



Waithaka & 3 others v Kenya Urban Roads Authority & another (Land Case Appeal E019 of 2023) [2024] KEELC 7305 (KLR) (31 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7305 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
LAND CASE APPEAL E019 OF 2023
LN GACHERU, J
OCTOBER 31, 2024**

BETWEEN

**FRANCIS MURIUKI WAITHAKA 1ST APPELLANT
JACKSON MURURI WATHIGO 2ND APPELLANT
JULIUS MACHARIA MWANGI 3RD APPELLANT
DEDAN KIMANI MUCHOKI 4TH APPELLANT**

AND

**KENYA URBAN ROADS AUTHORITY 1ST RESPONDENT
NOTCHMARK SUPPLIES LTD 2ND RESPONDENT**

(Being an Appeal from the entire Judgment of the Hon. S.N. Mwangi Senior Resident Magistrate delivered on 20th September 2023 in Murang'a CMC ELC NO. E016 of 2021)

JUDGMENT

1. The Appellants herein were the Plaintiffs in Murang'a CMELC No. E016 of 2021, wherein they had sought for Judgement against the Respondents herein, as Defendants thereon, jointly and severally for;
 - i. An injunction directed at the Defendants or their servants and/or agents from trespassing into, carrying acts of waste, demolishing structures, building a road on and graveling of the plots namely; Murang'a Municipality/Block 1/4, Murang'a Municipality/Block 1/371, Murang'a Municipality/Block 1/2, Murang'a Municipality Block 1/17.
 - ii. The costs of this suit.
 - iii. Any further or other relief this court may find just.



2. The 1st Respondent filed its statement of Defence dated 9th July 2021, and denied all the allegations made in the Plaint, and sought for dismissal of the Plaintiffs (Appellant's herein) suit with costs. The 2nd Respondent did not enter any appearance nor file any Defence, and therefore, the suit proceeded for hearing without their participation.
3. After the viva voce evidence, the trial court on 20th September 2023, delivered its Judgement and dismissed the Appellants (Plaintiffs) suit with costs to the Defendants (Respondents herein). The Appellants were aggrieved by the said Judgement of the trial court, and filed this Appeal vide the Memo of Appeal dated 17th October 2023.
4. In the above referenced Memo of Appeal, the Appellants prayed for Judgement in the following terms;
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 - i. That the Appeal be allowed;
 - ii. That the trial court's Judgement that was delivered on 20th September 2023, be set aside and the orders sought by the Appellants in their Plaint be allowed as prayed, and the Respondents meet the costs in this court and the court below.
5. In the suit before the trial court, the Appellants had alleged that they are the registered owners of land parcels Nos Muranga Municipality/ Block 1 /4; Muranga Municipality/Block 1 /371; Muranga Municipality/block 1 /2; and, Muranga Municipality/Block 1 /17 (the suit properties), located within Muranga township. They sued the Respondents herein vide the Plaint dated 25th March 2021, seeking an injunction orders to restrain the Respondents from demolishing structures built on their suit properties.
6. The Appellants had also contended that the 1st Respondent issued a letter dated 26th February 2021, and claimed that the Appellants (Plaintiffs) had encroached on the road reserve for Mukuyu-Kambwe-Sewarage Road, which it claimed was 18 meters wide, and demanded a stretch of 6 meters, from each of the Plaintiffs and which the Plaintiffs (Appellants), were required to surrender.
7. Further that the 1st Respondent (1st Defendant), had communicated to each of them of its intention to forcibly take-over portions of the suit properties for purposes of expansion of the said Mukuyu-Kambwe Sewerage Road as follows:
 - a. 46 square meters would be hived from 1st Appellant's property.
 - b. 42 square meters would be hived from 2nd Appellant's property.
 - c. 92 square meters would be hived from 3rd Appellant's property and stone-perimeter wall thereon demolished.
 - d. 92 square meters would be hived from 3rd Appellant's property thus affecting the one-storey building occupying the entire length of the plot.
8. The Appellants had also averred that the threatened action of the 1st Respondent (Defendant), was illegal, null and void, as it was not based on the law and facts, in that the said Mukuyu-Kambwe-Sewarage road was only 6 meters wide, and that the Appellants had not encroached on the said area.
9. The 1st Respondent in its Statement of Defence denied that the Appellants were the registered owners of Muranga Municipality / Block 1/ 4, 371, 2 and 17, as alleged in their claim. It alleged that the said land parcels were surveyed with fixed boundaries and are leasehold tenure.



10. It was the 1st Respondent's further averment that the Appellants encroached onto the road corridor, and the dimensions of the mentioned corridor were clearly demarcated in the Muranga Municipality Long Term Municipality Structure [Plan of 1981](#). The 1st Respondent claimed that the Appellants were afforded adequate opportunity to remove the stated encroachments, and restore the road reserve to enable the expansion of the said road, but declined to do so.
11. Further, the 1st Respondent's contended that the road project has no provision for compensation as no acquisition was carried out, as surrendering of land for purposes of provision of public services is a legal requirement to ensure provision of critical services to residents.
12. It was on the background of the above pleadings, evidence adduced in court and the rival written submissions tendered by the parties that the trial court delivered the Judgement in issue, and dismissed the Appellants' claim, which culminated in this Appeal.
13. The instant appeal is anchored on the following grounds:
 1. That the trial Court erred in fact and in law in declining to protect private property from forcible acquisition without compensation contrary to the [Constitution](#) of Kenya.
 2. That the trial Court totally ignored all the evidence showing that the Respondent accepted that what was in issue was private property and which fact was acknowledged in a stake-holder meeting where it was acknowledged that the appellants had a choice of whether to surrender their land or not.
 3. The trial Court failed to determine that such surrender is only done by a developer to provide for roads of access and provision of utilities whereby such surrendered roads of access are surrendered to the government to enable permanent access to the public into the newly-created land parcel or plots.
 4. The trial Court wrongly disregarded the Respondent's acknowledgment in cross-examination that it knew of the need for compulsory acquisition but which the witness claimed should have been done for it by the Murang'a County Government.
 5. The trial Court wrongly concluded that the matter was a boundary dispute instead of an illegal claim to the Appellants' land.
 6. The trial Court failed to find that the Muranga Municipality Long Term Municipality Structure [Plan of 1981](#), the basis of the Respondent's defence was ineffective and inappropriate as it lacked the necessary statutory requirements for its validity and could not therefore be the basis for surrender of the Appellants' land. Moreover, it was at most a mere proposal that would have still required the process of compulsory acquisition to be followed.
 7. The trial Court misapprehended the report by PW2, that he allegedly realized that there were approved development plans of 1981 but failed to include the same in his report and hence allegedly misled the appellants. The Court failed to realise that there were no approved development plans whatsoever for the additional road reserve.
 8. The trial Court made a wrong and unnecessary conclusion that the appellants failed to read, understand and adhere to the special conditions in their leases whereas such an issue did not at all assist the Respondent's case who could not benefit from it as the Respondent had no business questioning a development infringement that was not on a road reserve.



9. The trial Court erred in law and in fact in her finding that the appellants should have produced their own structural plans drawn by an architect, approved, payments made for such approvals and any other approvals required for the construction of buildings undertaken and/or change of use of the suit lands as required. The trial Court failed to connect the added requirements to the case which it was trying and hence sought proof of an issue that did not arise between the parties.
10. The trial Court's judgment was against the weight of the evidence, and both statutory provisions and case-law hence unfair to the appellants who suffered a miscarriage of justice.
11. The trial Court did not peruse the Appellant's submissions nor refer to the statutes or case-law cited therein thus occasioning injustice to the Appellants.
14. After the instant Appeal was admitted under Section 79B of the Civil Procedure Act, this court directed that the said Appeal be canvassed by way of written submissions.

The Appellants' Submissions

15. The Appellants filed their written submissions dated 16th August 2023, through the Law Firm of J.N Mbutia & Co Advocates, and submitted that the 2nd Respondent who was hired by the 1st Respondent to upgrade to Bitumen Standards the Mukuyu-Kambwe Sewerage Road, did not participate in the suit before the trial Court. That the trial Court had allowed the Appellants' prayer for injunction against the Respondents pending trial, and this Court also granted Injunctive Orders pending the hearing and determination of the instant appeal.
16. It was the Appellants' further submission that the acreage of the respective suit properties is clearly stated in the lease instruments thereto, and the trial Court failed to appreciate the inviolability of the titles held by the Appellants.
17. Reliance was sought on the provisions of Sections 24, 25 and 26 of the Land Registration Act, as read together with Article 64(b) of the Constitution. Further reliance was sought in the holding of the Court in the cases of Gujral Sandeep Singh Ragbir vs Minister for Public Works, Roads and Transport County Government of Kajiado & Another [2018] eKLR; and, Ahmed Ibrahim Suleiman & Another vs Noor Kahmisi Suru (2013) eklr.
18. It was further submitted that surrender of title is voluntary in nature, and the Appellants declined to surrender portions of the suit land to the 1st Respondent. The Appellants argued that no road reserve exists in respect of the sections of the suit properties in question, hence, surrender of land does not apply.
19. For this submission, reliance was placed in the decision of the Court in the cases of Bencaster Investments Ltd vs John Murithi & 3 Others, Attorney-General & 5 Others (Interested Parties) [2020] eKLR; and, Ngimu Farm Limited V Attorney-General [2019] eKLR to undergird the proposition that surrender of land is voluntary in nature and is governed by an elaborate procedure.
20. The Appellants further submitted that the Muranga Long Term Municipality Structure Plan of 1981, is legally non-existent, therefore, it does not constitute a proper basis for the 1st Respondent's acquisition of their lands. They argued that the 1st Respondent needed to invoke the process of compulsory acquisition in respect of the suit properties.
21. It was also submitted that the trial Court misapprehended the nature of the dispute before it by characterizing the same as boundary dispute, whereas there is no boundary demarcating the suit



- properties from the road sought to be expanded. The Appellants explained that the holders of Freehold titles on the MARAGI side of the road surrendered 6 meters from their holdings to create the existing 6 meters wide road reserve, and which did not previously exist.
22. Reliance was sought in the report prepared by Geomatic Services Ltd, appearing from pages 28 to 31, of the Record of Appeal being inter alia Cadastral Plans, and which was produced before the trial Court by PW2 Franko T. Odhiambo, to buttress the position that the backside of the suit properties forms the boundary between Muranga township and Maragi sub-location, and the said boundary is fixed.
 23. They also submitted that in view of the trial Court's holding to the effect that "it is clear that it is the cadastral map which is used to indicate the approximate position of the boundaries", it was inexplicable for the trial Court to find that the MURANGA Long Term Municipality Structure *Plan of 1981*, was indicative of the boundary between the suit properties and the road.
 24. The Appellants denied having encroached on the road reserve as claimed by the 1st Respondent and argued that the existing 6 meters width of road was carved from the land holding of the holders of freehold titles situated on the MARAGI Sub-location side. They also submitted that there was no boundary dispute as stated by the trial Court, and that the suit properties are entirely allocated private land, and do not fall within a road reserve.
 25. On the issue of the legal status of the Muranga Long Term Municipality Structure *Plan of 1981*, the Appellants submitted that the same is at best a mere proposal and could not form a basis for the surrender of the suit properties by the Appellants. It was argued that in the proceedings before the trial Court, DW2 described the said Plan as a mere proposal. Moreover, the trial Court misconstrued the evidence placed before it, and misdirected itself in arriving at the conclusion that the same plan had been approved.
 26. Reliance was sought in the case of Titus Musya Musee vs Francis Ichamui M'Mwenda [2020] eKLR, to anchor the proposition that the boundaries to the suit properties having been fixed as indicated by the survey maps, the 1st Respondents Part/Physical Development Plans (PDPs) are rendered inapplicable.
 27. The Appellants further contended that no restrictions were placed on their titles by the 1st Respondent, and the condition not to build beyond 50% of their respective plots was an issue between the Appellants and the County Government of Murang'a, which was not a party to the suit before the trial Court. It was argued that the 1st Respondent was not entitled to raise the issue of the Appellants having built on more than 50% of their land holdings as it was only concerned with the road reserve. They reiterated the claim that the 1st Respondent wanted to hive off 6 meters from each of the suit properties forcefully.
 28. Further, they submitted that the trial Court disregarded the issues for determination framed by the Appellants' counsel, and only identified a single issue for determination being a boundary dispute. Reliance was placed in the holding of the Court in the case of Cosmas Maweliwe Wephekulu vs Sameer Africa Ltd (Previously known as Firestone East Africa (1969) Limited [2018] eklr.

The 1st Respondent's Submissions

29. The 1st Respondent filed its written submissions on 23rd September 2024, through The Attorney-General's Chambers, and submitted that the expansion of the Mukuyu-Kambwe Sewerage Road is legally above-board, and is meant to benefit the public. The 1st Respondent described the trial Court's Judgment which is the subject of this Appeal as sound and based upon a proper reading of the applicable legal principles, and took to account the totality of the evidence as adduced by the parties.



30. Reliance was sought in the holding of the Court in the case of Kamundi vs Mbae *ᵉ Another (ELC Appeal No E002 of 2022)* [2022] KEELC 14677 (KLR) 9 November 2022 (Judgment)., where the court held;

“(96) “Considering the totality of the evidence availed in this case, and applying the legal principles outlined in law, I am satisfied that the learned trial magistrates was justified in arriving at the decision he made. The findings and holdings of the learned magistrate were well founded and I find no basis to interfere with the same”.

31. The 1st Respondent refuted the Appellants’ contention that it was seeking to acquire the suit properties forcibly and without compensation. It reiterated that pursuant to the Tenant Purchase Scheme between the Muranga Municipal Council (defunct), and the National Housing Corporation through which the Appellants acquired ownership of the suit properties, the Appellants were required to utilize the properties for single dwelling houses, and were also required not to occupy more than 50% of the plot size, which conditions the Appellants violated.

32. It was further submitted that the Mukuyu-Kambwe Sewerage Road is based on existing maps, and the project involved all the relevant stake-holders, therefore, the Appellants are not entitled to compensation as claimed. That the Appellants are not entitled to compensation in respect of portions of land which they have encroached upon. Reliance was sought in the provisions of Article 40(6) of the *Constitution* of Kenya.

33. It was the 1st Respondent’s further submission that the dimensions of the Mukuyu-Kambwe Sewerage Road were set out in the Muranga Long Term Municipality Structure *Plan of 1981*; therefore, the 1st Respondent was not seeking to construct a new road, hence the Appellants claim for compensation is not sustainable. Further, that public participation was carried out in respect of the said project in line with Article 10 of the *Constitution*, as read together Article 47 of the *Constitution*.

34. This court has carefully considered the available evidence as contained in the Record of Appeal, the Memo of Appeal, the rival written submissions and the relevant provisions of law, and finds the issues for determination are; -

- I. Whether the instant Appeal is merited.
- II. Who shall bear the costs of the appeal?

i). Whether the instant Appeal is merited?

35. In answering this question, this court will consider the grounds of Appeal as set out in the Memo of Appeal, the available evidence, then juxtapose them with the holding of the trial court, and thereafter come to its own independent conclusion, and then arrive at a finding on whether the Appeal is merited or not.

36. What is not in doubt is that the Appellants herein are the registered owners of the land parcels Nos Muranga Municipality/Block 1 /4; Muranga Municipality/Block 1 /371; Muranga Municipality/Block 1 /2; and, Muranga Municipality/Block 1 /17, which properties were allocated to them by the defunct Municipal Council of Murang’a, and they hold these parcels of land in a leasehold tenure.

37. What is also not in doubt is that the 1st Respondent is in the process of upgrading to bitumen standard the Mukuyu- Kambwe-Sewarage Road, which according to the parties was initially 6 meters in width, and which was surrendered by the freeholders on the Maragi side of the land (Maragi Sub-location).



It is also evident that the 1st Respondent had alleged that the said road is required to be in the width of 18 meters, and thus it was a requirement for the owners of the adjacent parcels of land on each side of the road to surrender 6 meters each. For that reason, there was a Stakeholders meeting held on 2nd February 2021, to sensitize the Project Affected Persons(PAPS), on the need to surrender the required land for purposes of the road upgrading.

38. Further, what is evident is that after the said meeting, there was a way forward wherein, the 1st Respondent was to issue a 30 days' notice to PAPS, and PAPS, were to individually decide if they would honour the notice for the removal of the structures and the surrender process or not.
39. From the evidence produced in court, the 1st Respondent issued the notice to surrender 6 meters wide land for widening of the road on 26th February 2021, with a rider that failure to act would lead to forcible removal of their developments on the said part of their land, at their own costs.
40. The Appellants herein did not heed or concede to that request and demand to surrender the said 6 meters of land from their suit properties, and thus the suit before the trial court, wherein the said court dismissed their suit with costs.
41. While determining the suit before it, the trial court held and found that the issue before it was actually a boundary dispute one, which was a dispute between the actual boundary of the road, and that of the suit properties. However, the Appellants had alleged and submitted that the dispute was over the forced surrender of the 6 meters out of their properties to widen the road, but not a boundary dispute.
42. Was the dispute between the Appellants and the Respondents before the trial court a boundary dispute? It is this issue that the court herein will proceed to unravel in its Judgement after re-evaluating and re-consideration of the available evidence.
43. But before then, the court will take note of the fact that this being a first Appeal, the Court is required to re-evaluate the entirety of the evidence adduced by the parties before the trial Court, and arrive at its own conclusion. In the case of *Selle & another v Associated Motor Boat Co. Ltd.& others* {1968} 123, the Court held as follows:

“A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.”

44. The Court is equally guided by the holding of the Court in the case of *Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021)* [2022] KEHC 282 (KLR) (6 April 2022) (Judgment), where the Court referenced the decision of the Court in the Indian case of *Santosh Hazari vs. Purushottam Tiwari (Deceased)* by L.Rs {2001} 3 SCC 179 as follows:

“The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it”.



45. Section 78 of the *Civil Procedure Act* empowers a Court of first Appeal to appreciate the entire evidence and arrive at a different conclusion. In the case of *Peters vs Sunday Post Limited* {1958} E.A. page 254., the Court of Appeal for East Africa held as follows:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing witnesses. An appellate court has, indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”

46. The trial court having held that the dispute before it is a boundary dispute, this court would first define what a boundary dispute is. What is a boundary dispute? General meaning is that a boundary dispute, is a disagreement between two or more parties over a location of a boundary. Black’s Law Dictionary 10th Edition, defines boundary as the natural or artificial separation that delineates the confines of real property.

47. Further, the said Dictionary defines a dispute as a conflict or controversy, especially one that has given rise to a particular law suit. Further, the said Dictionary elaborates that “the object of all rules for the establishment of boundaries is to ascertain the actual location of the boundaries as made at the time. The important and controlling consideration where there is conflict as to the boundary is the parties intention, whether express or shown by the surrounding circumstances.

48. With the above in mind, this court will re- evaluate the claim before the trial court, the response thereto, evidence adduced and then analyze them together with the findings of the trial court, and thereafter arrive at its own conclusion. At the trial Court, the Appellants asserted their rights of ownership over the suit properties, which they claimed to have acquired through leases with the Municipal Council of Murang’a(defunct), now County Government of Muranga, as the lessor. The 1st Respondent alleged that the Appellants, had encroached on the road corridor, and thus they had an obligation to surrender the said road corridor for widening of the targeted road, being Mukuyu- Kambwe – Sewarage Road.

49. Through its Statement of Defence dated 9th July 2021, the 1st Respondent had opposed the Appellants’ claim, and had contended that the suit properties were surveyed, and had fixed boundaries, and are of leasehold tenure. The 1st Respondent further contended that all the four Appellants had ignored and contravened the terms of the irrespective lease agreements which granted them ownership over the suit properties as follows: the properties were meant for single residential dwellings not occupying more than 50% of the plot size.

50. However, it is very clear that the Appellants’ claim was over the alleged intimidation to surrender 6 meters of their land for widening of the Mukuyu-Kambwe- Sewarage Road. Whether the Appellants had breached the terms of their leases or not did not answer the question of whether the 1st Respondent was forcing the Appellants to surrender the said portions of their parcels of land without their consent, or whether the 1st Respondent intends to take the said 6 meters wide of land from the Appellants land, without following the due process or laid down procedures.

51. In any event, if the Appellants went against their terms of the lease agreements, the party that should have complained was the defunct County Council of Murang’a, and/or the County Government of Murang’a, which party has not complained so far. There was no evidence called from the County Government of Murang’a to give credence to this allegation, that the Appellants went against the terms of their lease agreements.



52. Further, the building plans are approved by the County Government, and if they did so without objection, why should the 1st Respondent complain now without involving the County Government of Murang'a. The trial court held and found that the Appellants failed to produce their approved architectural plans, approvals and change of user. This court finds no relevance of the said architectural plans and approvals to construct because the claim or dispute before the trial Court was not failure to comply with the lease agreements, or putting up developments without approved plans, but a claim on whether to surrender or not to surrender 6 meters of land to the 1st Respondent by the Appellants for widening of the Mukuyu-Kambwe-Sewarage Road.
53. Therefore, from the above analysis of the pleadings, and the evidence before the trial court, the dispute was whether the Appellants should be forced to surrender the 6 meters out of their parcels of land for the widening of Mukuyu- Kambwe- Sewarage Road, but not a boundary dispute as was held by the trial court because the Appellants had not yet surrendered the said 6 Meters out of their parcels of land. Further, the 1st Respondent had not yet acquired these part of land from the Appellants for its own use, and therefore, the Appellants cannot be said to have encroached on the land meant for road expansion or widening.
54. It is clear that the Appellants are holders of leaseholds over their respective parcels of land, and they enjoy their rights and privileges thereon. The Appellants claim was over right to property, and the safeguards provided by the law. Section 24 (b) of the [Land Registration Act](#) provides as follows:
- “The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”
55. Further, Section 25 (1) of the [Land Registration Act](#) provides that:
- 25.(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
56. As holders of leaseholds over the suit properties, the Appellants have a right to enjoy their property, which right should be respected and protected, thus their right to property. In the case of Gujral Sandeep Singh Ragbir vs Minister for Public Works, Road & Transport, County Government of Kajiado & County Government of Kajiado [2018] KEELC 4719 (KLR) which was cited by the Appellants, the Court understood the meaning and import of Section 24 (b) of the [Land Registration Act](#) as follows:
- “These provisions empower the Plaintiff by virtue of being registered owner of the suit land with vested rights and privileges therein and which no person should interfere with it.”
57. Similarly, in the case of Ahmed Ibrahim Suleiman and Another vs. Noor Khamisi Surur (2013) eklr, the Court reasoned as follows:
- “The Plaintiff having been registered as proprietor and having been issued with a certificate of lease over title No/ Nairobi/Block 61/69 are in terms of section 26(1) of the [Land Registration Act](#) entitled to the protection of the law.”



58. The Court has carefully considered the parties pleadings and the totality of the evidence, the parties' rival written submissions tendered before the trial Court and this Court finds and holds that indeed the dispute herein is not a boundary dispute, but a dispute on whether the 1st Respondent should be allowed to take 6 meters out of the Appellants parcels of land for road widening, and or whether each of the Appellants should be forced to surrender the said 6 meters out of their parcels of land or not, for purposes of land expansion. The 1st Respondent had alleged that the Appellants had encroached on a road corridor, as per the Municipality long term Structure of 1981.
59. The 1st Respondent argued and submitted that the 2nd Appellant herein, being the proprietor of land parcel No. Muranga Municipality Bloc 1/371, erected a three-level commercial building, which has subsumed the whole of his plot to the beacon line. Further, that none of the Appellants ever applied, for, and/or obtained a change of user or extension in respect of the constructions carried out on the suit properties, which constitutes a breach of the terms of the governing lease agreements.
60. The Appellants dispute is over the forced surrender of the 6 meters from their parcels of land, and the 1st Respondent's concern is over the availability of these 6 meters from the Appellants land for purposes of road widening. Whether the 2nd Appellant constructed the whole of his plot or not was an issue that ought to have been raised by the County Government of Murang'a, and the said issue was not relevant at the stage of surrender of the suit properties. It is evident that the 1st Respondent raised a concern that was not within its mandate.
61. Further on the issue of whether the Appellants constructed on their respective parcels of land without change of user or they breached the terms of their lease agreements, was not a mandate of the 1st Respondent, whose mandate was only construction and upgrading of roads. The body that issued the Appellants with the said leaseholds, being the County Government of Murang'a was the one that should have raised such an issue. This court finds and holds that this allegation and submission was not relevant before the trial court. Maybe, it could have been relevant for the purposes of compensation.
62. On the question of compensation, the 1st Respondent argued that the project does not contain any provision for compensation, and surrendering of the required land is a legal requirement in order to ensure provision of critical services to the residents of Muranga County. However, it is evident that the Appellants are holders of their respective parcels of land, and they enjoy rights and privileges, and they cannot be coerced to surrender the said land without their free will. Surrender is voluntary exercise and even the Stakeholders meeting of 2/2/2021 recognized that position.
63. The 1st Respondent argued and submitted that the Mukuyu-Kambwe Sewerage Road is meant for the public benefit, and it is not subject to compensation; and that other Project-Affected Persons(PAPs), have surrendered their lands for the said project with the exception of the Appellants herein. For their part, the Appellants argued and submitted that they retained the choice of whether to surrender or not to surrender their lands for the foregoing road expansion, and they opted not to surrender. The fact that other PAPS surrendered their portions of land cannot curtails the Appellants herein from objecting to the said surrender.
64. The Appellants had also testified and submitted that they attended and rejected the resolutions of the meeting convened by the 1st Respondent for the stated purpose of "Clearing Structures within the Road Corridors as Surveyed" because they were required to surrender 6 meters from each of the suit properties without compensation for the expansion of the Mukuyu-Kambwe Sewerage Road. As held above the Stakeholders meeting had held that each PAP was to individually decide whether to honour the notice to surrender or not.



65. The Appellants had further submitted that the 1st Respondent wished to acquire sections of the suit properties by intimidating them, rather than following the procedure for acquisition of land set out under Section 23(1) of the Roads Act, which states;(1) Where an Authority requires any land for its purposes under this Act, such Authority may either—
- (a) if such land is not public land, acquire such land through negotiation and agreement with the registered owner thereof: Provided that, notwithstanding the provisions of section 6 of the [Land Control Act](#) (Cap. 302), the ensuing transaction shall not require the consent of a land control board if the land to be acquired is agricultural land; or
 - (b) if such land is public land, or if the Authority is unable to acquire it by agreement in accordance with paragraph (a) of this subsection, notify the Cabinet Secretary responsible for public lands that the land specified in the notice is required for the purposes of the Authority and section 107 of the [Land Act](#).
66. The Appellants faulted the Muranga Long Term Municipality Structure [Plan of 1981](#), relied upon by the 1st Respondent in seeking to acquire the said sections of the suit properties for the purposes of road widening for non-compliance with the provisions of Sections 41 up to 51 of the [Physical and Land Use Planning Act](#) No. 13 of 2019. They also argued that they were within their rights to accept or decline to surrender portions of the suit properties as requested by the 1st Respondent and elected not to surrender the same. Further, that the said Long Term Municipality Structure plan of 1981, was not approved and was only a proposal and was not registered and therefore not binding to the Appellants.
67. From the history of the suit properties adverted to by the parties herein, it is clear that the properties were created by the defunct Muranga County Council, in collaboration with the National Housing Corporation, and subsequently acquired by the Appellants. The Mukuyu-Kambwe Sewerage Road located at the backside of the suit properties marks the boundary between the Muranga Municipality and Maragi Sub-location. It was alleged and submitted by the Appellants that this road was initially surrendered by the freeholders on the Maragi side, which allegation was not disputed by the 1st Respondent.
68. The parties herein are all in agreement that the Mukuyu-Kambwe Sewerage Road, was carved out of the Freehold holdings located on the MARAGI Sub-location side of the said road, with no contribution coming from the lands situated on the Muranga Municipality side, that is the side on which the suit properties are located. There was no evidence called from the County Government of Murang'a to confirm or dispute this allegation, and also confirm about the long term Municipality Structure [Plan of 1981](#).
69. The acreage in respect of each of the suit properties is clearly stated in the respective lease instrument. The Appellants averred that the suit properties are subject to the protection set out under Article 64(b) of the [Constitution](#), as read together with Section 26(1) of the [Land Registration Act](#). It was their further contention that they are protected from any unlawful deprivation of property pursuant to Article 40(3) of the [Constitution](#).
70. Part VIII of the [Land Act](#) provides guidelines on the process of compulsory acquisition. Section 107 of the [Land Act](#) stipulates as follows:
- “(1) Whenever the national or county government is satisfied that it may be necessary to acquire some particular land under section 110, the respective Cabinet Secretary or the County Executive Committee Member shall submit



a request for acquisition of land to the Commission to acquire the land on its behalf.

- (2) The Commission shall prescribe a criteria and guidelines to be adhered to by the acquiring authorities in the acquisition of land.
- (3) The Commission may reject a request of an acquiring authority, to undertake an acquisition if it establishes that the request does not meet the requirements prescribed under subsection (2) and Article 40(3) of the Constitution.”

71. The 1st Respondent stated that the Mukuyu-Kambwe Sewerage Road project does not contain any provision for compensation. Further, that all other Project-Affected-Persons with the exception of the Appellants voluntarily surrendered the 6 meters requested by the 1st Respondent, and which has resulted in a varying width road of between 6 meters and 12 meters at different sections of the road in question. However, this court finds and holds that the Appellants herein cannot be denied their rights because other persons have decided to forego their rights.
72. The 1st Respondent argued and submitted that the planned corridor width for the Mukuyu-Kambwe Sewerage Road is 18 meters wide according to the Muranga Municipality Long Term Municipality Structure Plan of 1981, which forms the buffer zone between the Maragi location registration scheme and the Muranga Municipality boundary. There was no tangible evidence availed from the County Government of Murang’a to confirm this allegation.
73. The 1st Respondent argued and submitted that the suit properties must be reduced in line with the Muranga Municipality Long Term Municipality Structure Plan of 1981. The Court in Titus Musya Musee vs Francis Ichamui M’mwenda [2020] KEELC 2349 (KLR), addressed the legal status of Physical Development Plans (PDPs) as follows:

“Physical Development Plans (PDPs), also commonly known as Part Development Plans are planning tools, used for general purposes of determining land use in a particular area of the city, municipality or council (read county). Thus the PDPs cannot solely be used to confer or determine rights in the land. The land ought to have been surveyed in order to generate survey maps such that the specific portion of the land for each claimant is discernible from a map and on the ground.”
74. From the Witness Statement of Paul O. Odak dated 20th April 2022, filed in his capacity as the Assistant Director of Survey, at the 1st Respondent, it is indicated that the original size of the Mukuyu-Kambwe Sewerage Road as the Registry Index Map Loc 11/Maragi/Sheet No. 10 and 20 is 6 meters in width (emphasis added), and traverses a total of approximately 3.5 kilometers. Therefore, the additional 12 meters was to be acquired from the adjacent parcels of land, but through following the land down procedure.
75. Taking into account that the original width of the Mukuyu-Kambwe Sewerage Road is 6 meters, it is the holding of this Court that any expansion of the said road consequent to the issuance of titles to the Appellants needed to comply with the procedures set out under the law. Therefore, this Court is not persuaded that the suit properties have encroached on a road reserve.
76. The upshot of the foregoing is that this Court finds and holds that 1st Respondent is not entitled to hive off sections of the suit properties in order to create the 18 meters corridor in respect of the Mukuyu-Kambwe Sewerage Road, without first effectuating the provisions of Section 107 of the Land Act, or without the PAPs consenting to surrender the targeted portion of this parcels of land. The said surrender should be voluntarily, and through negotiations, but not through use of force.



77. It is the further finding and holding of this Court that the fact that the road project in question is designed to benefit the public including the Appellants and arises out of a PDP cannot operate as a waiver of the Appellants' right to property as stipulated under Article 40 of the Constitution as read together with Sections 24, 25, 26 Land Registration Act, and Section 107 of the Land Act.
78. Therefore, this Court holds and finds that pursuant to the provisions of Article 40(3) of the Constitution, which forbids the illegal acquisition of property, the acreage of the suit properties cannot be subject to reduction without the registered proprietors' consent.
79. In light of the foregoing, it is clear that the instant appeal is merited, and this court further finds and holds that the trial court erred both in law and in facts when it determined that the dispute before it was a boundary dispute, whereas the dispute was over the issue of an attempt to acquire 6 meters from the Appellants parcels of land without their consent, or before the laid down procedure was adhered to. Accordingly, the Judgement of the trial Court dated 20th September 2023, is hereby upset and/or set aside in its entirety.
80. For the above reasons, this Court in its appellate jurisdiction finds and holds that the Appeal herein succeeds and the said Appeal is allowed wholly as sought in the Memo of Appeal dated 17th October 2023, and the Judgement of the trial court dated 20th September 2023, is upset and/or set aside, and the Appellants' claim is allowed entirely as sought in their Complaint dated 25th March 2021.

ii). Who should bear costs of this Appeal?

81. On the issue of costs, this court will be guided by the provisions of section 27 of the Civil Procedure Act, where costs are granted at the discretion of the court. However, costs follow the event and it is ordinarily granted to the successful litigant, unless there are circumstances that would allow the court to depart from the above position. See the case of Morgan Air Cargo Limited vs Everest Enterprises Limited [2014] eKLR, where the court noted that;

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Costs follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the Civil Procedure Act is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

82. In the instant Appeal, this court finds no such circumstances exist that would prompt the court herein to decline to grant costs to the successful litigant. The Appellants having succeeded in the instant Appeal are entitled to both the costs at the trial Court, and in respect of this Appeal.

Appeal allowed accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A, THIS 31ST DAY OF OCTOBER 2024.

L. GACHERU

JUDGE

31/10/2024

Delivered online in the presence of;



Joel Njonjo - Court Assistant.

Ms Wangui Wangai H/B for Mr Mbuthia for the Appellants

Ms Mbatiany H/B for Mr Mwambonu for the 1st Respondent

N/A for 2nd Respondent.

L. GACHERU

JUDGE.

31/10/2024

