



REPUBLIC OF KENYA



KENYA LAW
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**Juma v County Government of Kisumu & 2 others (Environment & Land
Petition 18 of 2021) [2023] KEELC 277 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 277 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND PETITION 18 OF 2021
A OMBWAYO, J
JANUARY 26, 2023
IN THE MATTER OF LAND PARCEL, NO.N. NYAKACH/EAST
AGORO/37
IN THE MATTER OF GRADING WORK ON OFF KATITO-
NYANGWESO ACCESS ROAD AROUND MARCH 2021
AND
IN THE MATTER OF THE LAND ACT, 2012
AND
IN THE MATTER OF ALLEGED VIOLATION OF THE RIGHT TO
PROPERTY
IN THE MATTER OF THE UNIVERSAL DECLARATION OF
HUMAN RIGHTS, 1948
AND
ELC PETITION NO. 18 OF 2021 1
IN THE MATTER OF THE AFRICAN CHARTER OF HUMAN AND
PEOPLE'S RIGHTS, 1981
AND
IN THE MATTER OF THE CONSTITUTION OF KENYA

BETWEEN
SILPER YOTO JUMA PETITIONER

AND
COUNTY GOVERNMENT OF KISUMU 1ST RESPONDENT



JUDGMENT

- 1 Silper Yoto Juma (hereinafter referred to as the petitioner) has come to court claiming that from September 23, 2009 to date, she has been the registered proprietor of the land parcel number N.Nyakach/East Agoro/37, measuring approximately 0.8 hectares (hereafter referred to as the property). The property is located in Warieha Village, North Nyakach Ward within Kisumu County. That on or around March 2021, the 1st respondent, through the 2nd respondent and /or its agents and/or its contractors, conducted grading work on off Katito-Nyangweso access road. The said access road serves or adjoins the petitioner's property. However, a surveyor engaged by the petitioner established that the said road grading work resulted in the said graded road encroaching into approximately 0.04 hectares of the petitioner's property. Consequently, the ground position of the said graded road, more so next to the petitioner's property, does not match the correct position of the said road as per the Registry Index Map. The said encroachment by the respondents was/is a violation of the petitioner's right to property, as enshrined under article 40 of the Constitution of Kenya, article 17 of the Universal Declaration of Human Rights and article 14 of the African Charter on Human and People's Rights.
- 2 The petitioner laments that the said actions and/or omissions of the respondents, jointly and/or severally, amount to unconstitutional and/or unlawful acquisition of the said approximately 0.04 hectares of the petitioner's property for public use. For instance, the petitioner has not received any compensation in respect of acquisition of the said 0.04 hectares of the property. By reason of the matter aforesaid, the petitioner suffered and continues to suffer grave loss and damage including special damages. The respondent, jointly and/or severally have refused or failed or neglected to make good the petitioners against them. This is despite being given adequate opportunity to do so.
- 3 The petitioner prays that a declaration be and is hereby made that the encroachment into approximately 0.04 hectares of the petitioner's land parcel number N. Nyakach/East Agoro/37 by the respondent and/or the 2nd respondent and/or their agents and/or contractors during the grading work on off Katito-Nyangweso access road on or around March 2021 violated the petitioner's right to property under article 40 of the Constitution of Kenya, article 17 of the Universal Declaration of Human Rights and article 14 of the African Charter on Human and Peoples Rights.
- 4 Last but not least, the petitioner prays that an order be issued directing the respondents to correct the section of the off Katiti-Nyangweso access road adjoining the petitioner's land parcel N.Nyakach/East Agoro/37 so that the ground position of the said access road matches the correct position of the said access road as per the Registry Index Map.
- 5 An order for general and/or exemplary damages, and interest thereon at court rates until payment in full, be and is hereby issued against the respondents for violation of the petitioner's right to property.
- 6 An order for special damages in the sum of Kshs20,000 and interest thereon at court rates from the date of judgment until payment in full, be and is hereby issued against the respondents. Costs of this petition, and interest thereon at court rates from the date of judgment until payment in full, be borne by the respondents. The respondents were served but did not file any document. The court went out of its way to accommodate the respondents to participate in this matter but the respondent did not.



7 I have considered the petitioners supporting affidavit and do find that the petitioner is the registered owner of the suit property. The petitioner has demonstrated that the respondents excised 0.04 hectares from the petitioners land during the grading of the public road adjacent thereto. This was unconstitutional and a breach to the petitioner's rights enshrined in article 40 (1) of the Constitution of Kenya. Article 40 (1) provides:-

40

- (1) Subject to article 65, every person has the right, either individually or in association with others, to acquire and own property--
 - (a) of any description; and
 - (b) in any part of Kenya.
- (2) Parliament shall not enact a law that permits the State or any person—
 - (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
 - (b) to limit, or in any way restrict the enjoyment of any right under this article on the basis of any of the grounds specified or contemplated in article 27 (4).
- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
 - (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with chapter five; or
 - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
 - (i) requires prompt payment in full, of just compensation to the person; and
 - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
- (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
- (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.
- (6) The rights under this article do not extend to any property that has been found to have been unlawfully acquired.

8 The import of article 40 is to protect proprietary rights under the law. In the event the State wishes to compulsorily acquire the land, article 40(3) provides the terms under which the land can be so acquired. The issue in this case is whether the State, which has issued a title, can excise part of the land and construct a road therein without following the right procedure or due process. The respondents have



not responded to the petition hence the allegations by the petitioner are not controverted. This court finds that the petitioner rights were violated by the respondents by excising part of his parcel of land.

9 I do grant a declaration that the encroachment into approximately 0.04 hectares of the petitioner's land parcel number N. Nyakach/East Agoro/37 by the respondent and/or the 2nd respondent and/or their agents and/or contractors during the grading work on off Katito-Nyangweso access road on or around March 2021 violated the petitioner's right to property under article 40 of the [Constitution of Kenya, 2010](#) . Moreover, that an order be and is hereby issued directing the respondents to correct the section of the off Katiti-Nyangweso access road adjoining the petitioner's land parcel N.Nyakach/East Agoro/37 so that the ground position of the said access road matches the correct position of the said access road as per the Registry Index Map.

10 I do award exemplary damages of Kshs 500,000, and interest thereon at court rates until payment in full, against the respondents for violation of the petitioner's right to property. I do grant an order for special damages in the sum of Kshs20, 000 and interest thereon at court rates from the date of judgment until payment in full. Last but not least, I do award costs of this petition, and interest thereon at court rates from the date of judgment until payment in full, to be borne by the respondents.

Judgment dated, signed and delivered virtually at Kisumu this 26th day of January 2023.

A O OMBWAYO

JUDGE

ELC PETITION NO. 18 OF 2021	0
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