



**Masinde v County Government of Busia (Environment and Land Constitutional
Petition E001 of 2023) [2024] KEELC 13435 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13435 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E001 OF 2023**

BN OLAO, J

NOVEMBER 14, 2024

BETWEEN

PHILIP JOHN WANYAMA MASINDE PETITIONER

AND

COUNTY GOVERNMENT OF BUSIA RESPONDENT

JUDGMENT

1. Philip John Wanyama Masinde (the Petitioner) moved to this Court vide his Petition dated 20th November 2023 and filed on 21st November 2023. Citing the provisions of Articles 21 (1), 22, 23, 40, 47, 159(2) (e) and 165 (b) of *the Constitution*, he sought the following reliefs against the County Government Of Busia (the Respondent):
 1. A declaration that the Respondent has violated the Petitioner’s rights under Article 47 of *the Constitution*.
 2. An order for compensation of the Petitioner of upto Kshs.5,000,000 being value of the properties destroyed.
 3. The Respondent be condemned to pay costs of this Petition.
 4. Any other relief that this Honourable Court may deem fit to grant.
2. The thrust of the Petition is that the Petitioner is the holder of the lease in property known as Busia Municipality/166 (the suit property) situated within Busia Town on which he has constructed a structure consisting of 3 guest room, 4 toilets cum bathroom, two shops and water piping system all valued at Kshs.5,000,000. That in January 2023, the Respondent’s workers, agents descended upon the premises and destroyed the said structures. The said demolition was done in purported construction of a road without any consultation with the Petitioner in contravention of Articles 21 (1), 22, 23, 40, 47, 159 (2) (e) and 165 (b) of *the Constitution* which, inter alia, protects the right to own property, requires



the state to protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights and grants this Court the jurisdiction to hear and determine any questions relating to the Contravention of *the Constitution*.

3. The Petition is supported by the Petitioner's affidavit dated 20th November to which the following documents are annexed:
 1. Copy of the Petitioner's Identity Card.
 2. Copy of a letter dated 3rd August 2023 addressed to the Respondent demanding compensation of Kshs.5,000,000 for the damaged property belonging to the Petitioner.
 3. Valuation report dated 11th July 2023 by Chirsca Real Estate Valuers on the damage to the structures on the suit property.
 4. Copy of certificate of official search for the suit property Busia Municipality/166.
 5. Copy of certificate of lease for the suit property Busia Municipality/166.
 6. Copy of survey of Busia Municipality/166.
 7. Copy of Practising certificate of Pius Isaiah Khaoya As A Valuer.
 8. Copy of Kenya Gazette dated 10th March 2023 confirming that Pius Isaiah Khaoya is a registered valuer.
4. In opposition to the Petition, the Respondent filed both a Response to Petition and a replying affidavit by one Vincent Wanjala the Chief Officer for Lands, Survey and Housing.
5. In the response to the Petition, it is pleaded that the construction of the road on the suit property was done after due process and following all the required procedures. The Respondent denies destroying the Petitioner's properties but adds that if any were damaged, they had been unlawfully built on the public land where the road was supposed to pass and therefore, it was in the public interest that the road be constructed as a public utility. The report that the value of the damaged property was Kshs.5,000,000 is denied and the valuation report is disputed. That before the road was constructed, all the stake holders were notified and therefore violation of any constitutional rights is denied. Further, that violation of Article 40 of *the Constitution* is denied since it is the Petitioner who encroached on public land. That both the National and County Surveyors were on the ground and surveyed the road and found that the Petitioner had entered into the road reserve by 3 metres a fact which is within his knowledge. That for this Honourable Court to fairly and justly determine this matter, it would be prudent for both parties to visit the ground and the land be surveyed and a report on the same produced. The Respondent added that the Petitioner does not meet the threshold set out in the case of Anarita Karimi Njeru -V- R 1970-80 KLR 80 and should be struck out with costs.
6. In the replying affidavit it is deponed, inter alia, that the myriad of allegations made against the Respondent claiming a violation of *the Constitution* are unfounded. That the construction of the road on the suit property was done after due process following all the required procedures and the Petitioner's properties were never destroyed but if they were, they had been unlawfully built on public land where the road was supposed to pass. The report that property valued at Kshs.5,000,000 was destroyed is disputed and in any event, it was the Petitioner who encroached on public land and constructed on it. That even the maps produced by the Petitioner show that the demolished properties had encroached onto the road reserve and the Petitioner has not produced any surveyor's report to show that the road is on his land. On the contrary, it is the Respondent who produced a surveyor's report dated 22nd August 2023 which shows that the demolition to pave way for the road did not encroach



onto plots along the road which include the suit property but instead, it was done within the road's surveyed position. The Respondent has also produced maps to corroborate the Surveyor's report. This Petition is an abuse of the Court process, baseless and un-merited. It should be dismissed with costs.

7. Annexed to the replying affidavit are:
 1. Report by the County Surveyor dated 22nd August 2023.
 2. Maps.
8. I directed that the Petition be canvassed by way of written submissions. The same were filed by Ms Kulecho instructed by the firm of R. E. Nyamu & Company Advocates for the Petitioner and by MR Mabachi The County Attorney on behalf of the Respondent.
9. I have considered the Petition, the responses, the various annexures and the submissions by counsel.
10. I have crystalised the following issues for my determination:
 1. Whether this constitutional Petition meets the threshold set out in the case of Anarita Karimi Njeru (supra).
 2. Whether the Petitioner's rights to the suit property were violated.
 3. Whether the Petitioners' right to fair Administrative action was violated.
 4. Whether the Petitioner is entitled to the remedies sought.
 5. Who bears the costs of this Petition.
 6. I shall consider those issues in the following consequence;

Whether The Petition Meets The Threshold Of A Constitutional Petition:

11. The principle in the Anarita Karimi Njeru case (supra) establishes the rule that there must be reasonable precision in framing of the rights alleged to have been violated in a Constitutional Petition. This follows what JESSEL M. R said in the case of Thorp -v- Holdsworth 1876 3 CH D 637 of page 639 that:

“The whole object of pleadings is to bring the parties to any issue, and the meaning of the rule ...

was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came up for trial, what the real point to be discussed and decided was. Infact, the whole meaning of the system is to narrow the parties to define issues and thereby diminish expenses and delay especially as regards the amount of testimony required on either side of the hearing.”

I have looked at the Petition and the Constitutional provisions cited. I have also looked at the supporting affidavit. In my view, the contestation that the Petition does not meet the threshold set out in the case of Anarita Karimi Njeru (supra) is not well founded. The Petitioner has clearly set out the Constitutional provisions and explained how they were breached by the Respondent. In that case, the Court held that:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that



of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

That principle was followed in the case of *Mumo Matemu -v- Trusted Society Of Human Rights Alliance & Others C.a. Civil Appeal No 290 of 2012* [2013 eKLR].

12. However, I do not see the cases of Anarita Karimi Njeru And Mumo Matemu (supra) laying down a hard rule that a Petition which does not set out with particularity the constitutional provisions alleged to have been infringed must suffer the fate of dismissal or striking out. Indeed the case of Mumo Matemu (supra) talks of “reasonable precision” while the case of Anarita Karimi Njeru (supra) refers to the need “to ensure that justice is done”. In any event, the Respondent has not stated that it has been prejudiced in any way by the manner in which this Petition has been drafted.
13. This Court is also guided by the decision of the Court of Appeal in the case of Peter M. Kariuki -V- A-G 2014 eKLR where it was held thus:

“Although Section 84(1) was, on the face of it, abundantly clear, it was from the early days of post-independence Kenya Constitutional litigation interpreted in a rather pedantic and constructive manner that made nonsense of it’s clear intent. Thus in decision like Anarita Karimi Njeru -V- R 1979 KLR 154, the High Court interpreted the provisions narrowly so as to deny jurisdiction to hear complaints by an applicant who had already invoked her right of appeal ... the narrow approach in Anarita Karimi Njeru was ultimately abandoned in Kenya in favour of purposive interpretation of Section 84(1).”

It is clear to me therefore that even if the Petitioner had not met the threshold set out in the Anarita Karimi Njeru case (supra), and which I have already found he has met, that alone would be no ground to dismiss or strike out the Petition as pleaded by the Respondent. I am persuaded that the Petition meets the required threshold.

Whether The Petitioner’s Rights To The Suit Property Were Violated:

14. The Petitioner’s main grievance is that the Respondent constructed a road through the suit property without paying compensation to him thus violating the provisions of Article 40 of *the Constitution*. That provision protects the right to own property and goes on to add that Parliament shall not enact any law which permits the state or any person to arbitrarily deprive a person of his property. And if any property is acquired for a public purpose or in public interest, then prompt and full compensation shall be paid.
15. In support of his case, the Petitioner has availed a report by a valuer showing that the Respondent demolished structures in the suit property valued at Kshs.5,000,000. It is also not in dispute that the Petitioner holds a 99 years lease of the land parcel No Busia Municipality/166 which measures 0.0594 Hectares.
16. The Respondent’s case however is that even if the Petitioner’s structures were demolished, they had been unlawfully constructed on land reserved for a road. It was therefore in public interest that the road be constructed. The onus was therefore on the Petitioner to demonstrate by credible evidence that the damaged buildings were on the suit property. All he did was to file photographs of the demolished structures and maps.



17. On the other hand, the Respondent produced as part of it's evidence, a report dated 22nd August 2023 by Geoffrey Kamadi The County Surveyor Busia. The final photographs of that report reads:

“From the above findings, the following can be deciphered:

The demolition done to pave way for the road did not encroach into the plots instead it was done within the surveyed position.

The alignment of the plots on the frontage of the taxi park is also another issue to address.

Parcels numbers 166 and 167 along the same line have a similar orientation.”

That report by the county surveyor is evidence of an expert. The Petitioner adduced no such evidence to prove his allegation that the demolished structures were not on public land reserved for a road. Indeed no such evidence was adduced to rebut the evidence of the County Surveyor. Evidence of an expert is evidence which a Court must give due weight especially when it is not controverted. As far back as 1995, the Court of Appeal stated in the case of *Dhalay -V- R* 1995-1998 E.A. 29 as follows:

“Where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected. But if a Court is satisfied on good and conjent ground(s) that the opinion though it be that of an expert is not soundly based, then a Court is not only entitled but would be under a duty to reject it.” Emphasis mine.

Therefore, the decision whether or not to accept the evidence of an expert is the preserve of the Court. In this case, I see no grounds not to accept the evidence of the County surveyor that the demolition was done to pave way for the road which was within it's surveyed position and it did not encroach into the suit property. That only means that it was the Petitioner whose structures had encroached onto public land meant for a road. In the circumstances, the Petitioner's claim that the Respondent constructed a road onto his land and therefore violated his right under Article 40 of *the Constitution* must collapse and is for dismissal.

3. Whether The Petitioner's Right To Fair Administrative Action Was Violated

18. Article 47(1) and (2) of *the Constitution* provides that:

47(1): “Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”

(2) “If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

The Petitioner's claim in this regard is captured in paragraph 7 of his supporting affidavit. Therein, he has averred thus:

7: “That the Respondent did not issue a notice to me of it's intended actions and as a result, took adverse action against me contrary to Article 47 of *the Constitution* of the Republic of Kenya and as a result destroyed my buildings.”

The same averment is repeated in paragraph 4 of the body of the Petition.

19. It is of course now common knowledge that this Court has found that the Petitioner is the one whose buildings had encroached onto the public land reserved for a pubic road. That is why this Court has not awarded him any compensation for the demolition of those buildings including the pleaded sum



of Kshs.5,000,000 being the value of the buildings and structures. This is because, the Petitioner had unlawfully occupied a portion of public land. That notwithstanding, he was entitled to a notice before the Respondent demolished his buildings and other structures. Section 155(1), (2) and (3) of the Land Act provides that:

1. “Any person who, without express or implied lawful authority or without any right or license, under customary or statutory land law so to do –
 - a. occupies or erects any building on any public land;
 - b. clears, digs, ploughs, cultivates or grazes animals over any public land or part of it; or
 - c. cuts or removes any timber or other produce on or from any public land or part of it, shall be taken to be in unlawful occupation of that land.
2. If, with respect to public land the Commission is of the opinion that a person is in unlawful occupation of public land, the Commission may serve on that person a notice in the prescribed form or give to that person an oral communication, in a language calculated to be understood by that person requiring that person to show cause as to why the person should not be required to vacate that land within any time and subject to any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters which the justice of the case may require, which may be specified in the notice or oral communication.
3. Any notice referred to in subsection (2) shall inform the person to whom it is addressed that the person has a right to be heard in connection with showing cause as to why the person should not vacate the land to which the notice relates”.

Since the above provision of the Land Act provides that even a person in unlawful occupation of public land ought to be notified to vacate the said land or show cause why he should not, the dictates of Article 47(1) of the Constitution demanded that the Petitioner be treated in a manner that was “lawful, reasonable and procedurally fair” by being notified to show cause why he should not vacate the portion of the road on which his building was constructed. No such notice was issued to the Petitioner either orally or in writing. That amounted to a violation of Article 47 of the Constitution which entitles him to Fair Administrative Action. That would have given him an opportunity to take any pre-emptive action which he may have deemed necessary in the circumstances. Even a person in unlawful occupation of land is entitled to be treated fairly. Failure to do so can only be a recipe for lawlessness, chaos, anarchy, disorder and break-down of the rule of law.

20. I am persuaded that under this head, the Petitioner is entitled to a sum of Kshs.150,000.
21. With regard to costs, the Petitioner has only succeeded in part. I award him half the costs of this Petition.
22. The up-shot of all the above is that this Petition is allowed in part and the following disposal orders are issued:
 1. The claim for an order to compensate the Petitioner with the sum of Kshs.5,000,000 being value of his destroyed properties is declined.
 2. The claim for a violation of the Petitioner’s rights under Article 47 of the Constitution is allowed and an award is made for Kshs.150,000.
 3. As the Petitioner has only partly succeeded, he is entitled to half of the costs of the Petition.



**JUDGMENT DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS
14TH DAY OF NOVEMBER 2024.**

BOAZ N. OLAO

JUDGE

14TH NOVEMBER 2024

Right of Appeal.

