



**Rumasila v Kenya Urban Roads Authority & 2 others (Environment & Land
Petition E006 of 2022) [2024] KEELC 4826 (KLR) (20 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4826 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND PETITION E006 OF 2022**

**DO OHUNGO, J
JUNE 20, 2024**

BETWEEN

JOHN UKIRA RUMASILA PETITIONER

AND

KENYA URBAN ROADS AUTHORITY 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. The Petitioner moved the court through petition dated 8th August 2022, wherein he averred that he was the registered proprietor of land parcel number Isukha/Shirere/3866 measuring 0.25 hectares (the suit property) along Shirere - Rosterman Road and that in the process of expanding the road, the First Respondent encroached on the suit property by 0.05 hectares and destroyed his property. He added that the Respondents' action contravened his constitutional right to own property and freedom from discrimination. He further cited various other provisions of *the Constitution* and the *Land Act*.
2. The Petitioner therefore sought the following reliefs:
 - A. Declaration of violation of petitioner's rights by the respondent.
 - B. Declaration that the respondents had a statutory obligation to comply with provisions of *Land Act* in acquiring a portion of land known as Isukha/Shirere/3866 measuring 0.25 Ha by 0.05ha.
 - C. A declaration that failure by 1st respondent to comply with mandatory provisions of the *Land Act* violated the petitioner's constitutional right to a fair administrative action that is lawful, reasonable and procedural as enshrined in Article 47 (1) of *the Constitution*.



- D. A declaration that the 1st respondent was under obligation to accord the petitioner a right to be heard at the inquiry as provided under section 107(7) of the Land Act.
 - E. A declaration that the petitioner is entitled to prompt just and adequate compensation in full within the meaning of Article 40 (3) (B) (1) of the constitution.
 - F. An order for permanent injunction restraining the respondents from further encroachment onto, trespass upon and damage to petitioner's property.
 - G. Compensation for compulsory acquired land measuring 0.05Ha of Isukha/Shirere/3866.
 - H. An order for compensation for damaging the fence, drainage system and pit latrine on the suit land.
 - I. Costs of the suit.
3. The Petition was supported by a supporting affidavit and further affidavit, both sworn by the Petitioner. He deposed that he was the registered proprietor of the suit property and annexed a copy of a title deed in his name. He added that the suit property is located on left side of the road access leading to Rosterman from Shirere and that he was aware that the first Respondent intended to construct Shirere-Rosterman Road. That a baraza was held where agents of the first Respondent assured him and others that none of their properties would be damaged during the intended construction. He added that the suit property was not a road reserve and annexed a copy of a survey report by Geosolutions Licensed Surveyors.
 4. The Petitioner also stated that his attention was drawn when agents or staff of the first Respondent entered the suit property without any notice and started marking the premises for demolition by clearing the fence. He annexed photographs and added that upon inquiring about the encroachment, he was informed that the area was a road reserve thus no need for notice or compensation. He annexed a copy of a valuation report by Odongo Kabita & Company Valuers and added that he had immensely developed the suit property.
 5. He also deposed that he never received any notice from the Respondents that the suit property would be affected during the constructing and that the first Respondent's agents encroached on the suit property by 0.05 hectares by destroying the fence, pit latrine and drainage. He added that the valuers assessed the value of the encroached land and developments thereon at KShs 1,380,000. That the Respondents' actions amounted to compulsory acquisition and caused him loss. He added that he the Respondents did not follow due process for compulsory acquisition as prescribed by law and that the Respondents are required to assess the loss that he incurred at current market value and to compensate him.
 6. The first and third Respondents opposed the petition through two replying affidavits, both sworn 7th December 2022; one by Paul Owino Odak and the other by Martina Aloo Dawson.
 7. Paul Owino Odak deposed that he was the Assistant Director (Survey and Mapping) of the first Respondent. That the first Respondent had planned and designed the implementation of Shirere - Rosterman road project which was part of the roads that were identified for improvement to bitumen standard Under Lot 15 Annuity Programme under the National Government Plan for the improvement of 10,000 kilometres of roads all over the Republic of Kenya. That the programme was a public interest undertaking for the benefit of all Kenyans and that parcel number Ishukha/Shirere/1912 was identified as one of the parcels that were likely to be affected by the project.



8. Mr Odak added that the map which showed the boundaries of the parcels in the area was a Preliminary Index Map with a charting of the boundaries at the time of adjudication and is a type that is not used in survey practice to delineate boundaries. That road reserve is usually determined and measured from the estimated centreline of the existing/ designed road and that the road in question was a classified road of Road Class K (Formerly E37) with a minimum road reserve size of 18 meters wide as per the requirements of the Physical Planning handbook. That since the area where the suit property is located is generally un-surveyed, to determine the size of the road reserve the first Respondent's surveyors carried out a ground survey and placed temporary marker posts/beacons to delineate the boundaries between the private parcels and the road reserve.
9. He added that having demarcated the road boundary as required, the first Respondent was obligated upon the finalization of the Resettlement Action Plan (RAP) process and the construction to liaise with the office of the Registrar of Lands and the Regional Survey Office Kakamega to carry out final surveys and amendment of the existing Preliminary Index Diagrams/Maps to reflect the correct position and size of the road corridor as defined by the temporary road beacons after the completion of the project at cost. He further stated that the said process was not compulsory land acquisition as captured in the Land Act 2012 but all affected people within the road corridor whose details and interests were recorded during the enumeration exercise for the RAP were to be addressed through a restitution under the Livelihood Restoration Plan (LRP) in line with guidelines set by the World Bank. That the LRP was to cover the improvements on Land and loss of business.
10. Mr Odak went on to depose that due to the prevailing circumstances, the engineers and project managers reviewed the width of the road from the intended 20 meters to 10 meters, with the result that the existing permanent structures on parcel number Ishukha/ Shirere/ 1912 would not be interfered with.
11. On her part, Martina Aloo Dawson deposed that she was working with the first Respondent as a sociologist and that her work entailed coordination between the public and the first Respondent on matters touching on people who were to be affected by any project undertaken by the first Respondent. That around September 2019, a stakeholders consultation meeting was held for Lutonyi - Kakamega road which had been earmarked for upgrading to bitumen and that 90 stakeholders attended, all of whom agreed to the Lutonyi – Kakamega – Ilesi – Rostaman - Kakamega road project by appending their signatures on a register which she annexed.
12. Ms Dawson added that a follow-up meeting was held on 2nd September 2020 at Rostermann Rehabilitation Centre within Kakamega County and that the Petitioner was present attended the meeting. That another meeting was held on 20th April 2022 at the Assistant Chief's Office Shirere between the First Respondent and the affected persons including the Petitioner who was in attendance. That earlier, another meeting was held on 24th March 2022, aimed at implementation of the Livelihood Restoration Program (LRP) and that the LRP entailed on fostering good relationship between the contractor and the community.
13. She further deposed that a register was opened for any stakeholder to register his/her grievances against the program and that the project began upon completion of stakeholders meeting. That a payment matrix was prepared, and the Petitioner was awarded a total sum of KShs 28,750 and that in March 2022, disclosure of awards as per the valuations carried out in 2020 by the first Respondent were released. She further stated the affected persons were required to submit their details for the awards to be transferred to their accounts and that the Petitioner submitted his details.
14. Ms Dawson also deposed that the Petitioner's award was enhanced to KShs 261,797 which sum was deposited into his account number 1216836965 held at Kenya Commercial Bank Kakamega Branch



- on 6th May 2022 and that the first and second Respondents were yet to receive any communication from the Petitioner. That since the Petitioner had accepted his payment, there was no basis of continued litigation and that the Petition ceased to be a Constitutional Petition.
15. The second Respondent opposed the petition through grounds of opposition in which it took the position that it played no role in the alleged construction and that the Petitioner had no cause of action against it.
 16. The petition was canvassed through written submissions. The Petitioner argued that he was the registered owner of the suit property and that his right to property under Article 40 of *the Constitution* had been breached. He further contended that the first Respondent did not comply with the procedure for compulsory acquisition as laid down under Section 107 of the *Land Act*. He relied on the case of *Ravaspaal Kyalo Mutisya v National Land Commission* [2022] eKLR and urged the court to grant him the reliefs sought.
 17. The first and third Respondents argued that the process that the petitioner complained about was not compulsory land acquisition but one for restitution under the Livelihood Restoration Plan and that since the width of the road was reviewed downwards from 20 metres to 10 metres, the Petitioner's valuations were rendered irrelevant. That the Petitioner's constitutional rights were not infringed since what obtained was a situation of one individual's rights against the public and public interest should prevail. In conclusion, the first and third Respondents argued that the petition does not raise any constitutional issue and urged the court to find that the petition lacks merit.
 18. On its part, the second Respondent argued that the petition discloses no cause of action against it. It relied on the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR and urged the court to dismiss the petition with costs.
 19. I have carefully considered the petition, the affidavits and the written submissions. The issues that arise for determination are whether the petition raises a constitutional issue, whether the court has jurisdiction and whether the reliefs sought should issue.
 20. The question of whether the petition raises a constitutional issue is closely tied to whether the court has jurisdiction. The entry point is that a court of law can only exercise jurisdiction as conferred by *the constitution* or other law. See *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR. Any action or step taken by a court in the absence of jurisdiction is a nullity. See *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR and *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR.
 21. A court of law can lose jurisdiction due to the procedure through which it is moved, such that what is placed before it for determination is a matter that is outside its jurisdictional purview. Procedure is itself an important component of justice. As the Court of Appeal stated in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR, procedure is a handmaiden of just determination of cases.
 22. The procedural law relating to constitutional matters requires that where there exist ample statutory avenues for resolution of a dispute, the statutory options for redress must be followed and the constitutional court will decline to entertain the dispute. The basis for that kind of approach is the principle of constitutional avoidance. The principle bars the practice of bringing ordinary disputes to the constitutional court.



23. The principle of constitutional avoidance was discussed by the Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR where the court stated:

The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v. Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

From the foundation of principle well developed in the comparative practice, we hold that the 1st, second and 3rd respondents’ claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright- infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court.

24. The Court of Appeal also discussed the principle in *Sumayya Athmani Hassan v Paul Masinde Simidi & another* [2019] eKLR where it stated thus:

... where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on *the Constitution* without challenging the legislation in question. That principle has been reinforced by the Supreme Court in *Communications Commission* case (supra).

- (17) In conclusion, we find that the alleged unlawful interdiction and termination of a contract of employment was not a constitutional issue and thus the petition did not disclose a cause of action anchored on *the Constitution*. Accordingly, the petition being incompetent, the court acted in excess of jurisdiction and erred in law in determining the petition.

25. The essence of the principle is that it sounds a warning to any litigant contemplating the constitutional jurisdiction of the court and urges him to seriously consider if he can obtain relief through a statutory route. If the answer is in the affirmative, then that is where he should head first. If he insists on approaching the court by claiming violation of *the constitution*, useful time and resources will likely be lost because the constitutional court will decline jurisdiction and he will have to start afresh, before the correct forum.

26. The petitioner’s case, as he has pleaded it and argued it, is that he is the registered proprietor of the suit property along and that in the process of expanding the Shirere - Rosterman Road, the First Respondent encroached on the suit property by 0.05 hectares and destroyed his fence, pit latrine and drainage. He contends that he instructed a valuer who assessed the value of the encroached land and developments thereon at KShs 1,380,000. He has maintained in his submissions that his right to property under Article 40 of *the Constitution* has been breached since the first Respondent did not comply with the procedure for compulsory acquisition as laid down under Section 107 of the *Land Act*.



27. There are elaborate provisions under Sections 107 through to 133E of the *Land Act* on the process of compulsory acquisition of land and how to obtain relief in the event that one is dissatisfied. The petitioner has not demonstrated any inadequacy in those provisions.
28. I am also aware that the First and Third Respondents have availed material on record demonstrating that they paid the Petitioner a sum of KShs 261,797 on 6th May 2022 pursuant to their Livelihood Restoration Program, and that the Petitioner accepted the said sum. The Petitioner has not disputed that he was paid the said amount. The dispute, at least from the petitioner's perspective, revolves around quantum of compensation. Mere mention of Article 40 of *the Constitution* does not render the dispute a constitutional one.
29. I find that the petition does not raise any constitutional issue and that the court therefore lacks jurisdiction to hear and determine it in view of the principle of constitutional avoidance. It follows therefore that the reliefs that the petitioner seeks cannot be obtained from this court.
30. In the result, I strike out the petition. I make no order as to costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 20TH DAY OF JUNE 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Luseno for the Petitioner

No appearance for the Respondents

Court Assistant: M Nguyayi

