



Kyambia & 10 others v Kenya National Highways Authority & 2 others (Environment & Land Petition 1 of 2022) [2024] KEELC 226 (KLR) (23 January 2024) (Judgment)

Neutral citation: [2024] KEELC 226 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND PETITION 1 OF 2022
LG KIMANI, J
JANUARY 23, 2024

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF
KENYA
AND
IN THE MATTER OF ARTICLES 29(1), (2)(3)A, B, (4)A & B, ARTICLE
21(1), 22(1),(2)& 23(1)&(3)A, B, C, D &E OF THE CONSTITUTION
AND
IN THE MATTER OF THE RIGHT TO PROPERTY
AND IN THE MATTER OF CONTRAVENTION OF ARTICLES
27,28,40,42 & 47 OF THE CONSTITUTION OF THE REPUBLIC OF
KENYA
AND
IN THE MATTER OF THE KENYA ROADS ACT, ACT NO. 2 OF 2007
AND
IN THE MATTER OF THE ENVIRONMENTAL MANAGEMENT AND
CO-ORDINATION ACT OF 2015
AND
IN THE MATTER OF THE LAND ACQUISITION ACT CAP 295
AND
IN THE MATTER OF ARTICLE 165(A), (B), (C), (D) (I) & (II) & 4 OF THE
CONSTITUTION AS READ WITH SECTION 20 & 21 OF THE
CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS, PRACTICE AND PROCEDURE RULES 2013)



BETWEEN

JOSEPHAT K. KYAMBIA 1ST PETITIONER
ONESMUS M. KONGO 2ND PETITIONER
REBECCA J. MWALIMU 3RD PETITIONER
ONESMUS K. MUTHAMI 4TH PETITIONER
KANINI MALOMBE 5TH PETITIONER
JACKSON K. WAMBUA 6TH PETITIONER
BERNARD K.MUSANGO 7TH PETITIONER
JOSHUA M. KITINDIO 8TH PETITIONER
ANN MWENDE KILILI 9TH PETITIONER
DANIEL MUSANGO MAKAU 10TH PETITIONER
JULIUS K NZINGA 11TH PETITIONER

AND

KENYA NATIONAL HIGHWAYS AUTHORITY 1ST RESPONDENT
NATIONAL LAND COMMISSION 2ND RESPONDENT
SINOHYDRO CORPORATION LIMITED 3RD RESPONDENT

JUDGMENT

1. This suit was brought by way of a Further Amended Petition amended on 4th October 2022 and filed on 17th October 2022. The Petitioners claim that their constitutional rights have been violated by the Respondent by issuing notices to demolish private properties by the 1st Respondent under Section 49 of the *Kenya Roads Act* without putting into consideration the provisions of Section 8 of the Land Acquisition Act. The Petition is founded on Articles 29(1),(2)(3)a, b,(4)a & b, Article 21(1), 22(1), (2)& 23(1)&(3) a, b, c, d & e, Article 2(1), 3(1), 10(1),2(a),(b),(c) and 27 of *the Constitution* of Kenya.
2. The Petitioner’s claim that the 1st Respondent’s assertion that they have encroached on a road reserve is a violation of their right to property under Article 40 of *the constitution* since they are bona fide owners of the structures set to be demolished. The facts relied on are that Section 8 of the Land Acquisition Act CAP 295 provides that where land is acquired compulsorily, full and just compensation shall be paid promptly to all persons who have an interest in the land. They state that the intended acquisition will lead to an estimated total loss of Kshs 30,044,575.
3. The Petitioners further claim that the 1st Respondent issued a gazette notice changing the original size of the Kibwezi-Kitui Road from class B road to an international standard road class A and as a result, the road expanded into their private properties at Ikutha Market.
4. Upon engagement with the stakeholders and public participation, the 1st Respondent agreed to acquire the land for the construction of a bypass to safeguard private properties which were to be affected in the



event of expansion and build feeder roads within Ikutha Market. The Petitioners claim that despite the agreement the 1st Respondent insisted that the feeder roads should have the same standard as the bypass despite having been constructed and commissioned to the public and as a result, the 1st Respondent issued notices to the Petitioners to demolish the business premises allegedly encroaching onto the road reserve. The Petitioners contend that the notices made no provision for compensation as was their legitimate expectation.

5. The Petitioners aver that from 1895 they have extensively developed the parcels of the land following approval of plans by the relevant authorities and there was no anticipation of expansion of the road. They are apprehensive that they will lose their land, business premises source of income and dignity if the said illegal acts of the 1st Respondent are not stopped.
6. The Petitioners seek the court's intervention in granting the following reliefs:
 - a. That a Declaration that the Kenya National Highways Authority's decision to compulsorily acquire the Petitioners' land without making provision for compensation is unlawful and unconstitutional and contravenes the provisions of Article 40 of *the Constitution* of Kenya, 2010.
 - b. A declaration that the respondent's action seeking to curtail, undermine and/or deprive the petitioners of their rights to the properties affected by the respondent notices within Ikutha Market without proper compensation is unjust, unlawful and unconstitutional.
 - c. An order of certiorari to quash the notices dated 15/7/2020 issued by the Kenya National Highway Authority to the Petitioners herein demanding them to remove their business on allegations that they encroached the road reserve.
 - d. An order to protect the Petitioners' business premises and parcels affected by the notice and/or in the alternative order adequate compensation upon the Petitioners whose land is acquired compulsorily.
 - e. Any other relief this court deems fit to grant and the petitioners pray for the costs of this Petition.
7. The petition is supported by the affidavit of the 1st Petitioner sworn on 10th August 2020 and reiterates the contents of the Petition.

1st Respondent's Case

8. Daniel Mbuteti, Senior Surveyor, Survey Department, Directorate of Highway Planning and Design at the Kenya National Highways Authority, the 1st Respondent herein, swore an affidavit on 14th September 2021 in response to the Petition.
9. He deposed that the 1st respondent has the exclusive mandate and responsibility to manage, develop, rehabilitate and maintain National Trunk Roads in Kenya. He stated that the 1st Respondent undertook the construction of Kibwezi-Mutomo-Kitui-Kabati-Migwani Road (A9/B64) whose objective was to reduce travel times and promote regional integration by improving connectivity. The Petitioners' properties are adjacent or share a common boundary with the said road which passes through Kabati and Migwani shopping centers where 3 bypasses were to be constructed at Ikutha, Mutomo and Kitui towns. Also to be tarmacked are roads passing through the towns connected to the bypasses and these roads had existing road reserve widths of 60 meters.



10. The deponent tabled a list of Petitioners showing the level of encroachment onto the road reserve and the developments erected in the encroached areas. He further deposed that the owners were issued Notices requiring them to remove the encroaching structures under Section 49 of the [Kenya Roads Act](#), 2007 and Section 91 of the [Traffic Act](#).
11. The 1st Respondent denies the petitioners' allegations that there has been any change of class and states that the existing road reserve in the section has always been 60 meters. Further, the project is part of the Kibwezi-Kitui-Kanyonyoo-Embu-Meru Road, which was earlier classified as B9 and later classified as class A and named A9 in the year 2016 through Legal Notice No. 2 dated 22nd January 2016 and this re-classification did not change the 60 meters width of the existing road corridor as depicted in the annexed Survey of Kenya Registration Map.
12. The 1st Respondent's position concerning the notices issued is that they were issued in compliance with the law and that it would be against the values and principles of [the Constitution](#) for them to pay compensation on land that is owned by the Government and constructions for the benefit of the public.
13. The Petitioners by consent withdrew the case against the 2nd Respondent, the Attorney General on 4th July 2022 as a result of a preliminary objection dated 13th September 2021.
14. By an application dated 30th June 2022, the Petitioners applied to further amend the Petition and the said application was allowed on 18th July 2022. A further amended Petition was filed on 17th October 2022 to include the National Land Commission as a 2nd Respondent. The said 2nd Respondent did not file any reply to the Petition though served.

3rd Respondent's Replying Affidavit

15. Xia Anquan, the Project Manager of Sinohydro Corporation Ltd, the 3rd Respondent swore a replying affidavit on 13th September 2021 in response to the Petition. He deposed that the 3rd Respondent was contracted by the 1st Respondent to upgrade the Kibwezi-Mutomo-Kitui-Migwani Road (A9/B64) to Bitumen Standard including the feeder road passing through Ikutha Market.
16. The 3rd Respondent stated that it is a private entity and contractor bound by its contractual obligations and has no role in the compulsory acquisition of private land by the Government of Kenya. Further, the responsibility of clearing the site including demolitions lies with the 1st Respondent. It is also deposed that the 3rd Respondent is not under any obligation to issue the notices and that the 1st Respondent has the responsibility of determining what constitutes a road reserve.
17. The 3rd Respondent avers that after issuance of the notices, a consultative meeting was held with leaders and representatives of the persons whose structures were encroaching onto the road reserve where the need to remove such structures was underscored, a copy of the minutes of one of the meetings held on the 24th July 2020 was annexed.
18. He stated that the stoppage of the construction of the road would have far-reaching effects, not only on the contracting parties but also on the entire community that spans beyond the Kibwezi-Migwani corridor.
19. It is also deposed that if any demolitions were to be done, they would only affect such buildings encroaching the road reserve as evidenced by the survey map which demarcates the road reserve to be up to 60 meters.



20. It is the 3rd Respondent's position that the Petitioners did not prove their proprietary interest in the suit property and did not lay a claim against the National Land Commission.

The Petitioners' written submissions.

21. Counsel for the Petitioners filed written submissions where they summarized their case and enumerated issues for determination as whether the Petitioners are the lawful owners of the suit parcels of land, whether the constitutional rights of the petitioners have been infringed without compensation making it unfair, unlawful and unconstitutional and whether they are entitled to compensation for the property that was compulsorily acquired.
22. Counsel for the Petitioners submit that the Petitioners acquired the suit parcels of land legally and followed the due process of the law and valid title deeds were issued. The Petitioners also submit that the Respondents did not prove allegations that the Petitioners had encroached onto the road reserve.
23. Counsel for the Petitioners cited the cases of Kenya Bus Service Ltd & 2 others vs The Attorney General & 2 others (2005) eKLR and the case of Republic vs Senior Registrar of Titles Ex-parte Brookside Court Limited (2012) eKLR, also relying on Section 26 of the Land Registration Act and Article 40 of the Constitution of Kenya 2010 on the property rights.
24. Counsel submitted that the Respondents violated the Petitioner's constitutional rights by not following the views of the public aired during public participation. They also rely on Section 8 of the Land Acquisition Act which provides for full compensation for compulsory acquisition of land.
25. The Petitioners submitted and relied on the case of Dry Associates Ltd v Capital Markets Authority and another Petition No.328 of 2011 and Articles 3,12 and 17 of the Universal Declaration of Human Rights, 1948. They also quoted Lord Denning in the case of R vs Chief Immigration Officer (1976) 3 AER 843 on the right to own property.
26. Counsel for the Petitioners also relied on the procedure for compulsory acquisition as was laid down in the case of Patrick Musimba v National Land Commission & 4 Others (2016) eKLR, stating that the process was not followed by the Respondents.
27. The Petitioners rely on the valuation by Keriasek & Co. which estimates a cumulative loss to the Petitioners of Kshs. 30,044,575 and pray that the court orders that they be compensated by the 1st Respondent and the costs of the Petition.

1st Respondent's written submissions

28. Counsel for the 1st Respondent submitted on the level of encroachment by each Petitioner onto the road reserve as explained in the Replying Affidavit of Daniel Mbuteti. The 1st Respondent submitted the Petitioners have no proprietary interests in a road reserve and are not entitled to compensation. They relied on the case of James Macheneri Isigi & 2 others v. Kenya National Highways Authority & Another (2021) eKLR. They also submitted that the body legally mandated to acquire property on behalf of the Government is the National Land Commission and they cited the case of Patrick Musimba vs the National Land Commission and 2 others.
29. Further, the 1st Respondent submits that the Petitioners have failed to demonstrate that the Respondents acted contrary to the public views agreed upon during public participation. They also failed to adduce evidence that the Respondents demolished portions of their businesses erected.
30. It is the 1st Respondent's submission that the notices dated 15th July 2020 were issued in the ordinary discharge of the 1st Respondent's statutory duty enshrined in Section 22(1) and Section 49(1) of the



Kenya Roads Act. They also quoted from section 91 of the Traffic Act on encroachment onto a road reserve being an offence.

31. The 1st Respondent finalized by submitting that the Petitioners' rights under Article 40 of the Constitution had not been violated since the Petitioners had encroached onto the road reserve. They relied on the holding in Kenya National Highways Authority v Shalien Masood Mughal & 5 Others (2017) eKLR stating that the Petition ought to be dismissed with costs.

3rd Respondent's written submissions

32. Counsel for the 3rd Respondent submitted that the Amended Petition does not mention or identify even a single parcel of land that is alleged to have been the subject of the demolitions or compulsory acquisition and that they have not shown how they arrived at the cumulative figure prayed for as Kshs. 30,044,575.
33. They also submit that in constitutional litigation, a party that alleges a violation of rights must plead with precision how the alleged violation arises. They rely on the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (2013) eKLR. It is their submission that the Petition provided little to no particulars as to the allegations and manner of the alleged infringements and that no reasonable cause of action has been demonstrated to warrant the intervention of the court.
34. It is also submitted that the Petition is ambiguous and that the 3rd Respondent has no role in the compulsory acquisition of private land including in issuing the impugned notices.
35. The 3rd Respondent also submits that the said notices were issued under statutory authority under Section 49(1) of the Kenya Roads Act and Section 91(2) of the Traffic Act, and noted that from the Petitioners' own annexure 'JKK-3' that the road reserve indeed exists and that the National Land Commission charged with compulsorily acquiring land for expansion of the road notified the affected land owners on the same, also noting that the Commission is not a party to this suit. They state that any adverse orders made against the National Land Commission would amount to condemning it without a hearing while relying on the cases of David Oloo Onyango vs Attorney General (1987) eKLR and the case of James Kanyita Nderitu & another vs Marios Philotas Ghikas & Another (2016) eKLR.
36. They also referred to the minutes of the meeting held on 24th July 2020 on the consultative meetings and deliberations held, noting that there was a need to remove structures that were encroaching onto the road reserve.
37. The 3rd Respondent concluded by submitting that the stoppage of construction of the road would have far-reaching consequences as it is part of the linkage of the Mombasa highway at Kibwezi to the Nairobi-Addis Ababa Highway as part of the government of Kenya's LAPPSET project and there is immense public interest to conclude it within contractual timelines. They quoted from and relied on the case of Kenya National Highway Authority v Shalien Masood Mughal & 5 others (2017)eKLR as they urged the court to dismiss the amended petition with costs to the 3rd Respondent.

The Joint Survey Report

38. On 9th November 2022, when the petition herein was mentioned in court, the Court noted that the Petition is a claim of violation of rights to property and that the issue could be determined by way of a joint professional survey which the parties agreed to by consent. A report by SMO Geospatial Systems Ltd was filed in court on the 22nd of May 2023.
39. The surveyor's report noted inter alia that as per the survey records the road reserve within the point of interest is 60 meters. Stanley Omucheni, the licensed land surveyor who made the report concluded



that the adjudicating team demarcated the road with a width of 60 meters but when they went to subdivide parcel Ikutha/ndili/46 into Ikutha Ndili/264,271,268,270,309,311, 312 and others, they reduced the road reserve to 20 meters.

40. The Petitioners filed their further submissions on the report, stating that as the registered land owners of the disputed parcels of land, they have indefeasible title deeds. They highlighted that the Survey report confirms that survey plans to establish their parcels of land were checked, approved and authenticated by the Director of Surveys as required by the *Survey Act* and form part of the current official survey records and that the director of the survey would have rejected the survey and subdivision if the width of the road had been reduced from the required standard of 60 meters. They quoted Regulation 26 of the Survey Regulations 1994 on the personal responsibility of a surveyor for every survey that they present for the approval of the Director. The Petitioners relied on the authority of *Chemei Investments Limited vs The Attorney General & others*.
41. The 1st Respondent also made written submissions concerning the survey report, submitting that the survey report has determined that the suit properties are indeed encroaching onto the road reserve.

Analysis and Determination

42. The dispute before this court relates to notices issued by the 1st Respondent, Kenya National Highways Authority (KeNHA), dated 15th July 2020, requiring the Petitioners to remove all structures encroaching onto the classified road reserve for Kibwezi-Mutomo-Kitui-Kabati-Migwani (A9/B64) Road. The Petitioners contend that they hold title deeds to the claimed parcels of land and that the notices by the 1st Respondent amount to the compulsory acquisition of their land without compensation.
43. Before the court deals with the petition herein it is noted that at the time of filing the petition, the Petitioners filed under certificate of urgency the Notice of Motion dated 10th August 2020. The said application was amended on 5th May 2020 and further amended on 4th October 2022 both times without leave of the court. The court record shows leave to amend granted on 28th April 2021 and 18th July 2022 was to amend the Petition only. The said amended and further amended Notices of Motion are hereby struck out for having been filed without leave of court.
44. The initial Notice of Motion dated 10th August 2020 sought preservatory and conservatory orders against the 1st and 3rd Respondents pending hearing and determination of the application itself and the petition herein. The said application was not heard inter partes and for the reason that the application sought interlocutory orders pending hearing of the petition, the court is of the view that prayers sought are now spent and declared moot since the petition has been heard and determined by way of the present judgement. The court will not deal with the said application and the same is struck out with no order as to costs.
45. Counsel for the petitioners have drawn several issues for determination, they include the determination of the ownership of several parcels of land mentioned in the submissions, whether the Petitioner's constitutional rights have been infringed and whether the Respondent's respective action curtails, undermines and/or deprive the Petitioners of their right to all those properties without just cause and adequate compensation is unfair, unlawful and unconstitutional.
46. Counsel for the 1st Respondent drew issues for determination being whether the Petitioner's properties are encroaching on the road reserve and whether the Petitioners are entitled to compensation. They also seek a determination of whether the Respondent was justified in issuing the notices dated 25th July 2017 and whether the Petitioner's rights to property under Article 40 were violated.



47. Counsel for the 3rd Respondent drew issues for determination as to whether the amended petition was pleaded with reasonable precision to enable the court to grant the orders sought. They also seek a determination of whether the Petitioners are entitled to any reliefs sought against the 3rd Respondent and who should bear the costs of this petition.
48. Having considered the pleadings herein, submissions by Counsel and the issues drawn, the Court considers the issues arising for determination as hereunder:
- A. Whether the amended petition was pleaded with reasonable precision to enable the court to grant the orders sought.
 - B. Whether the petitioners are the lawful owners of the suit parcels of land namely Ikutha/ndili/271, Ikutha/ndili/267, Ikutha/ndili/352, Ikutha/ndili/311, Ikutha/ndili/271, Plot No. 13 Ikutha market, Ikutha/ndili/268, Plot No. 40 Ikutha market, Ikutha/ndili/264 And Ikutha/ndili/270.
 - C. Whether the Petitioners encroached onto the road reserve and whether the 1st Respondent was justified in issuing the notices dated 25th July 2017.
 - D. Whether the Petitioner's constitutional rights were violated by the Respondents.

A. Whether the amended petition was pleaded with reasonable precision to enable the court to grant the orders sought.

49. Constitutional Petitions are premised on Articles 22, 23 and 258 of *the Constitution* of Kenya. Article 22(1) provides as follows:

“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.”

50. The Petitioners claim violation of right to property under Article 40 of *the Constitution* of Kenya which grants to every person the right to acquire and own property of any description in any part of Kenya. In particular, they claim that the acts of the Respondents amount to arbitrary deprivation of their land without compensation contrary to Article 40 (2) and (3) of *the Constitution* which provide that;

- (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 any interest in, or right over, any property of any description; or
 - (b) to limit, or in any way restrict the enjoyment of any right under this Article based on 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 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--
 - (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.

51. The 3rd Respondent contends that for the Petitioners to be afforded relief by way of a constitutional petition, they must specifically state which rights have been infringed and how they have been infringed. This was observed by the Court in the case of: Anarita Karimi Njeru v Republic [1979]eKLR where the High Court held:

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

52. The 3rd Respondent states that the Petitioners have failed to meet this requirement since they have not stated the alleged constitutional violations with a reasonable degree of precision, specifically, they note the failure to state with specificity the parcels of land and the structures erected thereon that each specific Petitioner owns that are the subject matter of constitutional violations. The 3rd Respondent further states that the Petitioners have failed to show how the cumulative loss of Kshs. 30,044,575/= claimed is arrived at.

53. The Court has considered the petition and finds that it is indeed true that the further amended petition does not mention any parcel of land on which any specific structure is erected and is claimed by any particular petitioner.

54. It is further noted that the said further amended petition is not supported by an affidavit as envisaged by Rule 11 (1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. Rule 11 (2) provides that documents in support of a petition are to be annexed to an affidavit or petition where there is no supporting affidavit.

55. Even if the court were to consider the supporting affidavits filed together with the initial petition sworn on 10th May 2020 and the affidavit supporting the amended petition dated 5th May 2021, none of them mention or allude to any specific parcel of land. The affidavit sworn on 10th May 2020 attaches a few title deeds whose ownership is: parcel Ikutha/ndili/267 is owned by Mutambo Muthiani Munyasya who is not a party to the petition, land parcel Ikutha/ndili/268 is owned by Bernard Kyangu Peter Musango who is not a party to the petition and land parcel Ikutha/ndili/271 is owned by Daniel Musango Makau, Petitioner number 10 A.

56. It is further noted that the bundle of documents filed together with the amended petition were annexures to the affidavit in support of the Amended Notice of Motion amended on 10th May 2021. The said documents are not annexed to the affidavit in support of the petition.

57. The court is alive to the position in law that the primary purpose of pleadings is to communicate with an appreciable degree of certainty and clarity the complaints that a pleader brings before the court and to serve as sufficient notice to the party impleaded to enable him to know what case to answer and the need not to lionize form over substance as per the finding of the Court of Appeal on the case of Mohamed Fugicha v Methodist church in Kenya (suing through its registered trustees) & 3 others [2016] eKLR.

58. However, in the present case, the Court finds that failure by the Petitioners to plead the particulars complained of and in particular the title numbers of the parcels of land subject matter of the dispute in



the petition and the particulars of structures said to be affected by the Respondents' acts was a failure to show the rights infringed, as well as the basis of the Petitioners' grievance. This requirement was set out by the Supreme Court of Kenya in the case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR where it was held that;

“Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Annarita Karimi Njeru v. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement. The 3rd respondent has not shown how it was affected by the decision of CCK to deny National Signal Networks a BSD licence, just as it has also not shown how it was affected by the decision of the Public Procurement Administrative Review Tribunal.”

B. Whether the petitioners are the lawful owners of the suit parcels of land namely Ikutha/ndili/271, Ikutha/ndili/267, Ikutha/ndili/352, Ikutha/ndili/311, Ikutha/Ndili/271, Plot No. 13 Ikutha market, Ikutha/ndili/268, Plot No. 40 Ikutha market, Ikutha/ndili/264 and Ikutha/ndili/270.

59. The Counsel for the Petitioner submitted the above as an issue for determination. He stated that the Petitioners acquired the above parcels of land legally and followed the due process of the law and they were issued with title deeds by the Kitui Land Registry before the 1st Respondent gazetted the upgrade of Kibwezi-Kitui Road from class B to international standard road class A. They contend that the 1st Respondent had no right to serve them with the notices of encroachment on the road and that the said encroachment had not been proved.
60. As noted earlier the specific land reference numbers of the properties whose ownership the Petitioners claim have not been pleaded in the initial petition, the amended petition and the further amended petition. The claim of ownership is also not deponed to in the affidavits in support of the initial Petition. The Respondents did not deny the Petitioners' ownership of the parcels of land mentioned in submissions since the same was not pleaded specifically.
61. However, ownership of the structures on the parcels of land alluded to by the Counsel for the Petitioners is alluded to by the 1st Respondent in the replying affidavit of Daniel Mbuteti where he gives a list of the Petitioners and the level of encroachment onto the road reserve. Ownership of the structures is also evidenced by the notices that were issued to the Petitioners by the 1st Respondent notifying them of its intention to remove the said structures in case they did not remove them.
62. In the court's view, the issue in contention was whether the land owned by the Petitioners and the structures constructed thereon encroached on the road reserve as stated by the 1st Respondent and not whether the Petitioners owned any specific parcels of land. It is further noted that the question of whether the Petitioners owned the land where the structures were constructed was raised by the Petitioners themselves to counter the notices by the 1st Respondent claiming that the structures complained of were not on the road reserve but on private land.
63. In the court's view, the question of ownership of land could only have become an issue for determination if such ownership was claimed by the Petitioners and denied by the Respondents as provided under Order 15 Rule 1 of the Civil Procedure Rules provides for framing of issues and states



that; “Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.” In the present case, the issue of ownership was not one for determination since it was not affirmed by one party and denied by another

B. Whether the Petitioners encroached onto the road reserve and whether the 1st Respondent was justified in issuing the notices dated 25th July 2017.

64. The Petitioners claim that they hold title deeds or documents of title to the suit parcels of land that were acquired following the proper procedure and that the structures complained of by the 1st Respondent were on their parcels of land. The Petitioners further claim that the 1st Respondent changed the original size of the Kibwezi-Kitui Road from a Class B road to an international standard road Class A road and as a result, the road expanded into private properties.
65. They claimed that the 1st Respondent agreed to acquire the land for the construction of a bypass within Ikutha Market to safeguard private properties. Despite this agreement, the 1st Respondent issued notices to demolish the business premises allegedly encroaching on the road without making provision for compensation.
66. In reply to the petition, the 1st Respondent confirmed that it undertook the construction of the Kibwezi-Mutomo-Kitui-Kabati-Migwani Road (A9/B64) and the Petitioners’ properties are adjacent or share a common boundary with the said road. The 1st Respondent also confirmed that the roads to be tarmacked were roads passing through the towns connected to the bypasses and these roads had existing road reserve widths of 60 meters. The 1st Respondent denies there has been any change of class and that the existing road reserve in the section has always been 60 meters.
67. Further, the project road is part of the Kibwezi-Kitui-Kanyonyoo-Embu-Meru Road, which was earlier classified as B9 before and later classified to class A and named A9 in the year 2016 through Legal Notice No. 2 dated 22nd January 2016 attached thereto and that this re-classification did not change the width of the existing road corridor which is 60 meters as depicted in the annexed Survey of Kenya Registration Map.
68. The 1st Respondent also stated that the Petitioner's structures on the road encroached on the road reserve hindering construction work. They attached a list of Petitioners showing the level of encroachment onto the road reserve and particulars of the developments erected in the encroached area. It was further deposed that the owners of the land were issued with Notices requiring them to remove the encroaching structures under Section 49 of the *Kenya Roads Act*, 2007 and Section 91 of the *Traffic Act*.
69. The question for determination is therefore whether the Petitioner’s structures encroached on the road reserve or the same were built on their land. If the same were private property for road construction, did the 1st Respondent follow the legally recognized process of compensation for compulsory acquisition of private property by a state agency?
70. The notice of intended removal of encroachment on the road reserve issued by the 1st Respondent to the Petitioners was issued under Section 49(1)(a) of the *Kenya Roads Act* and Section 91(1) of the *Traffic Act* CAP 403 Laws of Kenya. Section 49(1)(a) of the *Kenya Roads Act* No. 2 of 2007 provides that:

Except as provided in subsection (2), no person or body may do any of the following things without the responsible Authority’s written permission or contrary to such permission—



- (a) erect, construct lay, or establish any structure or other thing, on or over or below the surface of a road reserve or land in a building restricted area;

71. Section 91(1)(a) of the [Traffic Act](#) CAP 403 provides that:

Every person who, without the written permission of the highway authority—

- (a) encroaches on a road or on any land reserved therefore at the side or sides thereof by making or erecting any building, fence, ditch, advertisement sign or other obstacle, or by digging thereon or by planting or sowing any tree, shrub or seeds thereon; shall be guilty of an offence.”

72. The above legal provisions make encroachment on a road reserve an offence.

73. On 16th February 2023 Counsels for the Petitioners and the 1st and 3rd Respondents recorded a consent whereby it was agreed that the Petitioners and the Respondents were to carry out a joint survey of the various parcels of land listed in the amended Petition dated 4th October 2022 to determine whether the said parcels encroach on the road reserve and the extent of the encroachment if at all. The Surveyors were to file the joint report and if there was no agreement on the joint report, each of them was to file a separate report. A joint survey was conducted by SMO Geospatial Systems Ltd and was filed in court on 22nd May 2023. The report was signed by Stanley Omucheni, a licensed land surveyor and he made several findings and observations. He noted inter alia that as per the survey records the road reserve within the point of interest is 60 meters. He concluded that;

“The adjudicating team adjudicated the road with a width of 60 meters but when they went ahead to subdivide parcel Ikutha/ndili/46 into parcels Ikutha/ndili/264,271, 268, 270, 309, 311, 312 and Others they reduced the road reserve to 20 meters. Parcel 46 was also retained in the inset 1(see highlighted parcel).”

74. The joint survey further found that from the measured data he was able to enumerate and show the extent of the encroachment by the various petitioners where the encroachment is shown as hereunder;



S/No	Name	Distance (M)	Area (M2)
1.	Josephat K Kyamba	16.0	480
2	Onesmus M. Kongo	6.6	217
3	Rebecca J. Mwalimu	21	147
4	Onesmus K. Muthami	21	504
5	Kanini Malombe	17	561
6	Jackson K. Wambua	9.5	42.8
7	Bernard K.Musango	16	240
8	Francis K Kituku	20	-
9	Julius Nzinga	16	160
10	Daniel Makau	16	160

74. The foregoing information is a clear indication that the Petitioners have encroached onto the road reserve as claimed by the Respondents. The Petitioners in their further submissions in response to the survey report, stated that as owners of the disputed parcels of land, they have indefeasible title deeds which have not been canceled nor revoked. They highlighted that the report confirms that the survey plans establishing the petitioners' parcels of land were checked, approved and authenticated by the Director of Surveys as required by the *Survey Act* and form part of the current official survey records. They relied on Regulation 26 of the Survey Regulations 1994 on the personal responsibility of a surveyor for every survey that they present for the approval of the Director.
75. However, the survey plans referred to establishing the Petitioner's parcels of land were not produced in court to counter the information in the joint report and neither is it indicated that the same were made available to the joint surveyor.
76. The 1st Respondent cited and relied on the case of Kenya National Highway Authority v Shalien Masood Mughal & 5 others [2017] eKLR on where the Court of Appeal held a title deed to land encroaching a road reserve to be defeasible and stated:

“With that finding, the answer to the first issue becomes clear that there was an 80-meter road reserve and a 30-meter buffer zone on the Nairobi/Mombasa Highway at the interchange with the Southern bypass and the disputed plot was within it. It was scientifically proved by the survey report filed with the court. Needless to say, it was the disputed plot that encroached on the road reserve.....However, in the case before us, Kenha and the other respondents do not challenge the validity of Mughal's title to the disputed plot. Their assertion that, to the extent that he has, as confirmed in the report by the surveyors, encroached on the road reserve and buffer zone, his title is defeasible and is not entitled to the protection afforded by Article 40 of *the Constitution*. The Article protects proprietary rights but under the current Constitutional regime, those rights are not absolute. They can



be limited and one of the limitations appears in Article 40 (6) under which the protection does not extend to any property that has been found to have been unlawfully acquired. One may ask whether the disputed plot in this matter was lawfully acquired but it is unnecessary to go there. One may even wonder whether, with the exercise of due diligence it was possible to establish the extent of the road reserve for the Nairobi/Mombasa Highway before the disputed plot was created. .”

74. The Court of Appeal similarly in the case of Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others [2019] eKLR held as follows:

“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 the title was acquired illegally, unprocedurally or through a corrupt scheme.”

74. The court agrees and is bound by the above-cited authorities and observes that similarly in this case the joint survey report confirmed that the Petitioner's parcels of land encroached on the road reserve. The Court finds that, to the extent that the Petitioners have, as confirmed in the joint report by the surveyors, encroached on the road reserve their titles, are defeasible and they are not entitled to the protection afforded by Article 40 of *the Constitution*. As observed in the above-cited cases the said Article protects proprietary rights but those rights are not absolute as they can be limited in particular under Article 40 (6) where the protection does not extend to any property that has been found to have been unlawfully acquired.
75. The joint survey report shows that the road reserve existed before the disputed parcels of land were created. It is shown the road was at the time of adjudication surveyed at 60 meters but the same was reduced to 20 meters during subdivision of land parcel Ikutha/ndili/46. In the court's view due diligence by the Petitioners would have revealed the extent of the road reserve before subdivision and issuance of new title deeds.
76. It is noted that no evidence was adduced by the Petitioners on the process of acquisition of their parcels of land to show that the acquisition followed a lawful process. Section 26 of the *Land Registration Act* No. 3 of 2012 provides that a Certificate of title is to be held as conclusive evidence of proprietorship and states that;

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”



74. The Court of Appeal in the case of Samuel Kamere v Lands Registrar, Kajiado [2015] eKLR dealt with proof of acquisition of a valid and legal title and stated that;

“In the case of Munyu Maina vs Hiram GathihaMaina, Civil Appeal number 239 of 2009, this Court stated,

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.” (emphasis ours)

74. The Court thus finds that the Petitioners have encroached onto the road reserve for Kibwezi-Mutomo-Kitui-Kabati-Migwani Road and the 1st Respondent was justified in issuing the notices dated 25th July 2017.

E. Whether the Petitioner's rights to property under Article 40 of *the Constitution* of Kenya were violated by the Respondents.

74. The petitioners claim that their parcels of land were compulsorily acquired without compensation and thus their Constitutional right to property was violated. Compulsory acquisition of land is provided for under Article 40(3) which provides that:

“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— (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.”

85. According to *the Constitution*, the State shall not deprive anyone of property, without prompt payment in full or just compensation. Article 67 of *the Constitution* establishes the National Land Commission which has a mandate over public land including land that has been compulsorily acquired. The 1st Respondent holds that they did not compulsorily acquire any of the Petitioners’ parcels of land but that the Petitioners have encroached onto the road reserve. The joint survey report by SMO Geospatial Systems Ltd confirms that the road reserve was adjudicated by the adjudication team as 60 meters and that it was while carrying out subdivision of land parcel number Ikuth/ndili/46 that the road reserve was reduced to 20 meters. It is not claimed by the Petitioners that the Respondents were aware of or were party to the reduction of the size of the road.

86. From the said report the portions of land under dispute were originally adjudicated and reserved as part of a road, thus they were public land under Article 62 (h) of *the Constitution* of Kenya which provides that all roads and thoroughfares provided for by an Act of Parliament are public land.



87. The Court is of the view that it was upon the Petitioners to place before it evidence to show that such public land was available for survey as part of private land. No evidence was adduced to show that the disputed land was legally converted from public land to private land as provided under Section 9 of the *Land Act* which provides that:

- “(1) Any land may be converted from one category to another in accordance with the provisions of this Act or any other written law.
2. Without prejudice to the generality of subsection (1)—
- (a) public land may be converted to private land by alienation;
- (b) subject to public needs or in the interest of defence, public safety, public order, public morality, public health, or land use planning, public land may be converted to community land;”

88. Further, the Petitioners have not shown that the elaborate process of compulsory land acquisition as provided by the law was commenced with regard to their specific parcels of land. Compulsory acquisition of land is provided for under Article 40(3) while Article 67 of *the Constitution* establishes the National Land Commission that has mandate over public land including land that has been compulsorily acquired.

89. The *Land Act* (2012) governs the process of Compulsory Land Acquisition in Kenya and mandates in Section 111(1) that the National Land Commission shall regulate the assessment of such just compensation and prepare the award for compensation of such land that has been acquired:

“If land is acquired compulsorily under this Act, just compensation shall be paid promptly in full to all persons whose interests in the land have been determined.

(2) The Commission shall make rules to regulate the assessment of just compensation.”

90. The evidence adduced does not show that the Petitioners' parcels of land were compulsorily acquired by the Respondents entitling them to compensation. In the present case, the land in dispute was already part of the road reserve and the Respondents could not be expected to compensate the Petitioners for land that did not belong to them.

91. From the foregoing, the court finds that the portions of land that were reserved for the Kibwezi-Mutomo-Kitui-Migwani Road at Ikutha market and on which the Petitioners have encroached, remain part of the road reserve and the same were not compulsorily acquired by the Respondents. The court further finds that the Petitioners were not entitled to compensation for the same.

92. From the entirety of the foregoing findings of the court the Court concludes that the Petitioners are not entitled to the prayers sought in the Further Amended Petition amended on 4th October 2022. The said Further Amended petition has no merit and the same is hereby dismissed with costs to the 1st and 3rd Respondents.

DELIVERED, DATED AND SIGNED AT KITUI THIS 23RD DAY OF JANUARY 2024.

L. G. KIMANI

JUDGE ENVIRONMENT AND LAND COURT

Judgement read in open court and virtually in the presence of-

J. Musyoki Court Assistant



Kitindio Musembi for the Petitioners

Odoro holding brief for Maruti for the 1st Respondent

No attendance for the 2nd Respondent

Wanga for the 3rd Respondent

