



**Mukira v Kirinya & 2 others (Environment & Land Petition 12 of 2021)
[2023] KEELC 15762 (KLR) (22 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15762 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND PETITION 12 OF 2021**

CK NZILI, J

FEBRUARY 22, 2023

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER ARTICLES 40 AND 47 OF THE CONSTITUTION OF KENYA**

BETWEEN

CHARITY TIRINDI MUKIRA PETITIONER

AND

ELIAS KIRINYA 1ST RESPONDENT

ANASTACIA NKATHA 2ND RESPONDENT

MERU COUNTY 3RD RESPONDENT

JUDGMENT

1. Before the court is the petition dated 29.3.2021 in which Charity Tirindi Mukira as the registered owner of LR Kiirua/Naari/169, sued the 2nd & 3rd respondents claiming that on or about 22. March 2021 the respondents without any notice, justification or right trespassed on his property and illegally excised, excavated, destroyed her wall, fell trees, and or dug a non-existent road of access in her land. She averred that as a result of the aforesaid acts, they took away and or deprived her of almost two hectares of the land contrary to the Land Act and the Constitution.
2. Following the foregoing, the petitioner averred that through a notice dated 26.3.2021, she sought information from the 3rd respondent on whether they were the ones who had authorized and or sectioned the alleged illegal destruction and or alienation of her land. Further, the petitioner averred she made a formal report with Kiirua Police station.
3. The petitioner averred that the acts of the respondents not only flew against Articles 21, 22, 23, 24, 25, 35, 40 & 259 of the Constitution but also Article 17 of the Universal Declaration of Human Rights (UDHR), Articles 14 of the African Charter on Human & People's Rights (ACHPR), Articles 5 of



the *Intrnational Convention on the Elimination of All Forms of Racial Discrimination* (ICEAFRC) but also Articles 35 of the *Convention Elimination of All Forms of Discrimination Against Women* (COEAFDEW).

4. The petitioner, therefore, prayed for:
 - a. A declaration that her right to; - acquire own property and fair administrative actions had been violated.
 - b. Prohibitory injunction.
 - c. Mandatory injunction compelling the respondents to restore the suitland to the position it was before the unlawful entry on 22.3.2021.
 - d. Special damages upon valuation.
 - e. General and exemplary damages.
5. The petition was accompanied by a supporting affidavit sworn on the even dates in which the petitioner attached a copy of a title deed, photographs showing the destruction, and a demand letter.
6. The 1st respondent opposed the petition through an answer dated 20.5.2021. He averred that as the Member of the County Assembly of the 3rd respondent, his mandate was limited to oversight, representation and legislation hence he had no mandate or authority to order the 2nd and 3rd respondents to supervise, dig and construct the alleged road which role was under the Department of Roads of the County and therefore, he was barred by the law from exercising executive roles. The 1st respondent averred that in a community meeting held on 13.12.2020 with the petition duly represented, members of the Muthangethene/Nthangari community were notified of the intended excavation of the said road and further notification given to the occupants of the road reserve, the petitioner included by the agents of the 3rd respondent which the petitioner defied or ignored. The 1st respondent averred that the petitioner had authored her own misfortunes by encroaching on a road reserve and therefore had no rights protectable under the Constitution.
7. It was averred that the 3rd respondent in exercising its mandate on county road construction or reconstruction or any other public facility did not need any authorization from the petitioner. The 1st respondent averred that a contract was issued to Skyline Express by the 2nd respondent to routinely maintain county roads among them Kiirua-Naari Ward road by opening and for drainage works in Mitunguu Ward on behalf of the county.
8. As a consequence, the 1st respondent denied any alleged infringement of the rights of the petitioner. He averred that the petition lacked merits, was based on a wrong presumption that the petitioner had some proprietary rights on the land abating the road, and was therefore an abuse of the court process disclosing no cause of action against him. The answer to the petition was accompanied by a list of witness statements and documents dated 20.5.2021.
9. The 2nd respondent entered an appearance through the firm of Kiogora Mugambi & Co. Advocates but failed to file any response to the petition.
10. On its part the 3rd respondent filed a response to the petition dated 19.5.2021 terming the petition as an afterthought, an abuse of the court process, vexatious, speculative, generalized, and offensive of the rules governing pleadings in a constitutional petition. The 3rd respondent averred that the petition raised no constitutional issues, was civil in nature and pertained to the boundary between the petitioner's property and a road reserve, a private law claim disguised as a constitutional claim requiring the use of expert witnesses and a site visit by the court.



11. The 3rd respondent averred that the petition disclosed no violation of the alleged rights to warrant the reliefs sought, otherwise the contents were falsehoods or half-truths since the petitioner had always been aware of the road reserve bordering her land. It was averred that the petitioner knowingly encroached on the road reserve and illegally constructed offending structures therein hence the alleged constitutional rights was based on a misinterpretation or misapplication of the Constitution. The 3rd respondent urged the court to find the petition as disclosing no constitutional claim, and as an ordinary civil case which was lacking merits. The response to the petition was accompanied by the 3rd respondent's list of witnesses and documents dated 20.5.2021, 31.5.2021, and 31.10.2022 respectively.
12. With leave and direction of the court, parties opted to hear the petition through oral evidence. At the hearing, the petitioner testified as PW 1. She adopted her supporting affidavit sworn on 27.3.2021 as her evidence-in-chief and produced a title deed for LR No. Kiirua/Naari/169 as P. Exh No. (1), photographs as P. Exh No's 2-20 and a demand letter dated 26.3.2021 as P. Exh (21).
13. In cross examination, PW 1 admitted that she did not write a letter to either the land registrar or land surveyor seeking for the establishment of the boundaries to the land before filing the suit. Further, PW 1 however stated that a county surveyor was sent by the 3rd respondent, who took measurements of her land and wrote a report dated 14.4.2021. PW 1 said that the old beacons to the land though recovered were replaced with wooden ones by the respondents. PW 1 told the court that both the 1st respondent and the area chief were present during the events complained about but failed to listen to her plea for the land surveyor to visit the site and establish the boundaries before the grader could commence the works. PW 1 insisted that as per the sketch map produced as evidence, her parcel of land was No.169 bordering Parcels No. 625 and 510. She clarified that her fence and trees were removed in the course of the works as the respondents widened the road, though none of his neighbors objected to the same.
14. Fredrick Mwirigi Karigi was DW 1. He adopted his witness statement dated 31.10.2022 as his evidence in chief. As an inspector of road works with the 3rd respondent, his testimony was that the Maitei-Kanondone-Muruguma road was among the county roads in Kiirua/Naari Ward which had been demarcated for road opening and grading. He said that survey works were carried out to establish the extent of the road reserve and neighbors to the road notified over the same. DW1 in particular said that the road reserve at issue bordered LR No's Kiirua/Naari/169, 510 and 625 measuring approximately 9 meters. He denied that the 3rd respondent encroached on the petitioner's Parcel No. 169 given that it was the petitioner who knowingly encroached on the road reserve and constructed the offending structures on it. DW 1 confirmed that the excavation and grading was done on the road reserve and not on the petitioner's land. He clarified that the petitioner was all aware of the road reserve prior to the public works. He produced the map extract as D. Exh No. (1) and the county land surveyors report dated 15.4.2021 as D. Exh No. (2).
15. Additionally, DW 1 said that he was the one who supervised the works as per the contract in line with the legal requirements. He also said that the first step taken was public participation of the locals, thereafter the procurement of the contractor followed by the establishment of the beacons to ensure that the contractor stuck to the nine meters road reserve. DW1 said that the last step was the notification issued to the neighbors on any structures on the road reserve by affixing marks in the presence of area local leaders among them the 1st respondent and the area chief.
16. DW 1 told the court that the whole project was funded by the 3rd respondent and that the role of the 1st respondent was purely on oversight whereas the actual execution of the project fell under the contractor. In cross-examination, DW 1 said public participation took place through a public Barraza at the Maitei location headquarters after it was gazetted. He could however not remember the actual dates or produce any documents to that effect. He insisted that the fixed marks on the road reserve also



- served as a notice to the neighbors. He admitted however that no evidence was attached to the response including the dates when the x marks and the beacons were erected prior to the commencement of the works.
17. Further, DW 1 told the court that whereas it was not in dispute that PW 1 was the owner of LR No. 169, he did not ascertain the acreage of the said property. However, DW 1 clarified that after placing marks and beacons marking the extent of the road reserve, the petitioner was notified to cut down the trees and remove the fence falling on the road reserve before works could commence but instead threatened the respondents with a court action. DW 1 confirmed that he attended the site on 22.3.2021 when the excavator came and removed the petitioner's trees and the fence as per earlier on erected beacons, lying on the road reserve. He clarified that no notices served from the National Land Commission were served upon the neighborhood regarding the taking up of the road reserve, apart from those issued through the area chief and the 1st respondent regarding the grading. DW 1 said that D. Exh No.1 was clear that a road of access existed between LR No. 510 and 169 connecting Kanondone and Maitei. DW 1 acknowledged receipt by the respondent of a letter dated 26.3.2021 from the petitioner but could not ascertain whether it was acted upon or not. In so far as he was concerned, DW 1 said he knew very little on the procedures of eviction or alienation of road reserves. He was however certain that the petitioner was served with sufficient notice by the 3rd respondent whose only intention was to open up the road and not to evict or encroach on the petitioner's land. In addition DW 1 said that the petitioner did not deserve any alleged compensation since none of her property was destroyed or taken away since prior to the survey works, she was duly informed of the decision to clear the road as per its measurements.
 18. With leave of court parties were directed to file and exchange written submissions by 16.1.2023. The respondents complied by filing submissions dated 16.1.2023.
 19. The 1st respondent submitted that as per his answer to the petition, since his mandate in law was limited to oversight, representation and legislation, he was wrongly sued more so given that the activity complained about was lawfully carried out by the 3rd respondent on a road reserve. The 1st respondent submitted that the petitioner had been properly notified going by the documents attached to his answer to the petition. He urged the court guided by *Benjamin K. Kipkulei v County Government of Mombasa and another* (2015) eKLR to consider the pleading before the court and find it raised no constitutional questions but was a matter to do with a boundary to land. Reliance was placed on *Anne Wangui Ngugi & 2,222 others v Edward Odundo CEO Retirement Benefit Authority* (2015) eKLR and *Papinder Kaur Atwal v Manjit Singh Amrit* Nairobi Petition No. 236 of 2011 and *Anne Wawuda & 3 others v Kenya Railways Corporation & another* (2015) eKLR.
 20. The 1st respondent urged the court to find that the claim based on trespass raised no constitutional questions. As to whether the petitioner's right to land and fair administrative action were violated, the 1st respondent submitted that the point of departure between the parties herein was simply if there existed a road reserve. It was submitted that the county land surveyor's report dated 14.4.2021 showed the existence of the road reserve with the petitioner's valuation report at page 5 acknowledged and was also confirmed by the statement of the 1st respondent, her witness statement dated 20.5.2021, the witness statement by George Kimathi dated 31.5.2021 and that of DW 1.
 21. Given the said evidence, the 1st respondent submitted that Article 40 (6) of the *Constitution* barred anybody from enjoying rights on land unlawfully acquired hence the petitioner could not seek to benefit from an encroachment of a road reserve. Further, the 1st respondent submitted the claim as based on Article 47 of the *Constitution* was unfounded, since the respondents followed the due process including the community participation as per the minutes dated 13.12.2020.



22. The court has gone through the pleadings, documents filed, evidence tendered and the written submissions. The issues for determination are:
 - a. Whether the petition has disclosed a constitutional question
 - b. If the petitioner exhausted the internal dispute mechanism under the statutes and
 - c. If she has proved any breach of her fundamental rights and freedoms to be entitled to constitutional reliefs.
23. A party invoking the powers of a constitutional court based on the breach of the Bill of Rights has to meet the procedural requirements as set out under Rule 10 of the *Constitution of Kenya (Protection of Fundamental Rights & Freedoms Protection Practice and Procedure Rules* 2013.
24. In this petition, the petitioner has set out her names, address, facts relied upon, the fundamental rights and freedoms breached, the particulars of the alleged breach, nature of injury and damage and the reliefs sought. This, to my mind is in line with the law as well as the case law of *Anarita Karimi Njeru v Republic* (1970) eKLR, as read together with *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR.
25. The next hurdle to surmount is whether the petition raises a constitutional question or controversy which basically means that the answers to the problems raised by the petitioner as regards her bill of rights alleged breached, infringed or threatened, would solely or wholly find their answers from the Constitution and not from a statute.
26. In the case of South African case of *S v Boesak* (2001) (CCt 25/00) (2000) and which was cited with approval by the court in *Fredrick & others v MEC for Education & Training, Eastern Cape & others* (2002) 23 ILJ 81 CC it was held that statutory rights are not the same as constitutional rights and that any dispute which can be handled in an ordinary manner through ordinary civil or criminal process should not be elevated into a constitutional question.
27. Similarly, in *Mutanga Tea & Coffee Company v Shikara Limited & another* (2017) eKLR,..... the court held that courts must not entertain matters where there has been no exhaustion of internal mechanisms as set under statute following the mandate given under Article 159 of the *Constitution*.
28. In this petition what is complained about is an alleged encroachment by the respondents while excavating and or opening up a county road to an extent that it interfered with the petitioner's constitutional rights to ownership of LR No.Kiirua/Naari/169. The petitioner has alleged that the respondents failed to accord her fair hearing by giving her adequate notification, acquiring her land compulsorily without compensation or due process, depriving her property without compensation and failing to accord her rights as to equal protection of the law, the right to access information and lastly, her right to fair administrative action.
29. The petitioner therefore prayed for declaratory orders on violation of Articles 20, 21, 22, 24, 27, 35, 40 and 47 of the *Constitution*, prohibitory order of the restoration of the land to its initial status, special and general damages.
30. In their defence, the respondents have taken the view that the petitioner authored her own misfortunes by encroaching on a road reserve, erecting illegal structures therein, failing to heed the warning and notice to remove the structures on the road reserve and lastly, for filing an ordinary suit on boundary dispute otherwise disguised as a constitutional petition. Further the respondents averred that there was adequate and sufficient notice including a public participation. In support of the claim the petitioner



- produced P. Exh. No's 1 title deed and photographs as P. Exh No. 2 Nowhile the respondents produced a survey map as D. Exh. No. 1, & a surveyor's report dated 15.4.2021 as P. Exh No. (2).
31. The [Constitution of Kenya](#) delineates the powers and the obligations of the County Government under Articles 6, 10, 174, 175, 176, 185, 186, 187 & 190 of the [Constitution](#) as read together with Schedule IV thereof. Sub Rules 5 (a) & 7 of Part 2 of Schedule IV provides that the role and the duty to maintain, improve and undertake county roads as well as county planning and development falls under the 3rd respondent.
 32. The petitioner averred that her land was encroached upon while the respondents' defence was that what the 3rd respondent was undertaking was both a constitutional and statutory mandate in which the petitioner had unlawfully erected structures on a public land. Therefore, the respondents insisted that the petitioner cannot not be heard to complain for illegal structures on her property since Article 40 (6) of the [constitution](#) does not envisage such protection in favour of the petitioner.
 33. Article 62(1) (g) of the [Constitution](#) defines all roads and thorough fares as public land which vests in and is held in trust for the people of Kenya which must be administered on their behalf by the National Land Commission. Section 156 of the [Land Act](#) provides the manner in which to deal with a person obstructing a public right of way or encroaching on any public right of way by serving such a person with a statutory notice of not less than 14 days through the National Land Commission. Under Section 157 thereof, it is an offence punishable by a fine for unlawfully occupying public land or to obstruct or encroach on the public right way or to refuse to remove the obstruction or cease that encroachment upon notice to do so being served.
 34. In this petition, the petitioner averred that there was no encroachment on a road reserve and all what was destroyed by the respondents was within her land. Further, she stated that the respondents unjustifiably and illegally took away her land and converted it to public land without notice, justification and or compensation.
 35. The 3rd respondent in the evidence produced D. Exh No. (1) and (2) a map extract and a surveyor's report dated 15.4.2021 as justification that LR No's 169, 510 and 625 were served by an access road whose width on the ground was 9 metres.
 36. In the case of [Azzuri Ltd v Pink Properties Ltd](#) (2018) eKLR, the court held that the resolutions of dispute in a general boundary area as per Section 18 of the [Land Registration Act](#) falls under the jurisdiction of a land registrar. In [Kimani Wanyoike v ECK](#) civil appeal NO. 213 of 1995/UR, the court held that where there was a law prescribed by the Constitution or an Act of Parliament governing a procedure for the redress of any particular grievance that procedure should be strictly followed.
 37. In [Azzuri](#) (*supra*) the court held that a reference of a boundary dispute to Environment and Land Court was prescribed by statute. The trial court had held that the law recognized the fact that the Registry Index Map only indicated the approximate boundaries and the situation on the ground and therefore to place reliance on a map sheet alone to determine the extent of an encroachment was not enough without resorting to other features on the ground. The Court of Appeal confirmed the trial court's holding that the appellant had not established that the wall and development on the plot had encroached on the road of access. In the exposition of the law, the trial court had also stated that in resolving a general boundary area, regard must be had to the physical features on the ground such as hedges, fences and the road.
 38. In the case of [Gujral Sandeep Singh Raghbir v Minister for Public Works, Road and Transport County Government of Kajiado & another](#) (2018) eKLR, the court cited with approval [Cycad Properties Ltd & another v AG & 4 others](#) (2013) eKLR where it was held that the burden was on the petitioners to



- show an entitlement to the 20 meters road reserve to rebut the respondent's respondent that it had encroached on a road reserve which was unlawful. The court held that the custodian of all maps in the country was the Director of Surveys, and that the failure to produce such maps through the Director of Surveys, the alleged encroachment on a road reserve stood unsubstantiated. As to whether the plaintiff had been provided with ample notice before demolition was effected, the court held that under section 95 of the [County Government Act](#), the County Government was mandated to establish channels of communication and access to information, among them public meetings. The court held that there was no evidence of a personal notice to the plaintiff or the sticking of the said notice on the plaintiff's premises in line with Section 152 (1) (a) of the [Land Registration Act](#) before the demolition was effected.
39. The court also cited with approval [Titus Gatitu Njau v Municipal council of Eldoret](#) (2015) eKLR, on the award of general damages if the act was unconstitutional by servants of the government. In the case of [Stephen Njuguna Kiragu & another v KeNHA](#) (2018) eKLR the court held that a Registry Index Map or the Cadastral Map were the only authentic maps to point out the extent of a road reserve. The court proceeded to deny the plaintiff's claim for developments made on a road reserve since the developments therein were a problem of their own making without consulting KeNHA on the actual boundary before proceeding to erect the buildings. The court found that it was legal under Section 91 of the [Traffic Act](#) for the KeNHA to proceed to demolish the illegal structures made without permission. On the aspect of a notice as provided under the [Fair Administrative Action Act](#), the court found that the act of demolition was an administrative action requiring a notice in writing and evidence of the placing of mark. In absence of such notice even though not contemplated under Section 91 of the [Traffic Act](#), the court held that the defendant had acted unfairly.
40. Under Sections 10 & 11 of the [Public Road and Roads of Access Act](#) Cap 399 Laws of Kenya, a notice has to be served personally or by registered post to the owner of land or occupier thereof where a road shall pass calling him or her to show cause within one month, why the proposed road of access should not be granted. Section 11 thereof relates to the hearing of the views of the affected persons including the width of the road.
41. In this petition what the respondents have provided in compliance with the law are not Cadastral or Registry Index Maps from the Director of Surveys Kenya. D. Exh No's. 1 & 2 are not authenticated at all. Its source is not indicated as from the Director of Survey of Kenya in line with the [Surveys Act](#). The list of documents filed by the 1st respondent dated 20.5.2021 are not from the Kenya National Highways Authority. The said documents by any stretch of imagination cannot amount to a proper notice to the petitioner in line with Sections 10 & 11 of the [Public Road and Road of Access Act](#) as read together with the Section 6 of the [Fair Administrative Action Act](#). There is also no indication if the contractor by the 3rd respondent complied with Section 58 (1) & (2) of [Environmental Management & Coordination Act](#) by undertaking an Environmental Impact Assessment in which then the respondents can be said to have undertaken a proper public participation and proceeded also to cause the National Land Commission to serve a proper notice to the petitioner under Section 152 of the [Land Act](#) over and above the public meetings alluded above. In the case of [Elizabeth Wambui Gitinji & 29 others v KURA & 4 others](#) (2019) eKLR the issue before the Court of Appeal was whether the road reserve was 60 or 80 meters.
42. The court held that Regulations 56, 57 and 60 of the [Survey Regulations](#) 1994 laid down the method of taking triangulations and fixing of beacons in line with Sections 21 (2), 32 & 33 of the [Survey Act](#). The court cited with approval [Embakasi Properties Ltd & another v Commissioner of Land & another](#) (2019) eKLR on what authentication of the survey map means namely, to prove or show something to be true, genuine or valid.



43. In this petition, the respondents are using an unauthenticated map or reports to justify their actions. In my considered view, both the petitioner and the respondents were unable to call or produce reports from a licensed surveyor and a land registrar to establish the correct boundary.
44. The burden was more on the 3rd respondents to justify that the action to remove the alleged offending developments on a road reserve, were not only statutory but also constitutional in terms of fair hearing and fair administrative action. Even if the petitioner had allegedly encroached on a road reserve still two wrongs cannot make a right. The 3rd respondent had to comply with the law and give adequate notice to the petitioner to vacate from the road reserve through the National Land Commission. The 3rd respondent arrogated to itself a mandate, it did not solely have in law. No evidence has been tendered to the effect. National Land Commission was involved in assurance roles.
45. On the other hand, whereas the petitioner has proved that she was not given adequate notice before the demolition of her properties, she has been unable to prove the extent of the damage, the size of the land taken away and the cost of the damage. The law is that evidence must be tendered for special damages which have to be specifically pleaded and proved. Similarly, the deprivation of the property must have been quantified and specifically proved.
46. In the circumstances, the only appropriate relief available is a declaration that the 2nd & 3rd respondents breached the petitioner's rights to fair hearing, fair administrative action and the right to protection of property in failing to grant her adequate notices to vacate from the alleged road reserve to grant her a fair hearing, to supply her with written reasons and the decision leading to the demolitions of her properties.
47. As regards general damages there exists no mathematical formula to determine the damages. In the case of *Gitobu Imanyara & 20 others vs Attorney General* (2013) eKLR, the court held that each case must be determined under its own circumstances. Considering all the factors in this case, the 3rd respondent was doing this in furtherance of a public good. The petition has however failed to join the contractor who removed the offensive structures. That notwithstanding it is the 3rd respondent who constitutionally and statutorily has the obligation to involve the National Land Commission to issue the notices. Consequently, I award general damages of Kshs.250,000 against the 3rd respondent.
48. Costs of the petition to be met by the 3rd respondent.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 22ND DAY OF FEBRUARY, 2023

In presence of:

C/A: Kananu

Miss Mbogo for Maranya for 1st respondent

Kanyumoo for 3rd respondent

HON. C.K. NZILI

ELC JUDGE

