



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CONSTITUTIONAL JUDICIAL REVIEW DIVISION

CONSTITUTIONAL PETITION NO. 27 OF 2016

JUMA ALI MANGI AND 23 OTHERS.....PETITIONERS

VERSUS

KENYA RURAL ROADS AUTHORITY.....1ST RESPONDENT

THE CABINET SECRETARY, MINISTRY OF ROADS

INFRASTRUCTURE, HOUSING AND URBAN DEVELOPMENT...2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. By an Amended Petition dated and filed herein on 8th May 2017, the 24 Petitioners pray for:-

1. A declaration that the 1st Respondent's notices to the Petitioners requiring the Petitioners to demolish their properties located at Kakuyuni Trading Centre are unconstitutional, null and void;

2. A declaration that by constructing and improving to bitumen standard the Malindi-Kakoneni-Sala Gate Road B8 through Kakuyuni Trading Centre while the Petitioners are in possession and occupation of their houses situate at the said Trading Centre the Respondents have constructively and arbitrarily evicted the Petitioners therefrom without compensation and have violated the Petitioners' Constitutional right to property and housing;

3. A declaration that the Petitioners are entitled to compensation and/or alternative accommodation of equal or better quality from the Respondents jointly and severally;

4. An order of mandamus be and is hereby issued(sic) to compel the Respondents, jointly and severally to compensate the Petitioners and/or offer them alternative accommodation of equal or better quality within sixty(60) days of the date of this order;

5. A declaration that the Petitioners houses located at Kakuyuni Trading Centre are not erected on a road reserve;

6. In the alternative to Prayer (5) above, a declaration that if indeed the lands occupied by the Petitioners are on a road reserve they are therefore public land and fall within the Constitutional definition of public land hence the Petitioners are protected against arbitrary removal and treatment;

7. An order of prohibition be and is hereby granted (sic) to restrain the Respondents from evicting the Petitioners from their houses located at Kakuyuni Trading Centre before compensation and/or alternative accommodation is offered to them by the Respondents;

8. Costs of this Petition; and

9. Any further relief or orders that this Court shall deem just and fit to grant.

2. The Petitioners claim arises from their contention that in or about October 2016, the Kenya Rural Roads Authority (the 1st Respondent) gave them verbal notices to the effect that their houses would be demolished to pave way for the construction of Malindi-Kakoneni-Sala Gate Road. Thereafter, on or about 23rd November 2016, the 1st Respondent's Project Surveyor visited Kakuyuni Trading Centre and proceeded to put marks on the Petitioners' houses situated within the Centre indicating that the same would be demolished to pave way for the construction of the said road. Further, by notices issued on 9th December 2016, the 1st Respondent required the Petitioners to remove the marked buildings within 14 days from the date of the notice.

3. The Petitioners aver that the reason given by the 1st Respondent for the said notices was the 1st Respondent's contention that the marked buildings were within a gazetted road reserve. However, as far as the Petitioners are concerned, they have lived in the houses at the Centre for over 50 years and the 1st Respondent's contention is thus without basis.

4. The Petitioners further aver that the Respondents have failed to give them information as to when the land on which their houses stand was declared and/or gazetted to be a road reserve, which failure they contend is in breach of their right to access information under Article 35 of the Constitution. It is further the Petitioners' case that the declaration of their land as a road reserve without following due process is in utter breach of the Petitioners' right to own property under Article 17 of the Universal Declaration of Human Rights (UDHR).

5. The Petitioners further accuse the 1st Respondent of failing to ensure there is public participation by involving the Petitioners who are persons adversely affected by its decision contrary to the provisions of Article 10(2)(a) of the Constitution on national values and the principles of governance.

6. In addition, the Petitioners contend that the 1st Respondent has contravened Section 23 of the Kenya Roads Act, 2007 by failing to enter an agreement with the Petitioners before acquiring their land for purposes of upgrading the road. By seeking to demolish their houses without giving the Petitioners a hearing, it is the Petitioners case that the Respondents are in further breach of Section 5 of the Fair Administrative Action Act and Article 5 of the Universal Declaration of Human Rights and the UN Guidelines on Evictions and Displacement.

7. By a Replying Affidavit sworn by its Project Surveyor Roland Malika, the 1st Respondent states that as the Institution charged with maintenance and improvement of rural roads, it has embarked on what it described as improvement to Bitumen Standard of the Malindi-Kakoneni-Sala Gate Road. It is the 1st Respondent's case that the history of the said road dates back to the 1960s and it has all along been a public road without any objection from the Petitioners or any other person or entity.

8. The 1st Respondent avers that the Petitioners have not demonstrated that they have any right whatsoever to own or occupy the road reserve or the space on which the road is being constructed and therefore this Petition is frivolous, bad in law and designed to frustrate the 1st Respondent from carrying out its mandate. It is the 1st Respondent's case that the right to property enshrined under Article 40 of the Constitution does not extend to property acquired or occupied illegally.

9. The 1st Respondent avers that contrary to the Petitioners' allegations that they were not consulted, the County Government of Kilifi did publish a notice dated 5th March 2015 in which it invited stakeholders for purposes of preparation of a Zoning Plan for Kakuyuni Trading Centre as required under both the Physical Planning Act and the County Government Act.

10. The 1st Respondent further avers that after the stakeholder consultation, the Physical Development Plan for the area was prepared, after which the County Government of Kilifi did again by a public notice dated 7th March 2016, invite the people to make any representation in connection or objection to the Physical Development Plan. No objections were received from the Petitioners and subsequently a consultative forum was held with stakeholders on the effects of the road construction at Kakuyuni Market on 25th November 2016.

11. It is the 1st Respondent's case that some of the Petitioners have encroached on the road reserve and the Petition therefore lacks basis and ought to be dismissed.

12. The Cabinet Secretary, Ministry of Roads Infrastructure, Housing and Urban Development (the 2nd Respondent) and the Honourable the Attorney General (the 3rd Respondent) filed joint Grounds of Opposition to the Amended Petition in which they state:

1. That the Petition is filed in bad faith, is misconceived, frivolous, vexatious and an abuse of the Court Process.

2. That the Petition lacks merit as it does not demonstrate infringement of any right and freedom as contemplated under Article 10, 24(1), 28, 35, 40, 43(1) (b) and 60(1) (b) of the Constitution nor beach of any Law to warrant grant of the reliefs sought by the Applicants.

3. That compulsory acquisition of land for public purpose does not arise in the circumstances as Malindi-Kakoneni-Sala Gate Road B8 was marked out, authenticated and identified by the Survey Department of Kenya for purposes of the road (which) has not been occupied and was never to be allocated in the first instance.

4. That in any event the Petitioners have no basis for their claim as they have illegally invaded and encroached into the areas set for (a) road reserve.

5. That the Petition seeks Orders in vain as the upgrading of the road in question is 'fait accompli' and the same was undertaken by a competent Authority within the Law.

6. That the Petitioners have not exhibited proof of any demolitions, damages and/or evictions by the 1st Respondent to warrant grant of the relief sought.

7. That the Petitioners have not met the threshold for grant of the Orders sought.

8. That the 2nd Respondent is not a legal person hence the entire suit as against the 2nd Respondent is incompetent, bad in law and ought to be struck out and/or dismissed with costs.

9. That the action of the Respondents(was) done in pure public interest which is (a) greater good and militate(s) against (the) grant of the reliefs sought by the Petitioners as to do so would expose the Respondents to unnecessarily expenses of unjustified claims of compensation by the Petitioners; and

10. That the claim for compensation is misplaced, as it is admitted by (the) Petitioners that the action by KERRA was only to upgrade an existing road and not curving out a road from land that is in possession (of) the Petitioners.

13. I have considered the Petition and the responses thereto. I have equally studied both the written as well as the oral submissions as canvassed before me by the Learned Advocates for the parties. In my considered view the three main issues raised may be isolated and framed as follows:-

a) **Whether or not there was Public Participation prior to the construction of the Malindi-Kakoneni-Sala Gate Road as demanded under Article 10 of the Constitution;**

b) **Whether or not there was compulsory acquisition of the Petitioners land in a manner that was or is inconsistent with and or in contravention of Article 40 of the Constitution and/or any written law and;**

c) **Whether there has been a breach of the Petitioners right to information under Article 35 of the Constitution.**

14. In determining the above issues, I think I will also have answered two other related issues. First, whether the Respondents are in breach of Section 5 of the Fair Administrative Action Act and Article 5 of the Universal Declaration of Human Rights as well as the UN Guidelines on Evictions and Displacements. And secondly, whether in constructing the road as they did, the Respondent were in breach of Section 23 of the Kenya Road Act, 2007.

a) Whether there was a Public Participation Prior to the commencement of the road Upgrade.

15. In answering the first core issue, this Court is compelled to look at the meaning and intent of Article 10(2) (a) of the Constitution. It was the Petitioners' case that in the discharge of its mandate, the 1st Respondent has failed to ensure that there is public participation involving the Petitioners who are persons adversely affected by its decision. In essence, the Petitioners contend that the 1st Respondent did not seek the input of the Petitioners and other residents of Kakuyuni Trading Centre who are the citizens directly affected by the project upgrading the road which passes through the Centre.

16. In the same vein, the Petitioners accuse the 1st Respondent of contravening Section 23 of the Kenya Roads Act, 2007 which mandated it to enter into an agreement with the Petitioners before acquiring their land for road upgrading or to notify the Cabinet Secretary for Lands if it deemed the land to be public land.

17. Article 10(2) (a) of the Constitution provides that:-

“The national values and principles of governance include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people.”

18. I think it is now widely accepted that the objective in involving the public in the decision making process is to that the concerns of the public are taken into account whenever decisions are being made by those in positions of authority. This promotes the legitimacy and hence the greater acceptance of the decision that is arrived at. As was stated by Ngcobo J *in the South African Case of Doctors for Life International –vs- Speaker of the National Assembly and Others(CCT12/05) (2006) ZACC 11(2006) (12) BCLR 1399(CC); 2006 (6) SA 416(CC):-*

“The phrase “facilitate public involvement “is a broad concept which relates to the duty to ensure public participation in the law-making process....

According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something.....

The democratic government that is contemplated in the Constitution is thus a representative and participatory democracy which is accountable, responsive and transparent and which makes provision for the public to participate in the law-making process.”

19. In response to the Petitioners assertions herein, the 1st Respondent avers that when it embarked on the process of improving the Malindi-Kakoneni-Sala Gate Road to bitumen standard, the area residents were invited for purposes of preparing a Zoning Plan for Kakuyuni Trading Centre. The notice of invitation dated 5th March 2015 was published by the County Government. A perusal of the Notice annexed to the 1st

Respondent's Affidavit and marked "KERRA 2" indicates that it was meant to enable the authorities to prepare a comprehensive base map and an inventory of the area for the purpose of coming up with an implementable Zoning Plan.

20. From the material placed before me, it is evident that subsequent to the said meeting, the 1st Respondent prepared a Physical Development Plan which revealed that it referred to as various encroachments on the road reserve. Thereafter the County Government of Kilifi prepared another notice published in the Standard Newspaper on 7th March 2016 in which area residents were invited to make representations and/or objections to the Development Plan.

21. While it is not clear to me whether notice of another meeting was given, it is apparent from the material placed before me that a meeting was held at the said Kakuyuni Trading Centre on 25th November 2016. From the minutes of the said meeting annexed to the 1st Respondent's Replying Affidavit and marked as "KERRA 5", it is evident that those present at the meeting were informed by the Project Surveyor that the road reserve was 30 metres on either side of the road.

22. The Petitioners themselves do not deny that the meeting of 25th November 2016 took place. They however point out that under Agenda Item No. 3, concerns were raised for compensation and it was agreed that developments made before the Gazette Notice of 1971 be compensated by the Office of the Principle Secretary of the 2nd Respondent herein.

23. In the Petitioners Further Affidavit sworn and filed herein by Juma Ali Maingi on 8th May 2017, it is apparent from annexure "JAM 1" that there was another Stakeholders Meeting held on 21st May 2016 which meeting was attended by among others the then Women Representative Kilifi County Hon Aisha Jumwa Karisa, the MCA Kakuyuni Ward Hon Nickson Mramba and various members of the Kakuyuni Planning Committee. The said Meeting agreed inter-alia that the concerned road be made to pass outside Kakuyuni Trading Centre to avoid damage and/or demolitions and the Concerned authorities were to be approached for consultation on the issues. It is however apparent that no agreement was reached with the Respondents on the said subject.

24. Arising from the foregoing, I am satisfied that there is sufficient evidence before me to lead to the conclusion that prior to the upgrade of the road, the project was widely advertised and that some of the Petitioners participated by giving their views. I think in a situation such as this one, what matters is that at the end of the day a reasonable opportunity was offered to the Kakuyuni area residents and all interested parties to know about the issues and to have an adequate say. Whereas the views of the Petitioners may not have been swallowed hook, line and sinker, that does not necessarily mean that there was no public participation as envisaged under Article 10(2) (a) of the Constitution.

The Petitioners' Land and whether it was compulsorily acquired

25. In answering the second core issue, this Court has considered the meaning and intent of Article 40(3) of the Constitution. Article 40, reads in part as follows:

40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-

(a) Of any description, and

(b) In any part of Kenya.

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

a) To arbitrarily deprive a person of property of any description or of any interest in, or rights over, any property of any description; or

b) To limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).

(3) The State shall not deprive a person of property of any description, or 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 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.

26. Arising from the foregoing, there is absolutely no doubt that no citizen is to be deprived of his land by the State or any public authority against his wish unless expressly authorized by law and public interest also decisively demands so. This universally accepted principles of Constitutional law may be international in origin but is now well grounded locally and duly captured as seen above-under Article 40(3) of our Constitution.

27. It is the Petitioners contention in the matter before me that sometime in October 2016, the 1st Respondent gave them verbal notices to the effect that their houses would be demolished to pave way for the construction of the Malindi-Kakoneni-Sala Gate Road. Thereafter on or about 23rd November 2016 the 1st Respondent's representative moved to Kakuyuni Trading Centre whereupon they proceeded to put marks on the Petitioners buildings indicating that they would be demolished unless the Petitioners themselves removed them.

28. According to the Petitioners, the reason the Respondents gave for their said actions was the 1st Respondent's contention that the marked buildings were within a gazetted road reserve. As far as the Petitioners were concerned however, there was no basis for the 1st Respondent's contention as they had lived at the said buildings within Kakuyuni Trading Centre for more than 50 years.

29. It was the Petitioners case that they were unaware of any gazette notice that declared the land on which their buildings stood as a road reserve and the said declaration was therefore done without due process and hence contravened their rights to own property as provided under Article 40 of the Constitution.

30. The 1st Respondent, a statutory body established pursuant to Section 6 of the Kenya Roads Act however denies that it has breached the Petitioners rights as stated. Describing itself as the body charged with the responsibility of management, development, rehabilitation and maintenance of rural roads, the 1st Respondent avers that it did indeed embark on the process to improve the said Malindi-Kakoneni-Sala Gate Road to Bitumen Standard.

31. According to the 1st Respondent the said road has been used by members of the public from as early as the year 1960 and it is the Petitioners who have encroached thereon.

32. From the material placed before me; it was evident that indeed many residents of Kakuyuni Trading Centre only came to learn of the extent of the road reserve passing through their Trading Centre in 2016 when the 1st Respondent commenced the up-grade of the road.

33. While no Gazette Notice establishing the reserve was placed before me, it is apparent that sometime in the year 1971, the Government created the road corridor stated to measure approximately 30 metres. The 1st Respondent produced maps from the Survey of Kenya plus notices and Development Plans which purported to show the creation of the road corridor as well as the extent of encroachment thereon. The accuracy and authenticity of the maps and plans was not challenged by the Petitioners.

34. Under Section 89(1) of the Evidence Act:-

“The Court shall presume that maps or plans purporting to be made or published by the authority of the Government or any department of the Government, of any country in the commonwealth were so made or published and are accurate.”

35. Accordingly, and despite the absence of the specific Gazette Notice this Court shall presume that the maps and Plans presented by the 1st Respondent are authentic and accurate. From an extract of the Minutes of a Meeting held on 25th November 2016 with the residents at Kakuyuni Market, it is apparent that some people were already residing at Kakuyuni Trading Centre in 1971 when the road corridor was created. Under Minute No. MSG1 D 25/11/2016 entitled “Way Forward on Implementation of the Project”, the rights of the concerned parties was captured as follows:-

“Property established before gazetted road notice of 1971 to be compensated by the Office of the Principal Secretary accompanied by authenticated ownership documents.”

36. While it is not clear which Principal Secretary was being referred to herein, it is evident that the interests of property owners who had developed the same before 1971 when the road reserve was created, were to be dealt with by the Government upon production of authenticated documents of ownership.

37. As it were the Petitioners have not placed any evidence before this Court to demonstrate that they provided any proof of ownership to the Government and that they were not compensated. Indeed, the 24 Petitioners before me have not provided to this Court any proof of ownership of the parcels of land on which the marked buildings stand. No title deeds or documents of ownerships, maps or survey plans were placed before this Court to enable me make a determination as to the ownership of the land.

38. In any event, it is apparent from the Further Affidavit of Juma Ali Mangi filed herein on 8th May 2017 that the construction of the road through the said Kakuyuni Trading Centre is now complete and further that no buildings were demolished as a result thereof. While the Petitioners contend that the resulting tarmac road passes very closely to their houses and that its construction has affected the very existence of the buildings and weakened their foundations, no structural or other report or evidence was placed before me in support of the said contention.

39. As was stated in *Patrick Musimba –vs- National Land Commission & 4 Others (2016) eKLR:-*

“.....a closer reading of Article 40(3) of the Constitution would reveal that the Constitution did not only intend to have the land owner who is divested of his property compensated or restituted for the loss of his property but sought to ensure that the public treasury from which compensation money is drawn is protected against improvidence. Just as the owner must be compensated, so too must the public coffers not be looted. It is that line of thought that, under Article 40(3) forms the basis for “prompt payment in full, of just compensation to the person” deprived of his property through compulsory acquisition.”

40. Therefore and arising from the circumstances of this case, I did not find any basis to hold that the Petitioners rights under Article 40 of

the Constitution had been breached.

Whether there has been a Breach of the Petitioners' Right to Information.

41. Finally, the Petitioners contend that they were not given information as to when the land on which their houses stand was declared and/or gazetted to be a road reserve and that the same amounted to a breach of their right to access information as provided under Article 35 of the Constitution. It was their case that despite being persons that were adversely affected by the 1st Respondent's decision; they were not supplied with vital data, documents and other relevant information concerning the Project.

42. While it is indeed true that Article 35(1) of the Constitution provides that:-

“Every citizen has the right of access to information held by the State,”

It was however not clear to me how this right had been violated. As was stated in *John Kamau Kenneth Mpapau –vs- City Council of Nairobi & 7 Others(2014) EKLK:-*

“.....a reading of Article 35 shows that the right of access contains three key elements. Article 35(1)(entitles one) to information from the State or to information held by another person required for(the) exercise of Protection of a fundamental right and freedom. The Petitioners in moving the Court to enforce rights under Article 35(1) must set out what information was sought but not given.”

43. As it were, there was nothing placed before me to indicate that the Petitioners requested for any particular information and that the Respondents refused to provide the same. I am in the circumstances unable to hold that their rights under Article 35 of the Constitution were violated.

44. In conclusion, I must agree with the Submissions of the Honourable the Attorney General herein that the upgrading of this road was done in the public interest and the Petitioners have not suffered any deprivation, loss and/or damage. As Nyamu J(as he then was) expressed himself in *Kenya Guards Allied Workers Union vs- Security Guards Services and 38 Others Nairobi H.C. Misc 1159 of 2003:-*

“Where national or public interest is denied, the gates of hell open wide to give way to deforestation, pollution, environmental degradation, poverty, insecurity and instability. At the end of the day, we must remember those famous words of a famous Jurist-Justice is not a cloistered virtue. I must add that where justice is done and public interest upheld, it is acknowledged by the public at large, the sons and daughters of the land dance and sing, and the angels of heaven sing and dance and Heaven and Earth embrace. By upholding the public interest and treating it as twinned to the human rights we shall be able to do away with poverty eradication programmes and instead we shall have empowered our people to create real wealth for themselves. Public interest must be the engine of the millennium and it must where relevant occupy centre stage in the Courts....”

45. On that note, I think I have said enough to demonstrate that I did not find any merit in the Petition before me. The same is dismissed.

46. Each party shall bear their own costs.

Dated, signed and delivered at Malindi this 14th day of December, 2018.

J.O. OLOLA

JUDGE