



Kung'u & 3 others (Suing as the administrators of the Estate of Michael Ng'ang'a Njoroge) v Kenya Railways Corporation (Environment & Land Petition 7 of 2023) [2024] KEELC 4459 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4459 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT & LAND PETITION 7 OF 2023**

YM ANGIMA, J

MAY 30, 2024

N THE MATTER OF ARTICLES 2(6), 22, 23, 64, 162, 165 & 258(1) & (2)(C) OF THE CONSTITUTION OF KENYA, 2010 IN THE MATTER OF ALLEGED THREAT TO & CONTRAVENTION OF ARTICLES, 10, 19, 20, 21, 22, 23, 24, 27, 28, 29(D) & (F) 35, 33, 40(1), 47 & 50 OF THE CONSTITUTION OF KENYA, 2010 IN THE MATTER OF SECTIONS 2, 3, 4, 5, 6, 7, 10, 11, & 12 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015 IN THE MATTER OF SECTION 16 OF THE KENYA RAILWAYS CORPORATION ACT CAP 397 LAWS OF KENYA

BETWEEN

**LUCY WAITHERA KUNG'U 1ST PETITIONER
EDITH WAMBUI NG'ANG'A 2ND PETITIONER
FRANCIS MUNGAI NG'ANG'A 3RD PETITIONER
BEARNARD NJOROGE NG'ANG'A 4TH PETITIONER
SUING AS THE ADMINISTRATORS OF THE ESTATE OF MICHAEL
NG'ANG'A NJOROGE**

AND

KENYA RAILWAYS CORPORATION RESPONDENT

JUDGMENT

A. Petitioners' Claim

1. By a petition dated 01.02.2022 expressed to be brought pursuant to Articles 2(6), 10, 19, 20, 21, 22, 23, 27, 28, 29(d) & (f), 33, 35, 40, 47, 50, 64, 162, 165 and 258 of *the Constitution* of Kenya, 2010,



Sections 2, 3, 4, 5, 6, 7, 10, 11 & 12 of the [Fair Administrative Action Act](#), 2015 and Section 16 of the [Kenya Railways Corporation Act](#), the Petitioners sought the following reliefs:

- a. An order declaring the actions of the Respondent's servants/agents/ persons working under the Respondent's directives/ instructions trespassing onto L.R.No.3777/279/17 – Ol'Kalou Township (I.R.7124/1) purporting to mark and partially demolish the building erected thereon were unconstitutional for violations of Constitutional and statutory provisions being Articles 27(1) & (2), 28, 29(d) and (f), 40(1), 47 and 50.
 - b. Upon grant of order 1 above, an order for damages for the violation of Constitutional rights (separate from the compensation envisaged under Section 83 of the Kenya Railways Act, Cap 397 Laws of Kenya) as proposed.
 - c. A permanent injunction restraining the Respondents jointly and severally, either acting on its own and or through its agents, employees, servants, National Police Service and or any other person acting and or purporting to act under their instructions and or orders from trespassing onto L.R. No.3777/279/17 – Ol'Kalou Township (I.R.7124/1).
 - d. Costs of this petition.
 - e. Any other orders, writs and or directions this honourable court deems fit and just to grant.
2. The Petitioners pleaded that they were administrators of the estate of the late Michael Ng'ang'a Njoroge (the deceased) who was at all material times the proprietor of L.R. No. 3777/279/19(I.R.7124/1) (the suit property) who had constructed a 3 – storey building thereon upon obtaining all the necessary approvals from the relevant authorities.
 3. The Petitioners pleaded that on 15.02.2021 and 16.02.2021 the Respondent's agents, without any lawful justification and without a court order, entered the suit property and partially demolished the 3 – storey building thereon whereas the same was wholly constructed on private property. It was the Petitioners' case that as a result of the Respondent's action the estate of the deceased had suffered loss and damage for which the Respondent was wholly liable.
 4. It was the Petitioners' case that the Respondent had not issued notice or adequate notice prior to the said demolition and that it had not obtained a court order under Section 16 of the [Kenya Railways Corporation Act](#) to undertake the demolition. The Petitioners were further of the view that the Respondent's said actions constituted a violation of their property rights over the suit property and a violation of various constitutional provisions cited in the petition.

B. Respondent's Response

5. The Respondent filed a response to petition dated 11.03.2022 denying liability for the Petitioners' claim. It was denied that the deceased was the registered proprietor of the suit property. It was pleaded, in the alternative, that if he was so registered then he must have obtained the suit property illegally or fraudulently.
6. The Respondent further pleaded that there was no evidence to demonstrate that the deceased had obtained all the necessary approvals including approvals from the Respondent prior to construction of the 3 – storey building. The Respondent pleaded that under Section 16 of the [Kenya Railways](#)



Corporation Act, it has power to enter any land and demolish a building causing obstruction to the railway or transport service.

7. It was Respondent's contention that the grounds raised in the petition were flimsy and baseless and that the Petitioners had not come to court with clean hands. In particular, it was pleaded that the Petitioners' claim fell short of the basic threshold for a constitutional petition and that the alleged violations of the constitution were not pleaded with particularity as required by law. As a result, the Respondent prayed for dismissal of the petition with costs.
8. The Respondent also filed a witness statement dated 10.05.2022 signed by Engineer Mwanja Mativo in which he stated that the suit property lay within an area known as the 'visibility diamond' in which only vegetation of not more than 9 inches tall was allowed under the Railway Engineering Manual in order to ensure clear visibility between motorists on the road and the train operators. It was further stated that the visibility diamond is usually 300 feet along the railway and road intersection.
9. It was the Respondent's contention that the deceased ought to have obtained approval from it prior to undertaking construction of the 3 – storey building on the suit property and that there was no evidence that such approval was ever sought and obtained. The Respondent was thus of the view that the Petitioners' building was causing visibility obstruction at a level-crossing hence they had no legitimate complaint since the building was constructed without the Respondent's approval.

C. Directions on Submissions

10. When the petition first came for directions on 12.06.2023 the Petitioners' advocate requested for a hearing via viva voce evidence. The Respondent's advocate, however, requested for the petition to be held in abeyance on the ground that the Petitioners had filed a claim for compensatory damages which was pending before an arbitrator. The Petitioners conceded that there were pending arbitration proceedings but contended that they were merely seeking compensation for the demolition of the building but there was no claim for a declaration of violation of their constitutional rights. The court thereupon stood over the petition to 13.02.2024 for directions.
11. Come 13.02.2024, the Petitioners' advocate requested that the petition should be canvassed on the basis of the documents and affidavits on record and the written submissions of the parties without an oral hearing. As a consequence, the court directed that the petition shall be canvassed as suggested by the Petitioners and granted the Petitioners leave to file a further affidavit. The parties were also granted 60 days to file and exchange their respective submissions and the matter was fixed for mention on 24.04.2024 to confirm compliance and fix a judgment date.
12. By the time the petition was listed for mention on 24.04.2024 to fix a judgment date, the Petitioners' advocate had changed his mind on the mode of disposal of the petition. He consequently requested for a hearing via oral evidence in the absence of the Respondent's advocate. The court rejected the Petitioners' request in view of the position they had taken on 12.06.2023 and 13.02.2024 and proceeded to fix the matter for judgment on 30.05.2024. The court also granted the Petitioners an extension of 14 days to file and serve their submissions. The record shows that the Petitioners' submissions were filed on 07.03.2024 whereas the Respondent's submissions were filed on 18.03.2024.



D. Issues for Determination

13. The court has perused the pleadings and material on record in this matter. The court is of the view that the following are the key issues which arise for determination herein:
- a. Whether the Petitioners have raised valid constitutional issues for adjudication in a constitutional petition.
 - b. Whether the Petitioners have proved their claim in the petition to the required standard.
 - c. Whether the Petitioners are entitled to the reliefs sought in the petition.
 - d. Who shall bear costs of the petition.

E. Analysis and Determination

- a. Whether the Petitioners have raised valid constitutional issues for adjudication in a constitutional petition
14. The court has considered the pleadings, documents and submissions on record. It is evident from the material on record that the Petitioners are aggrieved because of the Respondent's partial demolition of the 3 storey building erected on the suit property which was apparently owned by the deceased. They were aggrieved because of what they considered to be a violation of the property rights of the deceased whom they contended was the legitimate owner of the suit property. It is also evident from the material on record that the estate of the deceased may have suffered some loss and damage as a result of the partial demolition hence they sought compensatory damages in the petition. The Petitioner's valuation report dated November 2021 sought a sum of Kshs.76,523,309.45 as the cost of replacement of a brand-new building inclusive of valuation fees and 16% Value Added Tax.
15. The court is unable to find any constitutional issues in the circumstances of the instant petition. The petition appears to be an ordinary claim for monetary compensation for partial demolition of a building on private property. The court is of the opinion that the petition simply discloses a violation of a land owner's proprietary rights for which the appropriate action would be a civil suit for damages. Although the right to own property is protected by *the constitution* it is not every infringement of one's proprietary right which would require redress through a constitutional petition.
16. In the case of Kenya Bus Services Limited & 2 Others -vs- Attorney General [2005] 1KLR 787 Nyamu J (as he then was) held as follows on the issue seeking to redress a violation of one's legal rights through a constitutional petition:

“In addition, although there is no direct authority on the point, the holding No. 3 in the Trinidad and Tobago Constitutional Case of Re Application by Bahadur [1986] LRC (Const) 297 at page 298 represents our position as well:

‘*The Constitution* is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can found a claim under substantive law, the proper course is to bring the claim under the law and not under *the constitution*. See Harrikssoon -vs- Attorney General of Trinidad and Tobago [1979] 3 WLR applied.’”



17. In the case of OAPA (suing as Parents and/or Guardians of Student Minors currently schooling at Oshwal Academy) -vs- Oshwal Education Relief Board & 2 Others [2020] eKLR, it was held, inter alia, that:

“50. The said doctrine was stressed by the Court of Appeal in Gabriel Mutava & 2 Others -vs- Managing Director Kenya Ports Authority [2016] eKLR thus:

Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation.

... this Court has severally held that where a fundamental right is regulated by legislation, such legislation, and not the underlying constitutional right, becomes the primary means for giving effect to the constitutional rights....

Of course, violations of constitutional rights may nonetheless be different, and more serious than the violations of statutory or contractual rights. There is no clear demarcation however, where one violation begins and ends, and when one violation should attract desperate remedies. In employment matters, such as was the case here, the contract of employment should have been the entry point. The terms and conditions of employment in the contract, govern the employment relationship, except to the extent that the terms are contrary to the law; or have been superseded by statute. Certainly, invoking the constitutional route in the circumstances of this case was misguided. *The Constitution* should not be turned into a thoroughfare for resolution of every kind of common grievance.

A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done.”

18. Similarly, in James Kuria -vs- Attorney General & 3 Others [2018] eKLR it was held that:

“44. Courts abhor the practice of parties converting every issue in to a constitutional question where such issues can safely be left to the dispute resolution mechanism established under the statute. The Court of Appeal in Gabriel Mutava & 2 Others. vs. Managing Director Kenya Ports Authority & Another[23] underlined the conventional judicial policy as established by the courts over time and now settled that constitutional litigation is not open for every claim which may properly be dealt with under the alternative existing mechanism for redress in civil or criminal law as follows ...”

19. In the Supreme Court decision of Bernard Murage -vs- Fineserve Africa Limited & 3 Others [2015] eKLR it was held, inter alia, that:

“...Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such statutory remedy should be pursued.”



20. The court is thus of the view that the Petitioners are not at liberty to ventilate every violation of the law as a constitutional issue even where the grievances simply relates to damage to private property which can adequately be ventilated in a normal civil action. As a consequence, the court finds and holds that the petition herein does not raise any valid constitutional issues for ventilation through a constitutional petition. No wonder the Petitioners were at a loss as to whether to prosecute the petition through viva voce evidence or on the basis of the affidavits and documents on record. Accordingly, the court is inclined to strike out the petition without prejudice to the right of the Petitioners to institute a civil suit for vindication of their property rights.
- b. Whether the Petitioners have proved their claim in the petition to the required standard
21. In view of the position the court has taken on the first issue, it would be unnecessary to consider and determine the petition on merit. The instant petition is for striking out for reasons given hereinbefore.
- c. Whether the Petitioners are entitled to the reliefs sought in the petition
22. Since the court has already found that the petition does not raise any valid constitutional issues and the court is inclined to strike it out then it would follow that the Petitioners are not entitled to the reliefs sought in the petition.
- d. Who shall bear costs of the petition
23. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the Civil Procedure Act (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd [1967] EA 287. The court finds no good reason to depart from the general rule. As a result, the Respondent shall be awarded costs of the petition.

F. Conclusion and Disposal Orders

24. The upshot of the foregoing is that the court finds and holds that the petition does not raise any valid constitutional issues fit for adjudication in a constitutional petition. As a consequence, the petition dated 01.02.2022 is hereby struck out with costs to the Respondent without prejudice to the right of the Petitioners to file a normal civil suit for vindication of their property rights.

It is so decided.

Judgment dated and signed at Nyandarua and delivered via Microsoft Teams platform this 30th day of May, 2024.

In the presence of:

Mr. Akhulia for the Petitioners

Ms. Karimi for the Respondent

C/A - Carol

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Y. M. ANGIMA



JUDGE

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