rights that have been allegedly violated with the requisite exactitude and thus the Petition was a non-starter. The Respondent urged the court to dismiss the Petition with costs.

Petitioner's Rejoinder

- 12.** The Petitioner stated that **Section 5 Schedule 4** of the Constitution of Kenya assigns the responsibility over county roads to the Respondent. The Respondent has not denied that the road in question is a county government responsibility. He added that the Respondent has not challenged the survey and valuation reports filed that confirmed evidence of the road.

- 13.** The Petitioner also stated that they provided a report from the County Forest Officer which showed the number and value of trees that were destroyed during the said trespass.
- 14.** That the Respondent's action amounts to compulsory acquisition of their land and failure to issue them with an opportunity to be heard and compensation violated their constitutional rights.

Submissions

- 15.** Counsel for the Petitioner filed his submissions dated 9th December, 2025 where he gave a background of the case and identified two issues for determination. The first issue was whether the Petitioners have proved their case to the required standard and the second was whether the Petitioners are entitled to the reliefs sought.
- 16.** On the first issue, he relied on the case of ***Petition No. 300 of 2015 (Nrb)*** where the court cited with approval the case in ***Interchemie EA Limited V Nakuru Veterinary Centre Ltd.*** He submits that the Petitioners have annexed a copy of the title deed and official search as proof of ownership of the suit land.
- 17.** It was counsel's submission that the Petitioners also produced a report on the boundary which confirmed that the Respondent had encroached onto their suit land by 2 meters vide the erected 9-meter road reserve.
- 18.** He further submits that the Petitioners also annexed a valuation report together with photographs which confirmed

that the offending road had affected 0.5 of an acre. He added that the value of an acre of the land before encroachment was between Kshs. 1,200,000 and Kshs. 1,800,000 and after encroachment was given as Kshs. 800,000 which has since had a negative effect.

- 19.** It was his submission that there was sufficient evidence that the road reserve by the Respondent had extended onto the Petitioners' land thus encroaching onto it and they, the Respondents, had trespassed and still continue to trespass onto their land. He relied on **Article 40** of the constitution.
- 20.** He also submits that there was evidence from the Sub-County Forest officer which confirmed that the destroyed trees were valued at Kshs. 828,581.
- 21.** On the second issue, counsel submits that the Petitioners having failed to be accorded a chance to be heard before the suit land was forcefully taken from them was in violation of **Article 47** of the constitution. He relied on the case of ***Park Towers Ltd V John Mithamo Njika et al 2014.***
- 22.** He further submits that the Petitioners deserve an award of exemplary damages. He relied on the case of ***Kookes V Barnard [1964] AC 1129, Willesden Investment Ltd V Kenya Hotel Properties Nrb HCCC No. 367 of 2000*** and **Articles 22 and 23(3)** of the constitution.
- 23.** He submits that the Petitioners are entitled to the reliefs sought in the Petition and urged the court to allow the same as prayed.

24. Counsel for the Respondent on the other hand filed his submissions dated 16th December, 2025 and identified two issues for determination, whether the Petition meets the constitutional threshold and whether the Petitioners have proved trespass or road construction by the Respondent.
25. While submitting in the negative, he cited the case in ***Anarita Karimi Njeru V Republic (1979) eKLR*** and the Court of Appeal case in ***Mumo Matemu V Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR***.
26. It was counsel's submission that the Petitioners listed a myriad of constitutional provisions allegedly violated by the Respondent but failed to demonstrate with any specificity how the Respondent's conduct is directly involved in the said violations.
27. He submits that such an omnibus pleading offends the precision requirement and thus renders the Petition constitutionally incompetent.
28. He further submits that liability under **Article 40** of the constitution only arises where deprivation is proven to have been carried out by a state organ. He argues that in the present case, there was no such nexus to confirm that the Respondent constructed the road or destroyed the Petitioners property.
29. He also submits that the Petitioners have failed to prove that the Respondent's conduct caused their alleged food insecurity provided under **Article 43(1) (c)** of the constitution.

- 30.** He went on to submit that **Article 47** of the constitution only applied where there is an identifiable administrative decision which the Petitioners have not identified and action done by the Respondent.
- 31.** Counsel submits that the cause of action is that of trespass and destruction of property which are founded under civil law. He adds that the Petitioners ought to have filed an ordinary plaint and sought damages under the Civil Procedure Act.
- 32.** On the second issue, counsel relied on **Sections 107, 108 and 109** of the **Evidence Act** and submits that the Petitioners ought to have proved on a balance of probabilities that it was the County Government of Migori that entered their land and constructed the alleged road.
- 33.** He submits that the boundary confirmation report by a private surveyor only confirmed the land boundaries and does not identify the person that constructed the road or when. He added that the valuation report only quantified the loss but does not place any liability on the Respondent.
- 34.** It was counsel's submission that the Petitioners failed to produce photographs of county machinery, registration numbers of the equipment and eye witness affidavits that identified the county officers or any document that linked the Respondent to the alleged acts.
- 35.** In conclusion, counsel submits that the Petitioners failed to meet the constitutional threshold to sustain the Petition. He

urged the court to dismiss the Petition with costs the Respondents.

Analysis and Determination

36. I have carefully considered the pleadings, examined the evidence together with the submissions and analysed the law applicable and the issues that arise for determination are as follows:

a) Whether the Petition is merited.

b) Whether the Petitioners are entitled to the reliefs sought.

A) Whether the Petition is merited.

37. It is trite that a party who alleges a constitutional violation is duty bound to demonstrate the nature of the right and how it has been violated. This is the threshold established in the case of **Anarita Karimi Njeru V Republic [1979] eKLR** where the court explained; -

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

38. Further, in the case of *Manase Guyo & 260 others v Kenya Forest Services [2016] KEHC 3726 (KLR)* the court held that:

“To succeed in their Petition, the petitioners are required to state in a clear, concise and precise manner the correlation between the alleged infringement and the action of the respondent. It was not sufficient to merely cite provisions of the Constitution they believe to have been infringed but to also state the manner in which the provisions were infringed. This is because as it was held in Lyomoki and Others vs Attorney—general [2005] E A 127, the onus, in constitutional Petitions, as in other ordinary civil actions, is upon the petitioner or the plaintiff to establish a prima facie case, and thereafter the burden shifts to the respondents to justify the limitation to those rights”.

39. It was the Petitioners case that the Respondent trespassed onto their land and destroyed the trees and crops which they depended on as their source of livelihood. They claimed that the Respondent constructed a road reserve on their property without having notified them thus infringing on their constitutional right to ownership of property, right to fair administrative action and their economic right to food and income.

- 40.** The Petitioners cited breach of **Articles 40, 43(1)(c)** and **47** of the Constitution, by the Respondent.
- 41.** The Respondent on the other hand contends that the case being that of alleged trespass and destruction of property fell under ordinary civil law. It was the Respondent's contention that the Petitioners did not prove the alleged constitutional violations vis a vis the specific articles of the constitution.
- 42.** It also contends that the Petitioners did not provide evidence that it was the Respondent that constructed the road or destroyed their crops on the suit property.
- 43.** This court has keenly perused the court record and facts, and it is my view that the Petition as presented advances constitutional issues for determination by this court. It my opinion that the Petitioners have set out with a reasonable degree of precision that of which they complain, the provisions said to be infringed, and the manner in which they are alleged to be infringed.
- 44.** It is this court's view that the Respondent has merely given a blanket denial that it was not responsible for construction of the road, it did not deny that the said road was constructed on the Petitioners' property.
- 45.** The Respondent did not challenge the report dated 12th October, 2022 by the surveyor nor the report of the destruction of trees and crops dated 30th November, 2022 by the Rongo Sub-County Forest officer.

- 46.** It is evident that the Petitioners are the registered owners of LR NO Kamagambo/Kanyajuok/411 as per the annexed title deed issued on 25th June, 2021.
- 47.** It is this also this court's view that from the evidence adduced including the sketch map, the Respondent encroached on a portion the suit parcel being approximately 2 meters into the suit parcel. There is no explanation by the Respondent how they came to enter into the Petitioners land and erected a road therein.
- 48.** In addition, there is no evidence that the portion of the suit property was compulsorily acquired by the government to warrant encroachment by the Respondent.
- 49. Section 3 (1) of the Trespass Act, Cap 294** provides that:
“Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”
- 50.** It is this court's view that the aforementioned actions by the Respondent amount to trespass, thus infringing on the Petitioners constitutional rights. I therefore find that the Petition is merited in that respect.

B) Whether the Petitioners are entitled to the reliefs sought.

- 51.** The Petitioners have sought for special damages, general damages for the unlawful activities of the Respondent and exemplary damages.
- 52.** I have considered the report 30th November, 2022 being assessment of the destruction of Eucalyptus and Ficus trees grown by the Petitioners. The report assessed the total costs of destruction of the trees at Kshs. 828,851.
- 53.** It is trite law that special damages require to be specifically pleaded and proved. In this case, the Petitioners have pleaded and proved this claim through production of the assessment of destruction of trees report by the Rongo Sub-County Forest officer. I thus allow the claim of special damages.
- 54.** On the issue of general damages for trespass the court in the case of ***Philip Ayaya Aluchio v Crispinus Ngayo [2014] eKLR*** held as follows:

“The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the plaintiff’s property immediately after the trespass or the costs of restoration, whichever is less See Hostler - VS - Green Park Development Co. 986 S. W 2d 500 (No. App. 1999).”

- 55.** The Petitioners produced a valuation report dated 2nd August, 2023 which ascertained that the value of the suit property is Kshs. 800,000.
- 56.** This court having established that damage occurred on a portion of the Petitioners suit parcel. I am of the view that an award of Kshs.800,000/- as general damages for trespass suffices.
- 57.** It is trite law that exemplary damages are placed at the discretion of the court and are awarded with some degree of caution and in limited situations. In the case of ***Mikidadi v Khaigan and Another [2004] eKLR 496*** the court held as follows:

“Exemplary damages are only to be awarded in limited instances namely, (a) oppressive arbitrary or unconstitutional action by servants of government, (b) Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff, or (c) Cases in which the payment of exemplary damages is authorized by statute.”

- 58.** It is this court’s view that in exercise of its discretion, finds that the Petitioners have not met the threshold for grant of exemplary damages more specifically condition b) that the profit cannot exceed the compensation payable to the Petitioners.

59. The upshot of the foregoing is that judgment is hereby entered in favour of the Petitioners against the Respondent in the following terms:

1) Petitioners are awarded damages to be paid by Respondent as follows;

a) Special damages - Kshs. 828,851/-

b) General damages - Kshs. 800 000/-

c) Exemplary damages - Nil

Total Kshs. 1,628,851/-

2) The Petitioner is awarded costs of the Petition.

3) The Respondent is to pay interests on the figures mentioned in clause 1) which is to be computed after 60 days from the date of delivery of this judgment.

60. Orders accordingly.

Judgment dated, signed and delivered virtually via the Teams Platform this on 26th day of February 2026

**HON. DR. IUR F. NYAGAKA
JUDGE**

From 12:16 PM, in the presence of,

Ms. Atieno holding brief for Orondo Adv. for Petitioners

Mr. Otieno David for Jura for the Respondent.