



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT KISII**

**PETITION NO. 14 OF 2016**

**IN THE MATTER OF LAND RIGHTS UNDER ARTICLE 64(1)**

**OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**JEREMIAH OMWENGA CHWEYA.....PETITIONER**

**VERSUS**

**THE COUNTY GOVERNMENT OF KISII.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY EXECUTIVE COMMITTEE KISII COUNTY.....2<sup>ND</sup> RESPONDENT**

**J U D G M E N T**

1. The petitioner filed the present petition on 5<sup>th</sup> May 2016 alleging violation of her constitutional rights by the respondents. The petition is grounded on Articles 2, 10, 22, 23, 40, 47, 64(1), 165(3) (a), (d) and 162(2)(b) of the Constitution as well as Section 28 of the Land Registration Act, Section 150 of the Land Act and Sections 13(1), (2) and 7 of the Environment and Land Court Act, 2011. The petitioner contended that she was the registered owner of land parcel **LR No. West Kitutu/Mwamonari/808 (“the suit property”)** which she had occupied together with her family since 1995. The petitioner averred that on or about 20<sup>th</sup> October 2015 the respondents jointly and acting in concert invaded her said property and assembled thereon machinery and tractors which were used to destroy and/or demolish the petitioner’s 5 semi permanent structures, crops, coffee trees, tea bushes, bananas, napier grass and blue gum trees with the intention of creating and opening a road of access through the petitioner’s said parcel of land.

2. The petitioner’s assertion was that no road of access exists at the point the respondents wanted to create and open one on the suit property. The petitioner contended that as the registered owner of the suit property, her property rights were protected under Articles 40 and 64 of the Constitution and that the respondents by their acts violated these provisions of the Constitution to the detriment of the petitioner. The petitioner contended that the respondents’ acts were unlawful and illegal and were carried out without any justification and constituted unlawful deprivation of property contrary to Article 40(3) of the Constitution which requires the payment of prompt and adequate compensation to any person whose property may be required for any public use.

3. The Petitioner amended the petition with leave of the court and the amended petition was filed on 18<sup>th</sup> July 2016. In the amended petition, the petitioner pleaded that the road of access the respondents intended to create was also cutting across other adjoining properties belonging to other persons namely **West Kitutu/ Mwamonari/809, 810, 1575, 812, 815, 816 and 817**. The petitioner sought the following reliefs vide the amended plaint:-

**A. A declaration that property; West Kitutu/Mwamonari/808 registered in the name of the petitioner is a private property to which the respondent is disentitled.**

**B. A declaration that the respondents’ act of invading the petitioner’s subject property West Kitutu/Mwamonari/808 and the properties adjoining and the destruction of houses and crops thereof without a just cause and adequate compensation is unfair, unlawful and unconstitutional contrary to Article 40 and 64 of the Constitution of Kenya, 2010.**

**C. A declaration that the respondent’s act(s) amounts to unfair administrative action.**

**D. An order compelling the respondents to compensate the petitioner the value of the property invaded, value of the crops and structures demolished by the respondents’ illegal acts/invasion and or an order compelling the respondents to vacate the**

**petitioner's property forthwith.**

**E. A permanent order of injunction do issue restraining the respondents jointly and severally their agents, servants, employees and or functionaries by whatever name called from laying claim, encroaching upon, interfering with, taking possession, occupying or developing the petitioner's property West Kitutu/Mwamonari/808 situate within Marani Sub County within Kisii County.**

4. The respondents filed grounds of opposition dated 30<sup>th</sup> May 2016 to the Notice of Motion filed simultaneously with the petition but did not file any response to the petition inspite of being afforded the opportunity to do so. On 19<sup>th</sup> July 2016 the respondents were granted 30 days leave to file a response to the petition and yet again on 17<sup>th</sup> October 2016 the respondents were granted leave of 45 days to file their response to the petition. On 5<sup>th</sup> December 2016 Mr. Onsembe counsel for the respondents informed the court that the parties were in consultations with a view of settlement of the matter out of court.

5. No settlement was struck and the court on 12<sup>th</sup> June 2017 directed the respondents to make a formal response to the petition within 21 days failing which the court would proceed to make a determination on the petition on the basis of the evidence and material placed before the court by the petitioner. On 18<sup>th</sup> July 2017 the respondents yet again requested for more time to review the valuation report filed by the petitioner in support of her claim for compensation. The court granted the respondents leave to file a supplementary valuation report if they deemed it necessary. The court further directed the parties to exchange their respective submissions in regard to the petition within 60 days. The petitioner filed her submissions on 22<sup>th</sup> September 2017 but the respondents did not file any submissions inspite of the time to do so being extended in their favour on two occasions. Ultimately on 3<sup>rd</sup> July 2018 the respondents indicated they would not file any submissions and hence the court could proceed to give judgment on the basis of the evidence on record.

#### **6. The Petition:**

The petitioner is the registered owner of land parcel **West Kitutu/Mwamonari/808** measuring 1.8Hectares as per the copy of title deed dated 10<sup>th</sup> February 2016 and copy of official search dated 21<sup>st</sup> October 2016 exhibited as "**JOCI**" in the supporting affidavit of the petitioner. The petitioner states the respondents have constructed a road cutting across his parcel of land amongst others and has exhibited a report from the county surveyor (undated) but filed in court on 18<sup>th</sup> July 2016 annexed to the supporting affidavit to the amended plaint which confirms the road to be newly constructed and that the same does not exist on the survey map. The surveyor's report in part makes the following findings and conclusion:-

- (i) The plots are agricultural land and they are owned absolutely by the registered proprietors.**
- (ii) There is a newly constructed road approximately 12m wide cutting across the plot(s) (See attached sketch).**
- (iii) The road constructed has already been murramed.**

The surveyor concluded thus:

**"Having established the position of the disputed parcel of road according to the relevant maps, W/Kitutu/Mwamonari Sheet 21 the road as it is constructed does not exist on the map and therefore due diligence was ignored in its construction and therefore created the crisis over the road."**

7. The petitioner further furnished a letter from Tombe Tea Factory Co. Ltd dated 22<sup>nd</sup> June 2016 which showed that 780 tea bushes belonging to the petitioner were damaged during the construction of the road. The county surveyor vide a letter dated 20<sup>th</sup> February 2017 confirmed that the portion of the petitioner's land that had been affected by the road was 0.12Ha. The firm of Otundo & Associates Valuers & Estate Agents carried out an inspection for purposes of preparing a valuation for compensation of the petitioner for his land and damaged tea bushes. The valuation report dated 1<sup>st</sup> March 2017 was filed in court by the petitioner together with other documents as supplementary documents in support of the petition on 10<sup>th</sup> May 2017. The petitioner in his submissions has urged the court to adopt the valuation report and award the petitioner compensation/damages as itemized in the valuation report.

8. The issues in this petition are rather straight forward. The issue for determination is whether the respondents have unlawfully and/or illegally created and opened a road through the petitioner's land parcel **West Kitutu/Mwamonari/808** and if so, whether the petitioner is entitled to compensation. There is uncontraverted evidence that the petitioner is the owner of land parcel **West Kitutu/Mwamonari/808** as evidenced by the copy of the title and copy of the certificate of official search. The evidence by the county surveyor that no road exists on the survey map where the respondents have created a road cutting across the petitioner's land among others has not been contraverted either. The court in the absence of any response and/or explanation by the respondents as to why they decided to open a road through the petitioner's land is left with no option but to find and hold that the respondents act was illegal and unlawful. If the respondents were of the view that it was necessary to have a road created where they did, the respondents ought to have followed due process whereby the owners of the affected parcels of land would have been compensated as envisaged under Article 40(3) of the Constitution if the land was indeed required for public purposes as it appears. The constitution protects private property owners against arbitrary deprivation of their properties by the State.

9. Article 40(1) of the Constitution provides that a person is at liberty to acquire and own property of any description in any part of Kenya. Article 40(2) of the Constitution provides thus:-

- (2) Parliament shall not enact a law that permits the stated or any person-**

**(a) To arbitrary deprive a person of property of any description or of any interest in, or right over, any property of any description.**

Further Article 40(3) provides thus:-

**(3) The state shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-**

**(a) .....**

**(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that-**

**(i) requires prompt payment in full, of just compensation to the person; and**

**(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.**

10. The Land Act 2012 under Sections 107 to 133 makes provision as to how compulsory acquisition of land is to be executed. The respondents did not invoke the provisions of Section 107 of the Land Act to signify their intention to compulsorily acquire the land they required to construct the road. If the respondents had intended to compulsorily acquire the land, the County Executive Committee of the Kisii County would have made a request to the National Land Commission to undertake the process of the acquisition.

11. Section 107(1) of the Land Act provides:-

**(1) Whenever the national or County Government is satisfied that it may be necessary to acquire some particulars land under Section 110, the respective cabinet Secretary or the County Executive Committee Member shall submit a request for acquisition of land to the commission to acquire the land on its behalf.**

Section 110(1) of the Land Act provides:-

**(1) Land may be acquired compulsorily under this part if the commission certifies, in writing, that the land is required for public purposes or in the public interest as related to and necessary for fulfillment of the stated public purpose.**

12. It is thus clear that if the County Government of Kisii required a public road to be created cutting across the petitioner's land and other persons parcels of land, the county government ought to have invoked the provision of Section 107 (1) of the Land Act to set in motion the process of compulsory acquisition of the land. They did not do so but arbitrary went ahead and created and opened the road which as per the report of the surveyor is now murramed and presumably in use. The petitioner had a right and was entitled to protest the invasion of his land. The petitioner's property rights were violated and there was a clear breach of Article 40 of the Constitution. The petitioner cannot be remediless merely because the respondents forcibly caused the road to be done through his land and the matter is now **"fait accompli"**.

13. The valuation report prepared by Otundo & Associates, Valuers and Estate agents in the remarks section reads thus:-

**"The land being valued is private land on which Marani-Masakwe road is built. The road is newly built and of murram.**

**Therefore this valuation is for compensation of land and crops on it that were destroyed during the construction of the road."**

The valuer returned a valuation of kshs. 729,100/= made up as follows:-

**(i) Land (0.12Ha) .....kshs.400,000/=**

**(ii) Tea (780 bushes) .....kshs.234,000/=**

**(iii) Disturbance allowance 15% .....kshs. 95,100/=**

**Total .....kshs.729,100/=**

14. Under Article 23(3)(e) the court in enforcement of the Bill of Rights has power to make an order for compensation where breach has been established. In the instant petition, I am satisfied the petitioner's constitutional rights relating to protection of property were violated and his land was appropriated without due process of the law. The petitioner was deprived of the use of a portion of his land when the respondents appropriated the land to construct a road which is presently in use by members of the public. If due process was followed and it was found the land was required for a public purpose, the petitioner would have been compensated for the portion of his land deemed necessary for the construction of the road. The valuer has made an assessment of what would have been the appropriate compensation. Although the respondents had the opportunity to comment on the valuation report and/or furnish their own report, they chose to do neither. In the absence of any contrary report, I accept the report prepared by Otundo & Associates, Valuers & Estate Agents as reasonable and fair and it is therefore my holding that the petitioner is entitled to compensation from the respondents in the sum of kshs. 729,100/=.

15. Upon my evaluation of the petition and the evidence tendered in support thereof, I am satisfied that the respondents acted in breach of Article 40 of the Constitution in appropriating a portion of the petitioner's land to construct the road complained of. The action by the respondents was arbitrary and this contravened Article 47 of the Constitution which requires that every person be subjected to fair administrative action before a decision is taken that prejudicially affects him.

16. I accordingly hold that the petition has merit and I make the following orders:

**(i) That the respondents act of entering onto the petitioner's land parcel West Kitutu/Mwamonari/808 and constructing a road through it without following due process was unlawful and contravened Articles 40 and 47 of the Constitution.**

**(ii) That it is hereby ordered that the respondents pay to the petitioner a sum of kshs.729,100/= being compensation for the land appropriated for the construction of a road through the petitioner's said land being inclusive of the damaged crops.**

**(iii) Interest at court rates to accrue on the sum of kshs.729,100/= from the date of judgment until payment in full.**

**(iv) Costs of the petition, are awarded to the petitioner.**

**JUDGEMENT DATED, SIGNED and DELIVERED at KISII this 28<sup>TH</sup> DAY of SEPTEMBER 2018.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Mr. Ollando for Mose for the petitioner

Mr. Okenye for Onsembe for the 1<sup>st</sup> and 2<sup>nd</sup> respondents

Ruth court assistant

**J. M. MUTUNGI**

**JUDGE**