

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ELC PETITION NO. E002 OF 2022

DARSHANABEN DHARAMENDRA KUMAR PATEL & ANOR.....
PETITIONERS

VERSUS

KENYA NATIONAL HIGHWAY AUTHORITY.....
RESPONDENT

JUDGMENT

THE PETITION

1. The petition dated 14th January 2022 seeks the following orders:
 - a. A declaration that the petitioners are the rightful legal and beneficial owners of plot number CR 47840 and being a subdivision of LR 9122/489 Mtwapa Creek measuring approximately 0.0744 hectares;
 - b. A declaration that the petitioner’s fundamental rights and freedoms as ensuring under Article 40, 47, 48, and 60 of the Constitution of Kenya 2010 have been contravened and infringed upon by the respondents;
 - c. A declaration that the respondent’s threat of demolition of the premises erected on LR CR 47840 and being a subdivision number 9122/489 creek is illegal unlawful, wrong and an infringement and violation of the petitioners’ constitutional rights to property;
 - d. A conservatory order restraining, prohibiting and stopping the respondents jointly and severally their agents officers and any person acting under them from entering upon trespassing and crouching constructing any structures offering for sale selling disposing or charging, subdividing, dealing, alienating, occupying, managing, letting, or otherwise using, residing, and remaining or representing themselves as the registered owners of the property or in any way whatsoever from interfering with the petitioner’s proprietary right including the right to quiet possession and enjoyment over the suit premise;
 - e. That this honorable Court do grant any other appropriate relief and do make such further or other orders and do give such further or other directions as this court may consider appropriate for the purpose of enforcing or securing the enforcement of the provisions of **Articles 1(1) (2) (3)(a), (b) (4)(b), 2 (4), 6(1)(2), 10, 165 (3)(d)(ii) (iii), 238,244, 258(1) and 259(1)(3) of the**

- Constitution** and any other articles or the constitution in relation to the petitioner in this petition;
- f. Costs of this petition.

2. The petitioners claim that they own the suit land which measures 0.0744 hectares. The respondent has, without any consent from the petitioners unlawfully and by use of force threatened to interfere with the petitioners' quiet possession and enjoyment of the suit property for the ostensible reason that it encroaches on a road reserve. The petitioners claim that they have not been afforded any opportunity to present their side of the story or to show that they do not occupy the road reserve. They state that they were registered as co-owners on 18th May 2010 and a certificate of title was issued to them. The suit land has been always in their possession. They have leased it to a tenant. In **2021** the respondent, without production of any court order authorizing its action, gave the petitioners notice claiming that the suit property had encroached on a road reserve, requiring the same to be removed or demolished by the petitioners in default of which the respondent would carry out the demolition. According to the petitioners, the suit property does not encroach on any road reserve; that the structures erected thereon have been built within the boundaries of the suit property and upon legal authorization. The petitioners accuse the respondent of trespassing on their property which hosts a petrol station. The petrol station is operational. The petitioners claim that having lawfully obtained title, it can only be extinguished legally and procedurally. They maintain that

respondent's threat is against the rule of law social justice integrity and good governance and an infringement of the petitioner's constitutional rights to property as enshrined in **Article 40(3)** of the Constitution and is against the rules governing fair hearing and just administrative process and thus in contravention of **Article 40(7)** of the constitution and the Fair Administrative Action Act.

THE RESPONSE

3. The respondent filed replying affidavits sworn by **Daniel Mbuteti** dated 22nd March 2022 and 6th September 2023 in which the deponent stated as follows: that the respondent does not contest the petitioner's title deed to the suit land it has never laid in a claim to the suit property nor has it ever alleged that the suit property lies on a road reserve. The respondent has mandate under the Roads Act (No. 2 Of 2007) to construct and operate and rehabilitate and upgrade national trunk roads. The respondent is currently undertaking the construction of the Nyali-Mtwapa-Kwa Kadzengo section of the A7 road. The road section is scheduled for expansion into a dual carriageway which has necessitated land acquisition in some areas. According to the respondent, at its request, a portion of the land **LR Number 9122** measuring 0.2243 hectares was gazetted for acquisition before it's subdivision. This was done vide **Gazette Number 8482 of 25 October 2020**. That gazette notice conveyed intention to acquire. Notice of inquiry was published in **Gazette Notice Number 14012 Of 20th**

December 2021. Inquiries with regard to the suit land were scheduled for **18th February 2022.** The suit land is reflected in the survey of Kenya map under F/R 496/27. At the inquiry it was determined that personal number 9122 had been closed for subdivision to create several subplots including the petitioners' **Plot Number 9122/498.** It thus became necessary to delete **Plot Number 9122** since it had been closed for subdivision. The affected subplots were gazetted except the petitioners' **Parcel Number 9122/498.** The deponent avers that although **Parcel Number 9122** has been subdivided into several plots including **Plot Number 9122/498,** that parcel will not be affected by the improvement of the road for the reason that the existing road reserve will accommodate their upcoming road expansion. Consequently, the petitioners were not identified as Project-Affected Persons on the matter of the dualling of the road and no demolition notice has been issued to them, and indeed they have exhibited none in their petition. The conclusion of the deponent is that the petition is premature because the respondent has no intention to acquire the suit property. The respondent denies that it has violated any constitutional or statutory rights of the petitioners, and that all the actions it has undertaken, including the issuance of notice of intention to acquire, which was done on its behalf by the National Land Commission were done in accordance with the statute and the Constitution.

4. Further, it is stated that the petitioners have not demonstrated to the required standard how their individual rights and fundamental freedoms were infringed or threatened by the respondent since no demolition notice has been availed as evidence.
5. Midway through the proceedings it appears that Mr. Mbuteti ceased working with the respondent and two affidavits, each bearing the same content as his analyzed herein above were filed sworn by **Michael Obop**, the Assistant Director Lands Assets Department Directorate of Highway Design and Safety within the respondent corporation.
6. A site visit was conducted by the Deputy Registrar of this court and a Site Visit Report was prepared and filed on 11th September 2023.

HEARING

7. Hearing was undertaken by way of *viva voce* evidence.

Petitioner's Evidence.

8. The 1st petitioner testified orally in a brief manner and produced documents filed in the case on their behalf and was cross-examined. 2 witnesses for the petitioners were called including a surveyor Mr. Mwanyungu.
9. The 1st petitioner adopted the statements in the supporting affidavit evidence-in-chief and the exhibits attached to the affidavit in support of the petition and also in the list and supplementary list of documents, filed on 25th January 2022 and dated July 2023 respectively, as her

documentary evidence. There is a road being built near his home by the respondent. He testified that the respondent marked the property with yellow marks between the year 2022 and 2023, but they did not do anything else to the property. According to his evidence, the 1st petitioner wants to know if the respondent has appropriated the suit land or not. He sought compensation in the event the respondent needed to acquire his property. He averred that he had not been given any notice before the marking of the property.

10. Upon being cross-examined by Mr. Maruti, he admitted that there are no marks appearing in the photographs of the premises which he had produced, and also admitted that he was present at the site visit conducted by the Deputy Registrar of this court. He testified that one of the marks effected still subsists and there is no construction going on in her property. He had nothing to demonstrate that the respondent had taken possession of his property. He stressed that if the respondent takes up a property, he would need compensation. He is apprehensive of demolition by the respondent. Regarding her own Land Surveyor's Report, she admitted that the same reflected that there was a sign board from the suit premises which had encroached on the road reserve.

11. On Re-examination, however she stated that the sign board is outside the perimeter boundary but that it belongs to the tenant on the suit premises. She also stated that she has not received any notice from the respondent that her property is on a road reserve.

12. **Mr. Mwanyungu, Surveyor**, testifying on behalf of the petitioners, gave oral evidence and produced his Surveyor's Report dated 18th September 2022. He stated that the purpose of his exercise was to re-establish the position of the suit property and show the actual position of developments and take note of any encroachments. According to him the property borders the Mombasa-Malindi road and it hosts a Petrol Station which has underground fuel tanks and a sign post. The sign post is erected on the road reserve. All other developments are within the land **Parcel Number 498**. The property itself does not encroach on the road reserve and does not interfere with the carriageway. He visited the site physically. There are yellow markings on the walls of the structures along the road. They were arrows and numbers. However, he did not capture those markings since he was more interested in the developments. Nevertheless, he also observed that in most road development cases, contractors usually effects those markings.
13. Upon cross-examination by Mr. Maruti, Mr Mwanyungu indicated that he did not see any evidence of wrongdoing on the part of the respondent.
14. **PW3, Rashid Harun Shake**, testified and gave the value of a suit property at Kshs. 52,000,000/-.
15. On cross- examination by Mr. Maruti, he stated that only a very small portion of the suit property encroaches on the road reserve. He did not include that portion in his Valuation report. According to him, there were

no markings on the premises and the petrol station business was still in operation.

Defence Evidence

16. **Michael Obop, DW1** gave evidence on behalf of the respondent. He adopted all the contents of the replying affidavit set out earlier here in above as his evidence and was cross-examined by Ms Ombat. He stated that there would be no justification for the payment of Kshs. 52,000,000/- claimed by the petitioners.
17. Upon cross-examination by Ms Ombat, she he stated that only a small portion of the canopy of the petrol station encroached on the road reserve. He denied that the respondent had ever applied marks on the property as claimed by the petitioner.
18. Upon cross-examination he denied that **Plot Number 9122/498** is being acquired by the respondent.

SUBMISSIONS.

19. This court upon perusal of the file found only the respondent's submissions. I have considered those submissions in the preparation of the present judgment.

ANALYSIS AND DETERMINATION.

20. It is not in doubt that the petitioners own the suit land and that it is in use by their tenant who operates a petrol station thereon. The petitioner's

case is that the respondent has, threatened to interfere with the petitioners' quiet possession and enjoyment of the suit property for the ostensible reason that it encroaches on a road reserve. The petitioners state that in **2021**, the respondent, without production of any court order authorizing its action, gave the petitioners notice, claiming that the suit property had encroached on a road reserve, requiring the same to be removed or demolished by the petitioners in default of which the respondent would carry out the demolition. The petitioners claim that they have not been afforded any opportunity to present their side of the story or to show that they do not occupy the road reserve. Consequently, they claim infringement of the petitioner's constitutional rights to property as enshrined in **Article 40(3)** of the Constitution and a violation of the rules governing fair hearing and just administrative process and thus in contravention of **Article 40(7)** of the Constitution and also in contravention of the Fair Administrative Action Act.

21. The allegations made by the petitioners are denied by the respondent who states that neither has it contested the petitioner's title deed to the suit nor laid any claim to the suit property. It also states that it has it ever alleged that the suit property lies on a road reserve.

22. The issue arising for determination is whether the petitioners' constitutional rights under **Articles 40(3)** and **40(7)** of the Constitution have been violated by the respondent. Only a scrutiny of the evidence

availed by the parties can establish whether violation is threatened or has occurred.

23. The petitioner's evidence comprised of the written and oral statements of their witnesses and documents, *inter alia*, a Survey Report dated **18th September 2022** prepared by their surveyor, a survey plan, and a valuation report.

24. The legal rule is that evidence adduced must sufficiently support the pleadings to the required standard of proof in order for a legal claim to succeed. Where that has not been done then the claim can not succeed.

25. The petitioner's oral evidence is that there is a road being built near his home by the respondent. He testified that the respondent marked the property with yellow marks between the year 2022 and 2023, but they did not do anything else to the property. According to his evidence, the 1st petitioner wants to know if the respondent has appropriated the suit land or not. That he would like to be awarded compensation in the event the respondent needed to acquire his property. That there is no construction going on in his property. He had nothing to demonstrate that the respondent had taken possession of his property. The petitioner's witnesses never produced any evidence of yellow marks allegedly affixed by the respondent on their wall. A notice dated 21/10/2020 mentioned at **paragraph 11** of their petition was exhibited in their affidavit in support of the motion. Though it was not part of the evidence in support of the

motion, it is important to examine it, because it is also relied on by the respondent. That notice reads as follows:

**“THE LAND ACT
NO 6 OF 2012
DUALLING OF NYALI BBRIDGE -MTWAPA -KWA KADZENGO -KILIFI
(A7) ROAD SECTION
INTENTION TO ACQUIRE**

IN PURSUANCE of that Land Act 2012 part VIII, the national land commission, on behalf of Kenya National Highways Authority (KeNHA), gives notice that the National Government intends to acquire the following parcels of land for the dualling of Nyali Bridge -Mtwapa -Kwa Kadzengo -Kilifi (A107) Road project in Mombasa and Kilifi Counties.

Schedule

<u>Parcel No.</u>	<u>Registered Owner</u>	<u>Acquired Area(Ha)</u>
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Plan of the affected land may be inspected during office hours at the office of the National Land Commission, Ardhi House 3rd Floor Room 305 Mombasa and Kilifi County Co-Ordinators’ Office.

Dated the 16th October 2020.”

26. A perusal of that notice does not reveal any threat by the respondent to demolish the petitioners’ property. It innocuously notifies the owners of the properties listed that they will be acquired for the dualling of Nyali Bridge -Mtwapa -Kwa Kadzengo -Kilifi (A107) Road project in Mombasa and Kilifi Counties.

27. PW2's evidence was to the effect that the property itself does not encroach on the road reserve and does not interfere with the carriageway; that there are yellow markings on the walls of the structures along the road comprising of arrows and numbers. Nevertheless, to downplay the importance of the marks, he also observed that in most road development cases contractors or usually effect those markings. Upon cross-examination by Mr. Maruti, PW2 indicated that he did not see any evidence of wrongdoing on the part of the respondent.

28. The evidence of the respondent is that the suit property is not even gazetted as one of the properties targeted for acquisition. I have perused the gazette notices exhibited by the respondent and noted that that is the case. There was no affidavit filed by the petitioner in response to the respondent's claim that the land is not gazetted, is not needed for road expansion and will not be affected by the construction of the road. In the circumstances, I find that there is no evidence, first, that the respondent has undertaken any action that should occasion the petitioner any harm or loss to his property. Secondly, the petitioner is only apprehensive that their land will be taken away without any compensation. In fact, **PW1** showed that he is not aware of the actual state of affairs when he stated as follows:

"They have not done anything on my property. They are building a road. I need compensation if they need my premises."

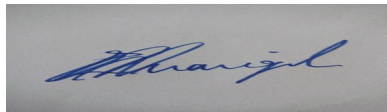
29. In cross-examination he stated as follows:

“I don’t have anything to show that KeNHA entered my property. If they come into my property, I need compensation. I am apprehensive of demolition.”

30. The respondent having demonstrated that it has complied with the law and that all the plots needed for the road expansion have been gazetted for compulsory acquisition for road construction purposes, the evidence of the petitioner’s witness above is an admission that the petitioner has no claim under the law of the constitution as against the respondent. The petition herein thus lacks merit and it is hereby dismissed. However, in the light of the circumstances of this case, it is hereby ordered that each party shall bear their own costs.

It is so ordered.

Dated, signed and delivered at Malindi on this 29th day of January 2026.

A rectangular box containing a handwritten signature in blue ink, which appears to read "Mwangi Njoroge".

**MWANGI NJOROGE,
JUDGE, ELC, MALINDI.**