



**Moronge v County Government of Homabay & 3 others (Environment & Land
Petition E001 of 2023) [2024] KEELC 3857 (KLR) (15 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 3857 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND PETITION E001 OF 2023
GMA ONGONDO, J
MAY 15, 2024**

BETWEEN

EDITH KERUBO MORONGE PETITIONER

AND

THE COUNTY GOVERNMENT OF HOMABAY 1ST RESPONDENT

THE CHAIRMAN NATIONAL LAND COMMISSION 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 3RD RESPONDENT

NATIONAL ENVIRONMENT AUTHORITY 4TH RESPONDENT

JUDGMENT

1. By the petition dated 31st August 2023, the petitioner, Edith Kerubo Moronge through Moriasi Osoro and Company Advocates, is seeking the following orders;
 - a. A declaration do issue that the actions of the respondents in failing to give notice to the petitioner before encroaching and or trespassing on to her lawfully owned land parcel was a violation of her rights and was in contravention of Article 10, 40 (3), 47 and 73 of *the Constitution*.
 - b. A declaration that in the absence of compliance with the provisions of the Land Acquisition Act as read together with among other Article 40 93) of *the Constitution* 2010, the process be declared illegal ab initio.
 - c. An order that the County Surveyor and the Land Registrar do visit site and re-establish the boundary as per the original aerial map and without any artificial amendment.
 - d. An order that the 1st and 2nd respondents do pay the petitioner general damages.



- e. An order that costs for this petition be borne by the respondents and such orders that the Honourable court may deem and expedient.
2. The petition is premised upon the petitioner's supporting affidavit sworn on even date and the accompanying documents being title deed, survey map and photographs in respect of the land in dispute namely LR No. land reference number Kanyada/Kotieno/Katuma A/961 measuring approximately zero decimal eight (0.8 Ha) hectares in area marked as "EK001, 2 and 3" (PExhibits 1, 2 and 3) respectively. The petitioner asserted, inter alia, that she is the registered proprietor of the land in dispute as captured in PExhibit 1 which she acquired from her late parents. That the respondents took advantage of her absence from the country as she is a resident of Minnesota in the United States of America, forcefully trespassed into the land in dispute and purportedly created a public road thereon without her knowledge and or consent. That she never surrendered or renounced her right to the land as the respondents encroached into it as demonstrated by PExhibits 2 and 3. That the acts of the respondents violated Articles 3, 27 (1) and 40 of *the Constitution* of Kenya, 2010 hence, she is entitled to the orders sought in the petition.
3. The respondents were made aware of the existence of the petition. Indeed, they were duly served as discerned in an affidavit of service sworn on 1st October 2023 and 1st February 2024 by Japhet Osoro Kaosa, learned counsel for the petitioner under Order 5 Rule 15 (1) of the *Civil Procedure Rules* 2010. However, the respondents opted not to respond to the petition; see *Festus Ogada-vs-Hans Mollin* (2009) eKLR.
4. The petition was heard by way of viva voce evidence.
5. In her evidence in support of the petition, the petitioner (PW1) relied on the supporting affidavit and P Exhibits 1 to 3. She told the court that the respondents did not consult her as they encroached into the land in dispute and created a road across it.
6. Learned counsel for the petitioner filed submissions dated 10th March 2024. It was submitted in part that the registration of the land in dispute is in the name of the petitioner having obtained a grant of letters of administration in respect of the estate of her late mother, Hellen Nyagechanga Nyanchama who had bought it from Akomo Nyamburi and Tobias Yambo Nyamburi on 9th November 1988. That the petitioner's ownership of the land in dispute followed challenges of purported ownership of the land through succession proceedings by the original owners in the year 2015 and forged land title deed by a purported purchaser in the year 2019
7. Also, counsel submitted that the petitioner has suffered damage as a result of the encroachment of the land in dispute as the public road originally passed on the lower side of the land. That officers of the 1st respondent decided to re-route the road to almost 15 meters into the land in dispute. Therefore, counsel urged the court to order the County Land Registrar and County Land Surveyor to visit the site and based on the original map which has not been amended, ascertain the alleged encroachment and file a report for consideration by this court.
8. The respondents did not file submissions herein.
9. I have carefully considered the entire petition, the evidence of the petitioner and her counsel's submissions and the fact that the respondent did not respond to the petition. Therefore, it is the duty of this court to determine whether the petitioner has established her claim against the respondents to entitle her to the relief sought in this petition.
10. Notably, this court has the mandate over the instant petition which revolves around creation of a public road across private land further to Article 162 (2) (b) of *the Constitution* of Kenya 2010 and Section



- 13 (3) of the *Environment and Land Court Act*, 2015 (2011); see also *Republic-vs-Karisa Chengo & 2 others* (2017) eKLR.
11. It is trite law that constitutional violations must be pleaded with a reasonable degree of precision; see *Anarita Karimi Njeru vs The Republic* (1976-1980) KLR 1272.
 12. Furthermore, in the case of *Mumo Matemo -vs- Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR, the Court of Appeal stated;

“.....However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements.,.....No particulars were enumerated.....”
 13. Clearly, the petition has attained the requisite threshold as the particulars of alleged violations and the manner thereof are stated in paragraph 17 (a) to (e) of the petition which include;
 - a. The respondents failed to act in accordance with the law and failed to give notice to the petitioner on the intended forced creation of a public road on her property.
 - b. The respondent failed to provide for proper disposal scooped soil which the adumbrated on the lower side of the remaining a nuisance to the environment and other aquatic life in the rivers below.
 - c. The respondents ignored the physical planning procedure and EMCA and other relevant laws.
 14. The petitioner’s evidence inclusive of PExhibits 1, 2 and 3 reveal that the respondents’ acts of unlawful creation of a road across the land in dispute belonging to the petitioner without her knowledge in her knowledge, violated her constitutional right to the land in dispute. That she suffered loss due to the respondents’ trespass thereunto and entitled to orders for declaration and compensation as sought in the petition and under Article 22 of *the Constitution* of Kenya 2010. The appropriate remedies that a court can grant to any deserving party in such a case, are stated under Article 23 of the same Constitution.
 15. Halsbury’s Laws of England 4th Edition Volume 45 paragraph 26 at 1503 stipulates that computation of damages in action for trespass including recovery of nominal damages even if there is no actual loss and general damages may be increased in aggravating circumstances. Further, the tort of trespass calls for no proof of specific damage or loss. As such, the court is under a duty to assess the damages awardable depending on the unique circumstances of each case.
 16. Sections 18 and 19 of the *Land Registration Act*, 2016 (2012) mandates the Land Registrar to determine boundary dispute. Further, it is established law that an existing road is a physical feature and any issue of encroachment to land be reported to the Land Registrar to fix it’s boundaries and ascertain if indeed there is any encroachment into the land in dispute. So, land boundary dispute ought to be heard by the Land Registrar; see also *Azzuri Limited-vs-Pink Properties Ltd* (2018) eKLR.
 17. It is established law that the burden was always on the plaintiff to prove his case on the balance of probabilities and that such burden is not lessened even if the case was heard by way of formal proof; see *Kirugi and another-vs-Kabiya and 3 others* (1983) eKLR.
 18. Similarly, in *Dr Sam Lyomoki and others vs. Attorney—General* [2005] E.A. 127, it was observed that in Constitutional Petitions, as in other ordinary civil actions, the onus is on the Petitioner or the Plaintiff to establish a prima facie case. That thereafter, the burden shifts to the Respondents to justify the limitation to those rights.



19. Taking into account the entire case and the circumstances, I am of the considered view that an amount of Kshs. 500,000/= general damages in favour of the petitioner, would be appropriate. So, I award the same.
20. In the premises, it is the finding of this court that the petition has met the threshold and established her claim against the respondents to the requisite standards.
21. Accordingly, judgment is hereby entered for the petitioner against the respondents in terms of orders 1, 2, 3, 4 and 5 set out in paragraph 1 (a) (b) (c) (d) and (e) hereinabove and as stated at the foot of the petition. General damages as per prayer 4 in the petition, is awarded at Kshs. 500,000/= (Kenya shillings Five Hundred Thousand only).
22. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 15TH DAY OF MAY 2024

G. M. A ONG'ONDO

JUDGE

PRESENT;

Mr. Japhet Osoro learned counsel for the petitioner

Mutiva and Obunga, court assistants

