



REPUBLIC OF KENYA



**Gekara v County Government of Nyamira (Petition E002 of 2023)
[2024] KEELC 6193 (KLR) (25 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6193 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
PETITION E002 OF 2023
JM KAMAU, J
SEPTEMBER 25, 2024**

BETWEEN

DAVID ONYAMBU GEKARA PETITIONER

AND

COUNTY GOVERNMENT OF NYAMIRA RESPONDENT

JUDGMENT

1. By a Petition dated 29/5/2023 and amended on 9/6/2023, the Petitioner seeks for:
 - a. A declaration that the demolition of his houses by the Respondent on L.R.No.West Mugirango/Siamani/2273 in order to create a road thereon is in violation of the Fair Administrative Actions Act, *the Constitution* of Kenya, 2010 and therefore illegal.
 - b. Compensation for demolition of the 2 houses.
 - c. Mesne profits at the rate of kshs.13,000/= per month with effect from June 2020 until the determination of the Petition.
 - d. Costs of the Petition.
2. The Petitioner, who describes himself as a Senior citizen, avers that he is the registered proprietor of L. R. No. West Mugirango/*Siamani/2273*. He says that he retired from the Civil Service in 2018 and is quick to add that he presents this Petition on his own behalf and in the interest of other persons of old age who may suffer similar fate in the future.
3. The Respondent is a devolved Government established under Article 176 of *the Constitution* of Kenya, 2010.
4. The Petition is based on the Petitioner's claims that he had put up his retirement benefits on the suit land where one of the houses was for his domestic use while the second one was rented out to



tenants. He also claims to have planted 2 avocado trees and 3 banana plants and kept 2 grade cows from which he drew additional income. In May 2020, in the process of constructing a 7-metre road, the Respondent trespassed on 0.010 Hectares of the suit premises thereby demolishing the 2 houses valued at kshs.11,568,519/= as at 30/10/2020. Also damaged were the 2 avocado trees and the 3 banana plants. The Petitioner has therefore been forced to look for alternative (rented) accommodation. Coupled with the foregoing loss, this action has led to the deterioration of the Petitioner's health.

5. The Petitioner avers the aforesaid actions have been in violation of his Constitutional rights under Articles 19(2), 21(1), 24(1), 27 and 40 and that the Respondent ought to have adhered to Articles 2(1), 3(1), 10, 19(2) 24(1), 27 and 47 of *the Constitution* of Kenya, 2010 failure to which this Court would be obligated to ensure appropriate remedies to the Petitioner under Articles 20, 21, 22, 23, 159,160, 258, 47,50 and 259 of *the Constitution*.
6. He also swore an Affidavit to support the Petition. In response to the Petition the Respondent filed a Replying Affidavit sworn on 25/9/2023 by one Josephat Matini Oruru, County Chief Officer attached to her transport, road and public works department who averred that the Petitioner constructed the 2 houses on a road reserve thereby illegally encroaching onto the public road of which he was not a lawful owner and has no proprietary interest thereon.
7. On 24/7/2023 this Court gave directions that the Petition be heard on priority basis and that viva voce evidence be tendered and that both parties do file their witness statements in readiness for the hearing which commenced on 17/10/2023 when the Petitioner, David Onyambu Gekara took to the witness box and introduced himself as a retired civil servant. He adopted his statement filed in Court on 3/5/2023 which is a replica of the Amended Supporting Affidavit sworn on 9/6/2023 and which is an elaboration of the Amended Petition whose contents have been captured above. He testified that together with his family he has been living on the 0.7Hectares suit premises within Nyamira County since 1986. He said that one evening in May 2020 the Respondent marked the suit premises for demolition and the following morning at 6.00a.m. the threat was made real when the houses were completely demolished save one part of one of the houses which was only partly demolished by tractors from the Respondent. About a month later, i.e. on 13/6/2020 the Notice for the development of the area was put in the print media. To buttress his case, the Petitioner produced the following copies of documents:
 1. Title Deed in respect of West Mugirango/*Siamani/2273* issued on 23/9/1988.
 2. Green card dated 25/1/2022.
 3. Letter dated 10/5/2023 from Solomon Njoga, a Private Surveyor from the firm of Prime Line Surveyors.
 4. Various records of medical treatment.
 5. Tenancy agreement for the new accommodation.
8. On cross examination by Ms. Kerubo for the Respondent, the Petitioner admitted that on the eve of the demolition, there were markings on the demolished premises and that is why he didn't take photos when demolition was taking place because the exercise was carried out immediately thereafter. He said he had lived on the suit land for over 30 years.
9. On re-examination, the witness said that he had confirmed with the lands office that there was no road of access passing through his parcel of land. Mr. Solomon Njoga, a private Surveyor and a diploma holder working under with Prime Line Surveyors, testified and produced a Report showing the status of the suit land. He said that his Report was informed by the P.I.D. map from the Surveys of Kenya.



He also produced a copy of official search showing the acreage of the suit land i.e. 0.07 Hectares and also a copy of the Title Deed. On cross examination by Ms. Kerubo for the County Government of Nyamira, Mr. Njoga admitted that the newly created road passes through the suit land but that the same is not in the map. He added that at the time of his inspection, the ground was still very fresh.

10. Samwel Otieno Odhiambo, a Valuer practicing in the name and style of Tysons Ltd based in Nairobi, produced the valuation Report having been instructed to carry out the valuation by the Petitioner on 17/9/2020 for purposes of compensation. The date of inspection is indicated as 21/9/2020. He put the value of the demolition at kshs.11,568,519/= as at 2020, 3 years earlier and that today he would increase the figures by about 15%. The figure is made up as follows;

Item Value (Kshs.)

1. Plot 3,500.000
2. Buildings
 - a. Bungalow 2,429,000
 - b. Toilet Block 68,000
 - c. Staff Quarters 1,137,443
 - d. Rental Block 1,751,400
 - e. Toilet Block 136,000
 - f. Water Tank 98,000
 - g. Fencing 118LM 118,000Total Land and
Improvements 9,237,843
15% Statutory addition 1,385,676
Grand Total (Land &
Improvements) 10,623,519
3. Loss of income/cost of alternative
Accommodation (18months)
 - a. Bungalow and SQ
 - b. Rental BlockTotal Claim 11,568,519
Words; Kenya Shillings Eleven Million
Five Hundred Sixty Eight Thousand
Five Hundred Nineteen Only

11. Mr. Francis Mebasia Mbeche, the Respondent's Director of Land Administration who replaced the earlier on listed Respondent's witness was the sole witness on the side of the Respondent. He adopted his witness statement dated 15/12/2023 as the Respondent's evidence in chief. He testified that the development of the area encircling the suit premises was captured in Nyamira County Integrated



Development Plan 2013-2017 and Nyamira County Integrated Plan 2018-2022 to prioritize the most urgent needs of the Residents of the County which necessitated increased infrastructural networks like roads. In order to provide efficient, affordable and reliable infrastructure for sustainable economic growth for the county residents, there was need to open up all the backstreets in Nyamira town and a Notice to this effect asking the affected residents to remove away illegal structures on the road reserves was issued. The Petitioner happened to be one of the la-di-da. This road was opened to the standard size of 6 metres which the Petitioner is alleged to have already encroached. Members of the public had been informed of the same through Gazette Notice Nos.2379 and 2380 dated 7/4/2000 published in the Kenya Gazette of 17/4/2000 copies of which the witness produced in Court.

12. He also produced a copy of the County Integrated Development Plan 2018-2022. On cross examination by Mr. Orando for the Petitioner, the witness admitted that the Respondent had not filed any Notice to the public of the intention to open the road reserves. This marked the close of the Respondent's case and accordingly the Petition and cleared the way for the writing of the Judgment.

I have carefully considered the pleadings, the evidence adduced together with the copies of documents produced in Court, the submissions by respective counsel, the cited authorities and the law before writing this Judgment which raises the following issues namely:

1. The ownership of the portion where the houses were demolished in order to construct a road of access. Was it on public land or the Petitioner's land?
 2. Secondly, in case the same belonged to the Petitioner was there any damage caused on his property.
 3. and if so, what is the commensurate compensation?
 4. Is the Petitioner entitled to Special Damages in a suit commenced by way of a Petition?
 5. And finally, whether the Petitioner is entitled to the reliefs he seeks.
13. On the issue of whether there is a public access road that had been encroached by the Petitioner, it is true that the Petitioner is the registered owner of the parcel of land known as West Mugirango/*Siamani/2273* having produced in Court a copy of the Title Deed issued to him on 23/9/1988. Similarly, a copy of a certificate of Official Search dated 2/5/2023 as well as a Green Card 25/01/2022 were produced in Court authenticating the same. And according to his own appointed Surveyor, the new road cuts across the suit land dividing the land into 2 portions of 0.036Hectares and 0.02Hectares respectively. The road occupies 0.010 Hectares. However, the Report is silent on whether the road of access exists in the Map from Survey of Kenya. The Respondent on the other hand testified that there was need to expand road infrastructure in the area around the suit premises due to population growth and an Integrated Development Plan 2013-2017 and another *one of 2018-2022* were prepared upon which Reports there was need to open up all the backstreets in Nyamira town and a Notice issued for the removal of all illegal structures on the road reserves. In an unclear manner, the witness did not say whether the Petitioner's houses were such illegal structures on the road reserves. Nor did he produce a copy of the said Notice save the Gazette Notice dated 7/4/2000 which is so general and which talks about part development plans relating to land situate within Nyamira County Council. This is too general and is not even conclusive since it gives members of the public an opportunity for public participation which is a welcome idea. But after the public participation, the Respondent never notified members of the public what the end result was after incorporating the views and feelings from the members of the public. It is not enough to invite members of the public for public participation and fail to indicate what their views were and whether the County Government the said views or not. And where they are found not to add value to the project the same should be indicated in the



final Report. Otherwise this would defeat the objective and purpose of the public participation. The Respondent's witness says in his statement that ".....no new road was to be opened, except those actively used on streets and paths in the town....." This was a sneaky, cunning, sly and nifty way of avoiding the Question whether there was provision for an access road through the Petitioner's parcel of land or not by the Respondent. The fact that there were streets and paths in the town being actively used as such does not make them lawful. And in the absence of such provision in the existing maps, the Petitioner was fully entitled to every inch of his soil in West Mugirango/[Siamani/2273](#) as well as everything appurtenant thereof. And the only lawful way for the Respondent to curve out the road of access through L. R. No. West Mugirango/[Siamani/2273](#) was by way of compulsory acquisition subject to adequate compensation which was open to the Respondent.

14. Having said so, this Court finds that the Petitioner has proved his case on a balance of probabilities that his right of protection of right to property under Article 40(3) of [the Constitution](#) of Kenya, 2010 was infringed upon. Even Parliament, which is the people's representative cannot pass law to arbitrarily deprive a person of his property, any intent thereof, or right over the same and cannot even restrict or limit any lawful enjoyment of any right over the property. The only way that the Respondent would have assumed the ownership of the land to create a road of access as I have shown above is by putting in motion the provisions under the proviso vide sub-Article 3(a) and (b) of Article 40 with the attendant reparation under Article 40(4) of [the Constitution](#) of Kenya, 2010. I also find that the Petitioners' right to be heard under Article 47(2) by way of providing him with (adequate) Notice before his properties were destroyed and also by not giving him an opportunity to explain why his property should not be brought down were trodden upon.
15. The Petitioner was also denied his right of inherent dignity provided for under Article 28 of [the Constitution](#) of Kenya, 2010 when the Respondent sent her employees very early in the morning to demolish his houses having only alerted him a few hours before (at night). Anybody who saw the Petitioner and his family scampering for safety and/or trying to salvage his property, could not have thought well of him and I agree with the Petitioner that his age should also have been considered as a person's advanced age would not stand such embarrassing and heartbreaking actions as were occasioned to him. And although he was not targeted as an older person in society although I don't think he was targeted as an older person in society I also agree with the Petitioner that he was denied his right to live in dignity and respect under Article 57(c) of [the Constitution](#) of Kenya, 2010.
16. Having found so, I now grant the Petitioner prayer number (i) and also prayer number (ii) in his Petition dated 29/5/2023 and amended on 9/6/2023.
17. Before proceeding to quantify the loss, I wish to caution the Respondent that even in a clear case of trespass, the law has to be followed. I wish to bring it to the attention of the Respondent herein that any Eviction must be carried out in accordance with [the Constitution](#) and the law under which the dignity of the Evictee must be protected. He must be treated in a humane manner.
18. Under Article 28 of [the Constitution](#) of Kenya, 2010, on Human dignity, every person has inherent dignity and the right to have that dignity respected and protected.
19. Under Article 19(2) of [the Constitution](#) of Kenya, 2010, on Rights and fundamental freedoms, the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.

Under Article 20 (4)

- (4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote—



- (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and

29. Every person has the right to freedom and security of the person, which includes the right not to be—

- (f) treated or punished in a cruel, inhuman or degrading manner.

20. Whereas Section 152A of the *Land Act* No. 6 of 2012 as amended vide the Land Laws (amendment) *Act No. 28 of 2016* provides that a person shall not unlawfully occupy private, community or public land, eviction has to be conducted in a civil and humane manner as laid out in *the Constitution* of Kenya, 2010, and the *Land Act* as amended vide *Act No. 28 of 2016*. Section 152B of the *Land Act*, No. 6 of 2012 provides for the mandatory procedures during eviction as follows: -

“an unlawful occupant of private, community or public land shall be evicted in accordance with this Act”.

22. What is that procedure to be followed?

Under Section 152G,

1. Notwithstanding any provisions to the contrary in this Act or in any other written law, all evictions shall be carried out in strict accordance with the following procedures-
 - a. be preceded by the proper identification of those taking part in the eviction or demolitions;
 - b. be preceded by the presentation of the formal authorizations for the action;
 - c. where groups of people are involved, government officials or their representatives to be present during an eviction;
 - d. be carried out in a manner that respects the dignity, right to life and security of those affected;
 - e. include special measures to ensure effective protection to groups and people who are vulnerable such as women, children, the elderly, and persons with disabilities;
 - f. include special measures to ensure that there is no arbitrary deprivation of property or possessions as a result of the eviction;
 - g. include mechanisms to protect property and possessions left behind involuntarily from destruction;
 - h. respect the principles of necessity and proportionality during the use of force; and
 - i. give the affected persons the first priority to demolish and salvage their property.

23. Section 152H of the Act also makes provisions on the disposal of property left after eviction:

“The competent officer of the Commission or County Government, community owning a registered community land or owner of private land shall at least seven days from the date of the eviction, remove or cause to be removed or disposed by public auction, any unclaimed property that was left behind after an eviction from private, community or public land”.

24. However, the Evictee(s) must also carry themselves with dignity during the exercise.



25. As to whether the Petitioner is entitled to Special Damages in a suit commenced by way of a Petition, Article 23(3) of *the Constitution* of Kenya 2010 provides as follows:

“In any proceedings brought under Article 22, a court may grant appropriate relief, including: -

- a. A declaration of rights
- b. An injunction.
- c. A conservatory order.
- d. A declaration of invalidity of any law that denies, violates, infringes, or trespasses, or threatens a right or fundamental freedom in the Bill of rights and is not justified under Article 24.
- e. An order for compensation, and
- f. An order of judicial Review.

26. There are several Court Decisions on this. In *Petition No. 1 of 2020*, the Supreme Court of Kenya in affirming the decision of the Court of Appeal in awarding Kshs. 464,973,248.70 for violation of right to property affirmed the right to compensation for any injury or loss suffered (par 4 and 5) and went ahead to state as par 27 as follows;

being the custodian of the land Register, and the guarantor of titles emanating therefrom, the Government (read County government) was acutely aware that the suit property was privately owned by the respondent”

27. I wish to distinguish this Petition with the cases of *Uhuru Muigai Kenyatta v National Star Publications Limited* [2013] Eklr and also *Christopher Ontiri v the County Government of Nyamira & Others* in that in the current Petition, very weighty instances of breaches of fundamental rights are manifest and there was no other way of making Declarations to that effect. Fortunately for the Respondent, the Petitioner did not pray for Damages in respect of the same. Secondly, this Court, by directing that the matter be heard by viva voce evidence was in fact converting the pleadings into a normal suit in the same way an Originating Summons is normally converted into an ordinary suit substituting the Summons into a Complaint and the Replying Affidavit into a Statement of Defence and calling for witnesses to stand on the witness box, adduce evidence and produce any documents in their possession. In the above case of *Christopher Ontiri v The County Government of Nyamira & Others*, *Nyamira ELC Constitutional Petition No. E001 of 2022* I observed:

.....The case is highly contentious and required adducing of Evidence but not to be heard by way of Affidavit Evidence which makes it difficult to get to the root of the matter

28. No short cut was applied here. The case was not determined by way of Affidavit evidence but by way of adducing evidence in Court. We were then able to get to the root of the matter in controversy.

29. Needless to say, the Petitioner, other than asking for Declarations that his Rights under *the Constitution* were trampled on, did not pray for Damages for the same but only pleaded for actual Special Damages. The same can therefore not be granted. The same applies to award of exemplary damages although oppressive, arbitrary and unconstitutional actions by servants of the government are manifest. The contrary contention is therefore inapposite and the Respondent cannot hide behind it.



30. Turning now to the Quantum of the loss the Petitioner put the value of his loss at kshs.11,568,519 and produced the Valuer's Report by Tysons Ltd. filed in Court on 12/6/2023. However, the Valuer does not indicate how he arrived at this figure since the entire buildings had been brought down as at the time of the valuation, save only one wall of one of the houses. This position is manifest from the Petitioner's evidence as well as his letter of instruction dated 17/9/2020 to his valuers. The Valuer also states this on page 14 of his Report christened, "General Remarks". However, there are photographs to show the remaining undemolished part of the houses at least to give the Court a clue as to how the houses could have looked like. For this loss, which was pleaded in the body of the Petition and from the photographs produced in Court, I would grant the Petitioner the sum of Kshs. 5,000,000/= made up as follows;
- a. Bungalowkshs. 3,500,000/=
 - b. Toilet block Not a house.
 - c. Staff quartersNo proof
 - d. Rented blockKsh. 1,500,000/=
 - e. Toilet blockSee (b) above.
 - f. Water tank..... No proof that there was one and if so, that it was destroyed during the demolition or at all. In any case, this was not a house.
 - g. Fencing No proof.
- TotalKshs. 5,000,000/=.
31. In any case, the Petitioner only prayed for compensation for the loss of the 2 houses and therefore in spite of the fact that the importance of toilets in any habitation cannot be overemphasized, (b), (c), (f) and (g) do not fall under ".....the 2 houses demolished.....". Parties are bound by their own pleadings.
32. As for loss of income under the head of mesne profits, I agree with the Respondent that evidence for the same should have been tendered in Court either by way of production of receipts, tenancy agreements or even by calling one or a few former tenants to tender evidence to that effect. But there is evidence by way of a Tenancy Agreement showing that the Petitioner secured 2 Rooms for his accommodation at kshs.6,000/= per month with effect from 7/6/2000 about 1 month after demolition. I will therefore grant him Kshs.6,000/= per month with effect from 1/5/2020 till 31/12/2022 which I feel should have been a reasonable time for the Petitioner to have regained his economic prowess. The Petitioner should not have been expected to remain in a rented house for the rest of his life. He had to mitigate his loss.
33. The upshot of this is that I grant the Petitioner the reliefs he has sought in his Amended Petition dated 9/6/2023 as follows:
- a. A declaration be and is hereby that the demolition of the Petitioner's houses by the Respondent on L.R. No. West Mugirango/*Siamani/2273* in order to create a road thereon is in violation of the Fair Administrative Actions Act, *the Constitution* of Kenya, 2010 and therefore illegal.
 - b. Compensation for the demolition of the 2 houses that had been put up on L.R. No. West Mugirango/*Siamani/2273* by way of Special Damages is hereby awarded in the sum of Kshs. 5,000,000/=.



- c. Kshs. 192,000/= being alternative accommodation for the period beginning from 1/5/2020 till 31/12/2022 (inclusive) at the rate of. Kshs.6,000/= per month.
- d. Costs of this Petition.

Order 4, rule 6 of the Civil Procedure Rules makes provision for Interest on the awarded sum even where not prayed for:

“ Every plaint shall state specifically the relief which the plaintiff claims, either specifically or in the alternative, and it shall not be necessary to ask for costs, interest or general or other relief which may always be given as the court deems just, whether or not it could have been asked for or granted when the suit was filed; and this rule shall apply also to a Defence or counterclaim.....”

34. I will therefore grant Interest on (b) and (c) above at Court rates from the date of filing Suit to the time of payment in full.

That is the Judgment of the Court.

DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 25TH DAY OF SEPTEMBER, 2024.

MUGO KAMAU

JUDGE

In the presence of:

Court Assistant – Brenda.

Applicant’s Counsel - .Ms. Atieno

Respondent’s Counsel – Ms. Moeche holding brief for Ms. Kerubo.

