



REPUBLIC OF KENYA



Mwinzi & 173 others (Per Attached List of Schedule) v Kenya Rural Road Authority & 3 others (Environment & Land Petition 2 of 2021) [2024] KEELC 427 (KLR) (31 January 2024) (Ruling)

Neutral citation: [2024] KEELC 427 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND PETITION 2 OF 2021**

LG KIMANI, J

JANUARY 31, 2024

**IN THE MATTER OF CONTRAVENTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS UNDER ARTICLES 10,27,28, 29,
35, 40, 42, 43, 47, 50, 60, 62, 63 AND 67 OF THE CONSTITUTION**

AND

IN THE MATTER OF COMPULSORY ACQUISITION OF LAND

BETWEEN

DOMINIC MUSYA MWINZI 1ST PETITIONER
NICHODEMUS MALUKI MAITHYA 2ND PETITIONER
FRANCIS MWANIKI MALUKI 3RD PETITIONER
JOHN MUTUA MULUNGA 4TH PETITIONER
FREDRICK KILUKU NGWENZE 5TH PETITIONER
MWANGANGI KIMANZI 6TH PETITIONER
KALUMU MUSYOKI MUTHAI 7TH PETITIONER
KILONZI MUSYA 8TH PETITIONER
MUTUNGA KISOYA 9TH PETITIONER
SYUMITI KITHEKA 10TH PETITIONER
MWANGANGI MAITHYA 11TH PETITIONER
PAUL KYENGO 12TH PETITIONER
JONATHAN MUSYOKA MWAKUYA 13TH PETITIONER
KITEME ITONGE 14TH PETITIONER
MWATHI MULONZYA 15TH PETITIONER



MESHACK KITHUVA KING'AO	16TH PETITIONER
MUTHUI MBILA	17TH PETITIONER
KATHURE MUTUNGA	18TH PETITIONER
KASYOKA KIMANZI	19TH PETITIONER
KYAMBI MUSYOKA MBILA	20TH PETITIONER
MWASYA KATHERU	21ST PETITIONER
SAMUEL MUSINGILA SIMON MWINZI & 152 OTHERS	22ND PETITIONER
PER ATTACHED LIST OF SCHEDULE	

AND

KENYA RURAL ROAD AUTHORITY	1ST RESPONDENT
THE HON. ATTORNEY GENERAL	2ND RESPONDENT
PRINCIPAL SECRETARY, MINISTRY OF TRANSPORT, INFRASTRUCTURE, HOUSING AND URBAN DEVELOPMENT	3RD RESPONDENT
THE PRINCIPAL SECRETARY MINISTRY OF LANDS AND PHYSICAL PLANNING	4TH RESPONDENT

RULING

1. Before the Court is an Amended Petition dated 6th April 2018. The petitioners claim that they are male and female adults of sound mind working for gain and residing in Kitui County. They bring this petition on their behalf and on behalf of 152 other persons whose names and signatures are appended to the verifying affidavit. The said Petitioners are the registered proprietors of different parcels of land situated in the following shopping/town centres which lie along Mwingi-Kandwia-Tseikuru Road, Ikuuni Market, Kang'ethya Market, Kwa Kimanzi Shopping Centre, Kwa Masemwa Market, Kyulungwa Market, Waita Shopping Centre, Munyumbuni Market, Munguu Market
2. The petitioners state that most of them have title documents to their respective parcels of land, while others hold allotment letters while others are beneficial owners of the properties. Some of the petitioners have occupied their respective properties since 1950 and have been in such occupation to date.
3. The genesis of the dispute is that on or about the year 2011, the Respondents awarded a construction contract to M/s China Wuyi Co. Ltd for the upgrade of the Mwingi-Kandwia-Tseikuru road (C39/D478). During the said exercise, the Respondents surveyed the road and placed beacons demarcating the road reserve. Guided by the beacons, the Petitioners' buildings, properties, trees, vegetation, walls and fence were to be affected by the construction of the road.
4. The Petitioners claim that the Respondents undertook a valuation exercise of the Petitioners' properties for compulsory acquisition and approved compensation of a total sum of Kshs. 97 million.
5. The Petitioners claim that, in violation of their rights, the Respondent compulsorily acquired their land but failed to compensate them in accordance with the value of the properties and or undervalued



the properties to their detriment. Out of the budget sum of Kshs. 97 million, the Respondent only paid the Petitioners a total sum of Kshs. 2,324,959/-

6. The Petitioners aver that the amounts awarded to them are extremely low and that the consents/ agreements entered into are reversible and can be avoided on account of the principles and or doctrines of inequality of bargaining power; illegitimate economic duress; unconscionable bargain; inequality of parties; unconscientious use of power; abuse of trust and confidence; breach of fiduciary duty; breach of public policy and fair play; constructive fraud and violation of standards of commercial morality.
7. 1. The Petitioners have undertaken a valuation of part of the properties owned by nineteen Petitioners and claim compensation for the said valuation sums totalling Kshs. 26,434,000/=.
8. The Petitioners claim that the Respondents threatened to demolish their properties by marking buildings and properties with an "X" mark. They complain that the notice given is a very short period to remove and demolish their structures and there is no reasonable and appropriate communication from the Respondents on the actions and decisions being taken which actions are draconian, unjust, unfair and amount to an unfair administrative action. The Petitioners also claim that there was no public participation in the entire exercise.
9. On the Constitutional basis for the Petition, the Petitioners cite violations of their right to equal protection of the law, right to information, right to a fair administrative action, right to property and their right to dignity.
10. The Petitioners therefore pray for: -
 - a. A declaration that the Petitioner's rights under articles 27, 28, 29, 39, 40, 43, 47 and 50 of *the Constitution* have been violated by the Respondents.
 - b. A declaration that the notices "x" markings issued by the first Respondent which were dropped at the Petitioner's properties are unlawful and in violation of *the Constitution*.
 - c. An order for the Respondents to provide the Petitioners with reports on all the survey works and Valuation Reports undertaken on Mwingi-Kandwia-Tseikuru in respect of the road reserve, compensation and or the construction.
 - d. An order that the Respondents undertake compensation to the Petitioners for any acquisition, removal or demolition of the properties of the Petitioners as identified under schedule B herein. The same is to be assessed and valued by a court-appointed valuer and in the alternative as per paragraph 7.1 above.
 - e. An order of permanent injunction to restrain the Respondents from acquiring, evicting, demolishing or removing any of the Petitioners' along the Mwingi-Kandwia-Tseikuru road.
 - f. Costs of the petition.

The Respondents' Replying Affidavit

11. In response thereof, K. Wando Odhiambo, the Survey Manager at Kenya Rural Roads Authority (KeRRA) swore a replying affidavit on behalf of the 1st Respondent stating that the 1st Respondent herein is a State Corporation under the 3rd Respondent's Ministry.
12. He stated that the petition was not properly filed as a representative suit contrary to Order 1 Rules 8 and 13 of the Civil Procedure Rules, 2010, since out of 174 petitioners, only 87 have given their authority to have the instant suit filed on their behalf.



13. Further, he deposed that the Petitioners have failed to discharge the evidentiary burden to prove that they are the registered owners of parcels of land known as Mwingi/Mwingi/1909, or any other parcels of land.
14. It was deposed that the Mwingi-Kandwia-Tseikuru (C93/d478) road project was awarded to China Wu Yi Co. Ltd in June 2011 and construction commenced in August 2011. The authentic road reserve corridor according to the cadastral maps is 40 metres.
15. At the time of the design of the project, the 1st Respondent states that the consultant undertook sensitization workshops with land owners along the proposed road corridor where the details of land and developments that would be affected by the construction were recorded. However, the proposed design road corridor was not utilized during implementation but the 1st Respondent did a design review to utilize the existing authentic road reserve.
16. The Respondent insists that the process leading to the acquisition of the land adjoining the authentic road reserve was done in strict conformity with *the Constitution* and the applicable statutes and that in so doing, none of the rights and fundamental freedoms of the Petitioners were violated, infringed and/or threatened.
17. Annexed to the Replying Affidavit were the relevant gazette notice numbers 4491, 4692 of 13th April 2012 and 7090 of 31st May 2013 to that effect.
18. He stated all the Projects Affected Persons (PAPs) were justly and fully compensated and the Petitioners have illegally encroached on the authentic road reserves.

Evidence at the Trial

19. Hearing of the suit began on the 28th of June 2022 where PW 1. Peter Musyoka Mulungi testified that he is a property valuer by profession, who graduated from the University of Nairobi in 1998. He stated that the 1st Petitioner, Dominic Musya Mwinzi sought valuation services from his office and he was assigned the duty of conducting the Petitioners' properties. He presented the Valuation reports filed and contained in the Petitioners' bundle of documents as exhibit 1.
20. The witness stated that they went to the site and met the respective clients who showed him their properties and they gathered the necessary information for valuation and prepared the report presented in Court.
21. On cross-examination, the witness was put to task for his lack of a practising license as a valuer to the fact that his degree was in Land Economics. He stated that he did not hold a license but the firm's directors have licenses and further stated that it is not a requirement in their practice.
22. The witness stated that there were 22 parcels of land affected by the Mwingi-Muungu-Kyuso Road and he stated that the Petitioners had title deeds, letters of allotment and gazette notices that the mentioned lands were affected by the road. Commenting on the Kenya Gazette notice, PW 1 stated that there was a discrepancy since some affected parcels were excluded from the said notices.
23. PW 2, Dominic Musya Mwinzi, the 1st Petitioner testified that he lives in Kyulungwa, Mwingi Sub-County in Kitui County where his parents have lived since the year 1950. He is a businessman and a shopkeeper. He stated that the construction of the Mwingi-Kandwia-Tseikuru road began on 1st August 2011 when the Respondents took people's land and demolished their houses. They complained to the District Commissioner, and they were told that they would be compensated in 2012



but they were not paid, and as a result filed this Petition. They sought compensation from KeRRA and got a valuer to ascertain the amounts they were to be paid.

24. The witness stated that he has been living on the suit land and built his house in 1970 and his shop was demolished. He claimed that there was already a 30-meter road and when the 1st Respondent came to construct, they expanded the road by about 5 more meters and promised to compensate them.
25. PW 2 confirmed that he had consent from all the other Petitioners to give evidence on their behalf and produced the Plaintiff's bundle of documents.
26. Upon cross-examination, the 1st Petitioner stated that the 1st Respondent, KeRRA demolished their properties in 2011 that his name was not on the Gazette Notice made in 2012 and that he complained about this matter to the office of the Kenya Human Rights Commission.
27. The 1st Petitioner stated that he has a letter of allotment for his land from the County Council of Kitui and that the affected portion of his land is about 50 feet by 10-15 feet. He stated that he knew all the Petitioners and their land which are all along the road from Mwingi to Munguu but not their parcel numbers.

Defence Hearing

28. The Defence hearing proceeded on 1st February 2023 when DW 1 K. Wando Odhiambo, stated that he worked for the 1st Respondent starting as a manager in charge of survey and exited as the Deputy Director of Survey from July 2009 to December 3rd 2022 when he retired. He adopted as his evidence his replying affidavit sworn on 31st December 2018.
29. He testified that the construction of a Section of 22 kilometres of the Mwingi-Kandwia-Tseikuru Road was contracted in late 2011. As head of the survey team supervising the construction of the road, one of their tasks was to establish the authentic road reserve to ensure that the construction work being undertaken was not on private property and that it was only affecting the authentic road reserve. They obtained authentic survey maps from the survey of Kenya office in Kitui, where the road reserve was shown to be 40 metres wide.
30. When the survey team went to the ground, they discovered that the design alignment of the road they were given ran on top of the main water pipe supplying Mwingi with water coincided with the main power line and the design affected residential houses. For the 1st Respondent, this meant costs would be incurred to relocate the power line, and the water pipeline and to resettle the affected settlements along the designed road. This would have caused delays and costs to the contractor for idle equipment.
31. As a solution, the survey team re-designed the road alignment to follow the authentic road reserve save for sections where for safety purposes, it was not a must to change the alignment. This led to some parcels being affected by the construction. They therefore carried out searches for ownership of affected parcels of land and applied for land acquisition as per the law, which was duly submitted to the Commissioner of Lands who was at the time in charge of land acquisition. The witness stated that the process was finalized with gazettelement, inquiries and awards being paid to the persons affected by the road.
32. The witness in the existing road reserve of 40 meters stated that they established that some of the shops in the trading centres were encroaching onto the existing road reserve of 40 meters. They did a public sensitization on the matter and the encroachments were removed.
33. Upon cross-examination, the witness stated that he was a land surveyor and a valuer. He stated that the valuation for compensation was not undertaken by the 1st Respondent and he could not testify as to



the correctness of the valuation, which was at the time the mandate of the Commissioner for lands. He referred to the letter from the Ministry of Lands signed by the then Commissioner of Lands Principal Valuer dated 26th June 2012 as well as the attached copies of cheques based on the awards they were instructed to pay to the affected persons.

34. He confirmed that he had not produced the cadastral map to show that the authentic road reserve was 40 meters as opposed to 30 meters stating that the document can be obtained from the lands office. He also denied that the list of the affected persons kept changing due to the Gazette Notices.
35. The witness acknowledged that some private properties were affected and the owners compensated. He noted that the persons earmarked to be affected in the initial design were not affected by the redesign the persons that were affected were compensated and the gazette notices contained a summary of persons affected.
36. Upon re-examination, the witness noted that the maps that existed at the relevant time were available and could be accessed by any member of the public and that the road was a Class C road, where the authentic road reserve was 40 meters.
37. Upon the Court's inquiry, DW 1 stated that according to his record, only 12 landowners were affected and were compensated. The Petitioners herein were not affected according to him.
38. The Respondent closed their case and both parties filed written submissions.

The Petitioners' written submissions

38. Counsel for the Petitioners filed written submissions stating that he submits *the Constitution*, the Land Acquisition Act and the *Land Act* 2012 dictate that if the state, national or county governments or any public authority or body desires to deprive a citizen of its use of private property, it must comply with the law and it must make a full and proper just compensation as provided under Article 40(b) on the same.
40. Counsel submitted that the process of compulsory acquisition for construction of the Mwingi-Kandwia-Tseikuru road began in 2011 before the *Land Act* No.6 of 2012 came into force, thus the applicable statute was the Land Acquisition Act noting Gazette Notice No.4491 dated 13th April 2012, was published under Section 6(2) of the *Land Act* 2012. He further submitted that Gazette Notice No.7090 published on 31st May 2013, is published under Section 162(2) of the *Land Act*.
41. Counsel submitted on the threshold for the constitutional petition and stated the petitioners particularized how the violation of rights occurred under Section D of the Amended Petition. They relied on the case of Kefa Nyaga Kariuki v. Office Commanding Station Kikuyu Police Station & 3 others: Welton Kibiwott Tubei (Interested Party) (2022) eKLR. They also relied on the case of Sella Rose Anyango v Attorney General & others (2021) eKLR on the same requirement.
42. On the issue of locus standi raised by the Respondent, the Petitioners state that the said objection is misplaced because the suit herein is filed in the public interest under Article 22(2) of *the Constitution*. They relied on the case of Otolu Margaret Kanini vs Attorney General & 4 others (2022) eKLR where it was held that Articles 22 and 258 of *the Constitution* are anchor provisions on locus standi for constitutional petitions.
43. In respect of the commercial or financial interests of the petitioners, the Petitioners submit that the suit complies with the provision of Order 1 Rule 13 of the Civil Procedure Rules (2010) and as a representative suit under Article 22 because consent and authority have been signed by 68 Petitioners. They relied on the cases of Moses Onchiri Kenya Ports Authority & 4 others (2017) eKLR and Evans



- Makoro & 32 members of the County Assembly of Kisii-vs Kisii County Assembly Service Board & 2 others (2017) eKLR.
44. Counsel for the Petitioners highlighted pages 26 to 102 of their documents that were signed by the Resident Engineer for the project which was headed 'Persons with affected properties within the Road Reserve during the implementation of the above project", which provides the name of the persons affected, the property affected and particulars thereof particulars of damages. They also pointed out that when the Respondent's witness was cross-examined on his assertion that the road reserve is 40 meters, he did not produce any cadastral maps to prove that indeed the road reserve measures 40 meters as opposed to the usual 30 meters.
 45. Counsel for the Petitioners submitted that their Valuation shows expansion of the road and that the Respondent failed to produce any report of the process of acquisition and an adverse inference should be drawn that the respondents were not transparent and acted in bad faith. They cited the case of Kenya Akiba Microfinancing Limited v Ezekiel Chebii & 14 others (2012) eKLR and section 112 of the Evidence on the burden of proof placed upon the party with knowledge of any fact.
 46. Counsel submitted that the 1st Respondent did not produce any comprehensive list of the persons affected. They submit that the Respondent failed to adhere to Article 40(3) of *the Constitution* and the Land Acquisition Act because the Gazette Notices published are not the ones contemplated under Section 6(2) of the Act to be published by the Commissioner for Lands and notices were published.
 47. They relied on the definition of a 'person interested' as was given in the case of Linus Mukuru Njuki v. Commissioner of Lands & 4 others (1987) eKLR and the similarities between the *Land Act* 2012 and the Land Acquisition Act(repealed) as was highlighted in the case of Virenda Ramji Gudka & 3 others v Attorney General (2014) eKLR.
 48. The Petitioners state that Section 6(1) of the Land Acquisition Act(repealed) only kicked off after the initial inquiries and determinations by the Minister and relied on the Court of Appeal's holding in the case of the Commissioner of Lands and Another v. Coastal Aquaculture Limited (1997) eKLR.
 49. Further, the Petitioners submit that the Respondents did not prepare any plan showing markings and measurements of the properties acquired or to be acquired under Section 7 of the Act. It is claimed that the Respondents did not comply with Section 9(1) of the Land Acquisition Act(repealed) on publishing of a notice. They, therefore, submit that the Respondent violated their right to information, right to fair administrative action and the right to equal protection of the law and relied on the process of land acquisition under the repealed act as was given in the case of Charles Lutta Kasamani v. Attorney General & Another (2019) eKLR.
 50. Regarding the matter of public participation, the Petitioners submitted that there was a want of it and highlighted that there is correspondence in respect of the complaints by the Petitioners, which were never addressed. They relied on the cases of Robert N. Gakuru & Others-vs-Governor, Kiambu County & 3 others(2014)eKLR and Justice Mrima's Richard Owuor & 2 others(suing on behalf of Busia Sugarcane Importers Association) vs Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries and Co-operatives & 7 others (2021)eKLR and the case of Mui Coal Basin Local Community & 15 others & 15 others v. Permanent Secretary Ministry of Energy & 17 others (2015) eKLR where the three-judge bench of the High Court held that a public participation program must show intentional inclusivity and diversity.
 51. On the matter of compensation and quantum, the Petitioners submitted that they hold indefeasible title documents and that their interest may only be taken after the laid down procedures in law are followed. They cited the case of Virenda Ramji & 3 others v. Attorney General (2014) eKLR.



52. Counsel highlighted paragraph 7.1 of the Petition, where the Petitioners have pleaded and given particulars of the sums claimed and that since Valuation reports have not been produced in respect of the other Petitioners, they urged the Court to direct an independent valuation to establish the value of compensation.
53. In respect of the compulsory acquisition undertaken from the year 2013, the Petitioners submit that Sections 104, 107 and 112 of the *Land Act* 2012 apply and were not complied with since the National Land Commission was never involved in the compensation. They therefore submit that all the Petitioners are entitled to compensation.

Respondent's written submissions

54. State Counsel for the Respondent submitted that at the time of the design of the road project, the consultant undertook sensitization workshops with land owners along the proposed design road corridor where the details of the land and developments that would be affected were recorded.
55. Their submission is that the demarcation of the road reserve was done based on the relevant authentic maps obtained from the Survey of Kenya offices, which indicate that the road reserve width is 40 meters and that the Petitioners mistakenly argue that the existing road reserve was 30 meters wide and was expanded, which is what affected most of their properties but this contention has not been supported by any documents.
56. Counsel submitted that the Respondents issued Gazette Notices No.4491 and 4692 of 4th April 2012 and addendum Gazette Notice No.7090 of 31st May 2013 notifying the public of the acquisition of the affected parcels of land and further inviting any other person interested/affected by the project for inquiries. Their submission is that the Petitioners comprise encroachers on the road reserve, who were allowed ample time to voluntarily relocate.
57. Regarding the Petition being a representative suit, counsel for the Respondents submitted that no application was made by the 22 petitioners for directions on the service of the Petition on the 152 residents of Mwingi Sub-County, as required by Order 1 rule 8(2) of the Civil Procedure Rules(2010) and that the attached document by the Petitioners named 'Consent and Authority' to the petition only bears the names and signatures of about 87 persons and not the 152 persons allegedly represented in the Petition and that only a number of them have appended their signatures against their names and no identification documents are provided to ascertain their names and their claims.
58. The Respondents also deny that this Petition is a public interest claim since a matter of public interest must be a matter in which the whole society has a stake which contributes to a proper understanding of the law in question without private gain and relies on the definition of public interest litigation in the case of Brian Asin & 2 others v Wafula W. Chebukati & 9 others (2017) eKLR, Kenya National Examination Council v R exp Kemunto Regina Ouru and the case of Kenya Power & Lighting Co. NMG Limited & 2 others.
59. The Respondents submitted that the two witnesses called by the Petitioners did not file witness statements or affidavits and that the trial amounted to an ambush, abridgement of procedure and violated the tenets of fair trial enshrined under Article 25 of *the Constitution*. They relied on the Court's holding in the case of Johana Kipkemei Too v Hellen Tum (2014) eKLR where the court declined to allow three more additional witnesses and the holding in the case of Paul Gitari v Board of Management Kanyakine High School (2019) eKLR where the Court found that it would not be fair if the witness was permitted to testify absent of any witness statement or affidavit.



60. Regarding the evidence presented by the Petitioners to support their case, the Respondents submit that pages 26-106 of the Petitioners' bundle of documents comprise undated forms signed by the Petitioners describing the affected properties by one Engineer Mwangangi Murengei who is unknown to the Respondents and did not take part in the construction project.
61. Commenting on the Valuation Report presented by the Petitioners, counsel for the Respondents noted that the valuation exercise was conducted in 2019 more than 8 years after the road construction. Further, in the valuation report, only 9 parcels were inspected and valued and there are no survey maps available for any of the nine parcels, without which it was impossible to establish the actual width of the road reserve and to identify exactly which parcels were affected by the road construction, which makes them curious about how the valuer managed to assess the properties on the ground.
62. The Respondents' submission is that the survey maps are public documents that are accessible to any interested person to peruse, only that the then counsel on record for the Respondents at the time omitted to file the same in court, which necessitated their application to adduce the map dated 15th March 2023 which was dismissed by the Court.
63. Finally, the Respondents submitted that the Petitioners should have enjoined the National Land Commission if they were aggrieved by the land acquisition process since they are mandated under Section 111(1) of the *Land Act* (2012) to oversee the process of compulsory acquisition.

Their view is that the Respondents are not mandated to assess just compensation and/or to prepare the award for compensation of compulsorily acquired land and therefore the Petitioners have no right to relief against the Respondents. They therefore submit that the Petition lacks merit and should be dismissed with costs to the Respondents.

Analysis and Determination

64. Counsel for the Petitioners drew issues for determination being; whether the petition is competent as a representative suit; whether the Petitioner's properties were affected by the Mwingi-Tseikuru road project and if so whether they are entitled to compensation and what quantum of compensation are the Petitioners entitled to.
65. Counsel for the Respondents drew issues for determination being; whether the petition is competent as a representative suit and/or as a public interest petition; whether the testimony of the Petitioners' two witnesses called in court and the Petitioners' bundle of documents should be considered by the court; whether the Petitioners' properties were affected by the Mwingi-Tseikuru road project and if so whether they are entitled to compensation and whether the petition fails for the non-joinder of the National Land Commission
66. The court has considered the Petition herein, the replying affidavit, the evidence adduced in court and submissions by Counsel for the parties and the issues drawn for determination and consider the following as the issues for determination.
 - i. Whether the petition is competent as a representative suit and/or a public interest petition.
 - ii. Whether the testimony of the Petitioners' two witnesses and the Petitioners' bundle of documents should be considered by the court.
 - iii. Whether the Petitioners' properties were affected by the Mwingi-Tseikuru Road construction project and if so whether they are entitled to compensation.



i. Whether the petition is competent as a representative suit and/or a public interest petition.

67. The Respondents challenged the petition on the ground the 22 Petitioners have no locus standi to bring the suit on behalf of 152 other persons whose names appended to the verifying affidavit. The Respondents state that the petition does not comply with Order 1 Rule 8 and 13 of the Civil Procedure Rules as a representative suit for the reason that the Petitioners did not seek directions from the court to serve the petition on the 152 residents of Mwingi whom the Petitioners claim to represent. Further, no evidence was adduced to show that the 152 residents were served with notice under Order 1 Rule 8 (2) of the Civil Procedure Rules and that none of the 152 persons applied to be made parties to the suit.
68. The Respondents claim that by Order 1 Rule 13(1) the Petitioners purported to draw and file a document titled "Consent and Authority" to the petition. The Respondent challenged this document by stating that the same is only signed by 87 of the 152 persons stated to be represented in the suit and no identification documents are attached to the said document.
69. Counsel for the Petitioners on the other hand submitted that the petition complies with Order 1 Rule 13 of the Civil Procedure Rules and/or as a representative suit under Article 22 of *the Constitution* of Kenya. They rely on the same document titled "Consent and Authority" and on the cases of Moses Onchiri V. Kenya Ports Authority & 4 Others (2017) eKLR and Research International East Africa Vs Arisi & Others (2007) 1 EA 348.
70. Order 1 Rule 8 of the Civil Procedure Rules (2010) provides that:
- "(1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as of all in same representing all or as representing all except one or more of them.
 - (2) The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct."
79. Article 22 of *the Constitution* of Kenya provides for enforcement of Bill of Rights and states that; "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." while Article 258 of the provides for enforcement of *the Constitution* and states that; "Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention." The two Articles go on to state that;
- 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

71. Further, *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 Rule 4 repeats the above Articles and states that where any right or fundamental freedom provided for in *the Constitution* is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to the rules and states;

- 1. In addition to a person acting in their own interest, court proceedings under sub-rule (1) may be instituted by—
 - i. a person acting on behalf of another person who cannot act in their own name;
 - ii. a person acting as a member of, or in the interest of, a group or class of person.
 - iii. a person acting in the public interest; or

72. In the present case, the heading of the Petition lists the 22 Petitioners and goes on to add " AND 152 OTHERS (PER ATTACHED LIST OF SCHEDULE.) In the body of the petition, it is stated that the twenty-two named persons are the petitioners and 152 other petitioners listed in the document marked X in the verifying affidavit. In paragraph 2 of the petition, it is stated that the Petitioners bring the petition on their own behalf and on behalf of 152 persons whose names and signatures are appended to the verifying affidavit.

73. Having considered the title of the petition and the parties cited, the court is inclined to agree with the position taken by the court in the case of *Evans Mokoro & 32 Members of the County Assembly of Kisii v Kisii County Assembly Service Board & 2 others* [2017] eKLR where the Hon. Justice Okwany accepted as proper parties to the petition some petitioners' names were contained on a separate list while others were listed on the body of the petition. The Court stated as follows;

“Furthermore, I find that the instant petition is not a representative suit per se as at the heading of the petition, the petitioners are listed as; "Hon. Evans Mokoro & 32 members of the County Assembly of Kisii (See List overleaf)." My reading and understanding of the said heading is that instead of listing the names of all 33 petitioners on the body of the petition, the petitioners opted to list only the 1st petitioner and provide a separate list of the other petitioners. Therefore, the petition is not filed by the 1st petitioner, but by all the 33 petitioners save that the names of the 32 petitioners are contained in a separate list which they have all signed. I find nothing wrong with this form of listing even though the



normal format would have been to list all the petitioners at the heading or on the body of the petition.”

74. Even if the petition herein were to be taken to be a representative suit, the court's view is that the same complies with the provisions of Article 22 (2) (b) and 258 (2) (b) of *the Constitution*. The Petitioners describe themselves as a group of “Businessmen, businesswomen and peasant farmers who have either constructed business premises, residential premises or are registered proprietors of undeveloped land in various shopping centres (Ikuuni Market, Kang'ethya Market, Kwa Kimanzi Shopping Centre, Kwa Masemwa Market, Kyulungwa Market, Waita Shopping Centre, Munyumbuni Market and Munguu Market) along Mwingi-Kandwia-Tseikuru road in Kitui County.”
75. As to whether the Petitioners ought to have complied with the provisions of Order 1 Rule 8 and/or 13 of the Civil Procedure Rules, the Court notes that this is not an ordinary suit where the Civil Procedure Rules apply but a Constitutional petition whose procedure and practice is governed and regulated by *the Constitution* of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013. In the case of Francis Angueyah Ominde & another v Vihiga County Executive Committee Members Finance Economic Planning and 3 others; Controller of Budget and 10 others (Interested Parties) [2021] eKLR the Court took this position and stated that;
- “ 11. On the matter of the joinder of the 2nd petitioner, it should be pointed out that the constitutional petitions are governed and regulated by *the Constitution* of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013, so far as procedures and processes are concerned. They are not subject to the Civil Procedure Rules, which govern processes that are brought under the *Civil Procedure Act*, Cap 21, Laws of Kenya. So far as procedure is concerned, *the Constitution* of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013 *the Constitution* of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013, captures the spirit of Article 159(2)(d) of *the Constitution*, which is an injunction against constitutional proceedings being hostage to technicalities of procedure, and which enjoins courts to protect and promote the principles of *the Constitution*. The focus is trained on substance rather than process. *The Constitution* of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013 are more flexible compared with the provisions of the Civil Procedure Rules, with respect to who may bring proceedings and the manner of initiating the proceedings.
12. Two issues are raised with respect to the above. One, it is about the 1st petitioner initiating the proceedings jointly with the 2nd petitioner, but without filing an authority executed by the 2nd petitioner to include him in the petition. I have carefully and scrupulously scoured through *the Constitution* of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013, and I have been unable to find a provision or rule which requires such an authority. It is a requirement under the Civil Procedure Rules, but the proceedings before me were not initiated under the *Civil Procedure Act*, and they are not subject to the Civil Procedure Rules, but *the Constitution* of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013.”



76. The court notes that under Article 22(3) of *the Constitution* of Kenya, the Chief Justice is enjoined to make rules providing for the court proceedings in enforcement of fundamental rights and freedoms which inter alia satisfy the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum. In particular, the court shall, if necessary, entertain proceedings based on informal documentation. The said Article further provides that while observing the rules of natural justice, the court shall not be unreasonably restricted by procedural technicalities. The Rules envisaged above were promulgated as *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and the said rules apply to the petition herein.

77. From the foregoing authorities, the court finds that the petition herein cannot be defeated and/or dismissed on the basis of non-compliance with the procedure contained in the Civil Procedure Rules unless the same has been reproduced in *the Constitution* of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013. The Court finds that all the 152 Persons whose names appear on the list attached to the verifying affidavit are proper parties to this petition and are properly before this court.

(ii) Whether the testimony of the Petitioners' two witnesses called in court and the Petitioners' bundle of documents should be considered by the court.

78. Counsel for the Respondents contend that the two witnesses who testified in support of the Petitioners' case during the trial did so without any affidavits or witness statements, which was unfair as it amounted to ambush, abridgement of procedure and violated the tenets of fair trial enshrined under Article 25 of *the Constitution*.

79. Rule 11 of *The Constitution* of Kenya (Protection of Rights And Fundamental Freedoms) Practice And Procedure Rules, 2013 provides that:

- (1) The petition filed under these rules may be supported by an affidavit.
- (2) If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit.

80. Musyoka J in the case of Francis Angueyah Ominde & another v Vihiga County Executive Committee Members Finance Economic Planning and 3 others; Controller of Budget and 10 others (Interested Parties) [2021] eKLR held that:

“A related issue is with respect to the supporting affidavit. It is averred that only one was filed and submitted that the petition was not supported by a verifying affidavit as it was presumed that the affidavit supported the Motion. The answer to this submission is to be found in Rule 11 of *the Constitution* of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013, which is clear that the requirement for filing an affidavit to support the petition is not mandatory. The provision in Rule 11(1) uses the permissive “may.” Rule 11(2), with respect to documents to be attached in the process, provides that such documents should be attached to the affidavit, and where the petition is not supported by an affidavit, to the petition itself. Clearly, the filing of an affidavit to support the petition is not mandatory, and where there is no supporting affidavit, the petition would still stand.”

81. From the foregoing, it is clear that filing an affidavit in support of a constitutional petition is not mandatory and thus failure to file is not fatal to the petition. Rule 20 of *The Constitution* of Kenya (Protection of Rights And Fundamental Freedoms) Practice And Procedure Rules, 2013 provides for



the procedure for hearing of petitions. Rule 20(1)(c) and (2) allows for a Court to hear a Petition by way of oral evidence as was done in this suit: Rule 20 provides for the hearing of the petition and states as follows;

- “(1) The hearing of the petition shall, unless the Court otherwise directs, be by way of—
 - a. affidavits;
 - b. written submissions; or
 - c. oral evidence.
- (2) The Court may limit the time for oral submissions by the parties.
- (3) The Court may upon application or on its own motion direct that the petition or part thereof be heard by oral evidence.
- (4) The Court may on its own motion, examine any witness or call and examine or recall any witness if the Court is of the opinion that the evidence is likely to assist the Court to arrive at a decision.
- (5) A person summoned as a witness by the court may be cross-examined by the parties to the petition.”

82. The Respondent relied on the case of Paul Gitari v Board of Management Kanyakine High School [2019] eKLR

“It would not be fair if the witness is permitted to testify absent any statement or an affidavit setting out his statement. It would be a travesty of justice to allow that and even Article 159 is no panacea to abridgment of procedure as proposed by the Respondent. The court will stand down the witness who was sworn in as he is not a proper witness and thus cannot testify.”

83. The Respondent also relied on the case of Johanna Kipkemei Too v. Hellen Tum (2014) e KLR. The court notes that the two cases cited above and relied upon by the Respondent are an environment and land civil suit and an employment and labour relations case whose procedures and practise are different from constitutional petitions.

84. With regard to constitutional petitions, the Respondent still argues that it is a travesty of justice to call a witness to testify where no statement or affidavits have been filed. They state that this is a trial by ambush, abridgement of procedure and violation of the very tenets of fair trial as enshrined under Article 25 of *the Constitution*.

85. The Constitutional and Human Rights Division of the High Court found that where a petition relies on matters of evidential fact, this must be proved by affidavit or oral testimony as the court may direct. This was in the case of Isaac Aluoch Polo Aluochier v The National Alliance and 542 others [2016] eKLR while quoting the earlier decision in Bryson Mangla v Attorney General & Others Nairobi HC Petition No 284 of 2016 considered Rule 10 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 (“Mutunga Rules”) interpreted the rules as follows:

“Want of supporting evidence in the petition... In Bryson Mangla v A. G. & Ors Nairobi Pet. No. 284 of 2016, this court held that



“*The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedures Rules, 2013 do not require that a petition must be supported by an affidavit, see Rule 11 thereof in these terms;

11. Documents to be annexed to affidavit or petition

- (1) The petition filed under these rules may be supported by an affidavit.
- (2) If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit.”

It is conceivable that a petition that challenges for example constitutionality of a particular legislative text may not require an affidavit. Where, however, a petition relies on matters of evidential fact, this must be proved by affidavit or oral testimony as the court may direct.”

So where, as here, it is sought to rely on matters of fact a suitable affidavit with documentary annexures ought to be filed in discharging the burden of proof of a plaintiff in terms of sections 107, 108 and 109 of the *Evidence Act*....”

86. In the present case, it is indeed true that the Petitioner’s witnesses did not swear any affidavit in support of the Petition. However, it is noted that on 24th January 2020 and 7th February 2022, the Court gave directions on the hearing of the petition by way of oral evidence. As earlier stated, under Rule 11 (1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedures Rules, 2013, filing an affidavit in support of a petition is not mandatory and under Rule 11 (2) there are options of whether or not to file documents relied on without a supporting affidavit and where no supporting affidavit is filed a party may file documents accompanying the petition.
87. Though the Petitioners did not file supporting affidavits, they filed documents attached to the initial petition, a bundle of documents dated 9th March 2020 and filed in court on 11th March 2020 and a further bundle of documents dated 6th October 2021 and filed in court on 7th October 2021. The Respondents did not object to the filing of the bundles of documents and neither did they object to the directions given by the Court that the suit would proceed by way of oral evidence which is provided for under Rule 20 (1) (c) and 20 (3). The Respondent ought to have sought direction for filing affidavits noting that at the time of giving directions, the Petitioners had not filed a comprehensive affidavit. On this, the finding in the case of *Gitari vs Board of Management Kanyakine High School* is distinguished for the reason the Respondent did not ask to have the Petitioner’s witnesses stand down to allow filing of affidavits or witness statements.
88. It is noted with regard to PW1 Peter Musyoka Mulyungi that the witness produced the Petitioner bundle of reports dated 6th October 2021 and filed in court on 7th October 2021 and proceeded to be cross-examined on the same by Counsel for the Respondents. Further during the trial the Respondents did not object to the evidence adduced by the Petitioners and their witnesses but proceeded to cross-examine them.
89. On the evidence of PW2 the court also notes that the witness reiterated what was contained in the petition and produced the Petitioner’s bundle of documents dated 9th March 2020 and filed in court



on 11th March 2020. Again the Respondents did not object to the said witness adducing evidence and proceeded to cross-examine him.

90. In the court's view, the Respondents acquiesced to the procedure adopted of adducing evidence by the Petitioners and their witness and participated in the trial and cannot be heard to object to the evidence in submissions. The court finds that the trial herein was conducted by way of oral evidence as provided under *The Constitution* of Kenya (Protection of Rights And Fundamental Freedoms) Practice And Procedure Rules, 2013 Rule 20(1)(c) and (2) which allows for a Court to hear a Petition by way of oral evidence.

iii) Whether the Petitioners' properties were affected by the Mwingi- Tseikuru Road construction project and if so whether they are entitled to compensation.

91. The Petitioners claim that their properties were affected by the Respondent's road project. They exhibited documents they state are signed by the Respondents Resident Engineer for the project showing persons with affected properties within the road reserve. Counsel for the Petitioners further relied on the contents of the valuation reports produced which stated that the initial size of Mwingi Kamuwongo road was 30 meters wide but the road construction project necessitated expansion to 40 meters five meters when the project was done.
92. Counsel for the Respondent on the other hand challenged the documents exhibited by the Petitioners stating that they were undated forms signed by the Petitioners describing the properties allegedly affected by the road construction which included land, buildings, crops, fences etc. The 1st Respondent stated that no documents of title or ownership to the said parcels were attached. Counsel further contended that the documents were signed by one Mwangangi Murengei described as the resident Engineer. The Respondents state that he did not take part in the construction project. That the only Engineer known to the Respondents was one S. M. Kathindai as per the letter dated 23rd August 2013 exhibited by the Petitioners.
93. The court has perused the documents relied upon by the Petitions that are titled
“UPGRADING OF MWINGI-MUNGUU ROAD PROJECT; CONTACT NO. RWC 037. PERSONS WITH AFFECTED PROPERTIES WITHIN THE ROAD RESERVE DURING THE IMPLEMENTATION OF THE ABOVE PROJECT” where the Petitioners claim that the said documents were confirmation that the 1st Respondent's Resident Engineer had confirmed that their parcels of land were affected by the road.
94. In the Court's view, the veracity and authenticity of the said documents is questionable for several reasons. The Respondent has denied knowledge of the “Resident Engineer” Mwangangi Muvengei. The said forms are not on the 1st Respondent's letterhead and neither do they have its stamp while the letter the 1st Respondent acknowledges as originating from their Resident Engineer is on the 1st Respondent's letterhead. Another reason is that before the amount of money payable on account of compulsory acquisition of land is assessed and paid a process exists under the *Land Act* No. 6 of 2012 and before that the Land Acquisition Act and the Petitioners did not show adduce any evidence to show that such a process was initiated and to warrant the issuance of the confirmation forms that were exhibited.
95. The valuation reports relied on by the Petitioners were also challenged and the Respondent's Counsel submitted that the inspection and valuation was done 8 years after the road construction had commenced and only nine parcels were inspected and valued. Further, the reports indicate that no survey maps were available. Counsel doubted that the Valuer could tell that the road was initially 30



meters without survey reports. Counsel submitted that the Respondent's witness was able to show that the road was 40 meters wide and that they had by omission failed to file and produce in court the survey maps to confirm this.

96. The Court has considered the rival submissions on the issue of whether the Petitioner's parcels of land were affected by the construction of the road project. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides for the burden of proof and states as follows:-

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

97. In this case, the burden of proving that the Mwingi-Kandwia-Tseikuru road (C93/d478) was originally 30 meters wide but the road construction project necessitated expansion to 40 meters and as a result, encroached on the Petitioner parcels of land, was on the Petitioners. The burden of proof was also on the Petitioners to show to the court that their rights under articles 27, 28, 29, 39, 40, 43, 47 and 50 of *the Constitution* have been violated by the Respondents by the "x" markings on their properties which are a threat of demolition of their structures. The burden of proof was still on the Petitioners to show that they were entitled to compensation for compulsory acquisition of their land, removal and/or demolition of their properties.

98. Apart from the forms relied on by the Petitioners titled “Persons With Affected Properties Within The Road Reserve During The Implementation Of The Above Project, the Petitioners presented various valuation reports by Seven Degrees North Limited. At the beginning of the reports it was stated inter alia as follows;

“The Mwingi -Kamuwongo road tarmacking project was done in the early 2010s. Originally the road was 30 meters wide, but the project necessitated expansion to 40 meters. The simplest way was to expand five meters both sides of the road

In some cases, the land acquired was more than five (5) meters to enable the road to be straightened, construct culverts and create by-passes during construction, Information obtained from the residents is that compensation was done selectively and many affected land owners were left out.”

99. The report further stated that “While conducting the appraisal, we have relied upon the information provided to us by the client and have assumed such information to be complete and accurate”.

100. The specific reports further stated as per the following extract from the report on land parcel Mwingi/ Mwingi/ 606 states inter alia as follows;

Survey Maps

Not available

Plot area

According to the information received from the client, the road redesign extended to the client's land. At one end it extended 16.5 meters while at the other it extended 17.2 meters. The length of the land is approximately 163 meters. The hived-off portion therefore measures approximately Nought decimal Four Six Two (0.2747) Hectares or 0.064 acres.”

101. The Petitioner's witness PW1 Peter Musyoka Mulungi stated in his testimony that he is a Property valuer by profession. He confirmed that he did not have survey maps in establishing the fact that the road redesign extended to the Petitioner's land and the extent of the said extension. Indeed he confirms



that this information was received from the Petitioners. It is the court's view that without the survey maps to show the extent of the Petitioner's parcels of land in relation to the road, it is difficult to see how the valuer was able to tell whether the parcels of land he was valuing were on the road or not. From the above extracts of the valuation reports the valuer relied on the information he received from his clients on the extent of the road vis-a-vis the Petitioner's parcels of land.

102. Section 24 of the *Land Registration Act* provides that land Boundary marks or beacons are erected for the purpose of defining boundaries that are to be shown on plans attached to instruments that deal with or affect title, right or interest. The section states that;

“Every trigonometrical station, fundamental benchmark and boundary beacon erected or placed to define the boundaries of any holding or land shall be shown on the plan (if any) attached to, or referred to in, any document or instrument purporting to confer, declare, transfer, limit, extinguish or otherwise deal with or affect any right, title or interest, whether vested or contingent too, in or over such holding or land, being a document or instrument which is required to be registered, or is ineffectual until registered, under any written law.”

103. The survey work itself is the responsibility of the Director of Survey and under section 23 the powers of the Director include inter alia making or supervising any survey or resurvey, affixing or setting up any survey mark, altering, repairing and moving or removing any survey mark.

104. Following the above provisions of Sections 23 and 24 of the *Land Registration Act*, in the event there were any changes made by the Respondents expanding the width of the road in question as claimed by the Petitioners the procedure for re-drawing the boundaries and fixing new survey marks would have involved all the persons with proprietary interests in any adjacent parcels of land. The said changes would have involved the office of the Director of Survey and the subsequent changes would have been recorded in their offices as provided by the law. Markings of such changes would have been shown on the boundaries between the Petitioner's parcels of land and the road and the same would have been reflected in Survey plans and any other documents necessary to show the boundaries between the Petitioner's parcels of land and the road. Section 30 of the *Survey Act* provides that all survey plans and records are to be deposited with the Director of Survey and become the property of the Government while subsection 2 provides that;

“No plan deposited in the Survey Office in accordance with subsection (1) shall be altered or amended in any way without the permission of the Director.”

105. Survey plans and maps are public documents available to members of the public and the parties to this suit. Section 34 of the *Land Registration Act* ensures that one can obtain copies of any documents stated therein that;

A person who requires an official search in respect of any parcel shall be entitled to receive particulars of the subsisting entries in the register, certified copies of any document, the cadastral map, or plan filed in the registry upon payment of the prescribed fee.

106. Section 109 of the *Evidence Act* provides for the evidentiary burden of proof and states as follows:-

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person.”



107. The Court of Appeal in *Mumbi M’Nabea v David M.Wachira* [2016] eKLR stated as follows while commenting on the burden of proof in the Kenyan context and noted that:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not? Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:-

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

The above provision provides for the legal burden of proof. However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:-

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person.”

The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M’airanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000* [2005] 1 EA 280 where it was held that:-

“Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

108. Similarly, the Court of Appeal in *Mbuthia Macharia v Annah Mutua Ndwiga & another* [2017] eKLR discussed the burden of proof as follows:

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence? In this case, the incidence of both the legal and evidential burden was with the appellant. It was upon the appellant to prove that he did not affix his signature on the transfer of the suit premises in favour of the 1st respondent.”

109. Counsel for the Petitioners, in the Court’s view, attempted to shift the burden of proof to the Respondents and also submitted that the Respondents failed to produce the reports of the process of ascertainment of the parcels of land to be compulsorily acquired the size of the road. Due to the said failure, an adverse inference ought to be drawn that the Respondents were not keen on being transparent and acted in bad faith. They conclude that the Respondents withheld such information because it would have been unfavourable to them. They relied on Section 112 of the *Evidence Act* and the case of *Kenya Akiba Microfinancing Limited V. Ezekiel Chebii & 14 Others* (2012) eKLR.

110. On this submission, the court goes back to its finding that the burden of proving the Petitioner’s case lies with the Petitioner. Documents that would have shown whether the road subject matter of



this suit was 30 meters or 40 meters are public documents that were available to both parties and were not "especially" within the knowledge custody and control of the Respondents only. Indeed, any documents that would have been used to alter the size of the roads would have been registered with the office responsible for the survey of land. Section 16 of the *Land Registration Act* states that;

“The office or authority responsible for the survey of land may rectify the line or position of any boundary shown on the cadastral map based on an approved subdivision plan, approved combination plan or any other approved plan necessitating the alteration of the boundary, in the prescribed form, and in accordance with any law relating to subdivision of land that is for the time being in force.”

111. It is further observed that after the close of the case for the Respondents Counsel for the Respondents made an application dated 15th March 2023 seeking inter alia to be granted leave to reopen the Respondent’s case limited to production of the cadastral maps and land acquisition plans for Mwingi-Kandwia-Tseikuru road. The Petitioners opposed the said application which was eventually dismissed. In the Court’s view if the Petitioners wanted proof of the size of the subject road before the commencement of the construction project and after all they would have done was to consent to production of the maps. It is the court’s view that the inference to be made is that the said maps held information that was adverse to the Petitioners.
112. In a similar case *Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others* [2019] eKLR where the Court of Appeal held that the title was defeasible for being on a road reserve, the Court found as follows:

“The truth, however, is that to this day there is no document maintained by the Director of Survey as “conclusive” proof that the width of the road as 80 meters. On the contrary, the documents available, including maps and plans show the width along the suit properties as 60 meters..... In the instant appeal, persuaded by the comparative jurisprudence, I find the appellants’ titles are defeasible to the extent that they encroach on a public road reserve. My finding is fortified by the provisions of Article 40 (6) of *the Constitution* wherein protection of private property does not extend to property unlawfully acquired. I am further guided by the provision of Section 26 (1) (b) of the *Land Registration Act* No. 3 of 2012 which stipulates a certificate of title can be challenged if title was acquired illegally, unprocedurally or through a corrupt scheme. In the instant case, the appellants’ titles were acquired illegally and unprocedurally. Illegally because public land that has been compulsorily acquired cannot be transferred to private individuals; and the vendor to the appellants had no interest in and no right to transfer any public land. I am further convinced the appellants are not entitled to retain any portion of the road reserve for to do so will be violating procurement laws where public property is given to private individuals without following the procurement process and without any consideration given or paid to the Government.”

113. Article 40(3) on the right to property and compulsory acquisition provides as follows:

“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— Constitution of Kenya, 2010
- (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.”

114. In the court's view, proof of whether the road subject matter of this petition was initially 30 meters and was expanded by the Respondents to 40 meters during the construction herein was readily available. It is further the court's view that the burden of proof in this regard lay on the Petitioners and the same did not at any time change or shift to the Respondents to show that the road in question was 40 meters as was alleged by the Petitioners. In the court's further view, the Petitioners did not adduce sufficient evidence to discharge this burden.

115. The court further finds that the Petitioners did not adduce sufficient evidence that their properties were compulsorily acquired by the Respondents, that any valuation was carried out by the Respondents for purposes of compensation and that the Respondents failed to compensate them as per the said valuations.

116. Indeed, the Respondent contended that the only parcels of land that were affected by the road were the ones listed in Gazette Notice No.4491, 4692 dated 13th April 2012 and Gazette Notice No.7090 published on 31st May 2013. It was incumbent upon the Petitioners to show that their parcels of land were also earmarked for compulsory acquisition in the same way that the parcels of land listed in the Gazette notices were processed for acquisition.

1. Are the Petitioners entitled to the orders sought?

117. Following the findings of the court set out above, the court concludes that the Petitioners have not proved that their Constitutional rights under Articles 27, 28, 29, 39, 40, 43, 47 and 50 of the Constitution have been violated. The Petitioners are therefore not entitled to the orders sought and their petition is hereby dismissed with costs to the Respondents.

DELIVERED, DATED AND SIGNED AT KITUI THIS 31ST DAY OF JANUARY 2024.

L. G. KIMANI

JUDGE ENVIRONMENT AND LAND COURT

THE JUDGEMENT IS READ VIRTUALLY AND IN OPEN COURT IN THE PRESENCE OF-

J. MUSYOKI COURT ASSISTANT

KALII HOLDING BRIEF FOR MUTUA SC FOR THE PETITIONERS

MULILI FOR THE RESPONDENTS

