



**M’Liria v Land Adjudication Officer Amung’enti “A” Adjudication
and Settlement Section & 2 others (Environment & Land Petition
E003 of 2021) [2023] KEELC 879 (KLR) (15 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 879 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND PETITION E003 OF 2021
CK NZILI, J
FEBRUARY 15, 2023

BETWEEN

DAVID MUINDI M’LIRIA PETITIONER

AND

**LAND ADJUDICATION OFFICER AMUNG’ENTI “A” ADJUDICATION AND
SETTLEMENT SECTION 1ST RESPONDENT**

CHIEF KABULINE LOCATION 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. By an amended petition dated 15.11.2021, the petitioner describing himself as the recorded owner of Parcel No’s. Amungenti “A”/6223 & 145 within Amungenti “A” Adjudication Section (hereinafter the properties), sued the respondents claiming that the 1st respondent on 13.4.2021 without any color of right or justifiable reason or notice forcefully and illegally curved out a public road of access through his properties despite the existence of an original public road of access in the area. He averred that in the process thereof, the 1st & 2nd respondents mobilized goons who cut the said road of access across his parcels of land causing destruction of his properties namely;173 miraa trees, 11 banana plants, 11 mature trees and a fence valued at Kshs.1, 054, 340/=.
2. The petitioner averred that the 1st & 2nd respondents acted contrary to their statutory duties as spelt out under the *Land Adjudication Act*, (Cap 284 Laws of Kenya). The petitioner averred that the acts of the 1st & 2nd respondents were malicious, unlawful, wrongful, illegal, harmful, arbitrary, amounted to an abuse of power, were discriminatory and amounted to breach of his constitutional right to own property in law, invasion of his rights and fair administrative action. The petitioner averred that the properties destroyed were his sole source of livelihood and that of his family, yet no reasons were given



for the illegal, arbitrary and oppressive action yet an existing public road of access was available and in use for over 30 years.

3. The petitioner sought for reliefs that:
 - a. A declaration do issue that the actions of the 1st respondent in curving out a public road of access through his properties was illegal, unconstitutional and violated his right to ownership of property.
 - b. An order directing the 1st respondent to rectify the map and remove the access road as curved out of his properties.
 - c. An order directing the 1st and 2nd respondents not to implement the said public access road on the ground.
 - d. Permanent injunction restraining the respondent from trespassing, curving out an access road or interfering with his parcels of land.
 - e. General damages and special damages for Kshs.1,054, 340/=.
4. The amended petition was accompanied by a verifying affidavit, witness statement dated 10.11.2020, list of documents dated 10.11.2020.
5. The petition was opposed by the 1st & 2nd respondents through replying affidavit sworn on 30.11.2022 by Moses M Mwangagi, John M. Muchiri and Gedion Gitiye Samson hereinafter the 1st, 2nd and 3rd replying affidavits respectively.
6. In the 1st affidavit, it was averred that according to the record of existing rights Parcel No's. 6223 and 145 were recorded under Amungenti "A" Adjudication Section after the section was declared an adjudication section on 3.7.1966 under the [Land Consolidation Act](#) (Cap 283 Laws of Kenya). That fragments gathering and hearing of RER cases was completed under Sections 17, 18, 19 & 20 of the Act hence the section was at objections to the adjudication register stage as per Section 26 of the Act. That under Section 23 of the Act, a demarcation officer was empowered to demarcate the boundaries of all parcel. That on the material date in the company of committee members for the adjudication section, they marked an access road to serve Parcel No. 145 among others since the road was, being opened as it was existing on the map and narrowly (foot path) on the ground. That all what the officers did was to show on the ground where the road was as demarcated. That the road had earlier been cleared by members of public in 2016 only for the encroachment to arise again.
7. The 1st respondent averred that the clearance was done by members of the public since the petitioner had failed to ensure that the road as earlier marked was maintained in terms of Section 23 (2) of the [Land Consolidation Act](#). The 1st respondent attached a copy of the map to confirm the existence of the access road. It was averred further that under Section 34 of the [Land Adjudication Act](#), the 1st respondent was immune from being sued for activities undertaken during his course of duty hence it was unfair to do so during his normal duties and that the practice of people blocking access road in the entire adjudication area should be discouraged.
8. In the 2nd affidavit, John M Muchiri, the Land Adjudication and Settlement Officer Igembe Central/ North and South Sub Counties averred that Section 23 of the [Land Consolidation Act](#) empowered a demarcation officer with the assistance of the committee members to mark boundaries, clear a boundary and prepare or cause to be prepared, a demarcation plan. That the petition as filed was premature since the petitioner failed to exhaust the procedures set under Cap 283 more so while aware that Section 21 (3) of the Act mandated the committee to require a land owner or county council to



- relinquish any land to which he was entitled to and to accept in place thereof relinquish the same to create a right of way or to provide for the needs of the community.
9. Further, the deponent averred that under Sections 17 and 18 (b) thereof, the demarcation or survey officers had the mandate to demarcate any right of way which was necessary for providing a parcel completely surrounded by other parcels with access to a public road or water. The deponent averred that the access road was opened to provide a right of way to land owners of Parcel Nos. 9031, 13116, 13058, 9208, 2077, 145 and 8898 in order for them to access the tarmacked Maua – Kanuni public land. Additionally, the deponent averred that if the portion of the access road was to be closed as the petitioner was seeking, it would make Parcel No's 898, 13534, 1406, 7964, 9724, 8120, 10478, 10475, 10477, 10479 and 12368 among others landlocked. The deponent averred that the road was being opened because it was existing on the map only that on the ground it was a narrow foot path, hence all what the officers did was to show on the ground where the road was as per the attached copy of the map. Lastly, the deponent averred that the area was still under adjudication hence it was be unfair to sue an officer while undertaking his normal duties or to block an access road for an adjudication section, forcing the adjudication officers to resort to using chiefs and police officers to open the roads.
 10. With leave of court, parties opted to canvass the petition through written submissions based on the pleadings, statements and documents in line Rules 20 & 22 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice & Procedure Rules 2013, (Mutunga Rules).
 11. The petitioner by written submissions dated 13.1.2023 submitted that, the 1st respondent acted ultra vires his powers and without any justification for the petitioner's consent was not sought or obtained and or responses made to the petitioner's plea as to why a road access had to be curved through his land, which was contrary to the *Land Adjudication Act* & Article 40 of *the Constitution*, more so, when an original public road of access existed on the ground.
 12. The petitioner submitted that even if Section 23 (3) of the *Land Consolidation Act* empowers the 1st respondent to demarcate boundaries, the law did not empower the 1st respondent to destroy private property or violate the rights of land owners and or to ignore the rights to fair hearing before the decision is made. The petitioner submitted that after the demarcation of his land was done, he was issued with a sketch map which showed no road of access across his parcels of land hence the replying affidavits were lacking any probable reasons why an original public road of access was changed from its original position to be created across his parcels of land. The petitioner urged the court to find the petition pleaded with precision, clarity and specificity in line with *Anarita Karimi Njeru vs AG (1979) KLR*, *Mumo Matemu vs Trusted Society of Human Right Alliance and others (2013) eKLR*.
 13. On general damages, the petitioner submitted that he was entitled to special damages for the destruction caused and for general damages based on *Park Towers Ltd vs John Mithamo Njika & 7 others (2014) eKLR*, *Gitobu Imanyara & 2 others vs AG (2016) eKLR* and *Pete Ndegwa Kiai t/a Pema Wines and Spirits vs AG & 2 others (Civil Appeal 243 of 2017) (2021) KECA 328 (17 December 2021) (judgment)* and should grant Kshs.5,000,000/= as general damages.
 14. The court has gone through the pleadings, documents attached and the affidavit evidence tendered. The issues commending themselves for courts determination are:
 - i. If the petitioner has met the constitutional threshold.
 - ii. If the petitioner exhausted the internal dispute mechanisms set under the law.
 - iii. If the petitioner has pleaded and proved his claim.
 - iv. If the petitioner is entitled to the reliefs sought.



15. A party invoking the court’s jurisdiction for a constitutional relief has to meet the constitutional tests by disclosing a constitutional question(s) and adhering to the procedural requirements. On the procedural requirements a petition has to comply with Articles 22, 23, & 258 of *the Constitution* and Rule 10 of the Mutunga Rules by disclosing the name, address, facts relied upon, provisions violated, nature of the injury caused, details of pending or previous cases over the matter and the reliefs sought. Similarly, the respondents must also adhere to Rule 15 thereof.
16. The petitioner has anchored his petition on Articles 19, 20, 23, 24, 27, 40, 47 & 50 of *the Constitution*. At paragraphs 13-23, the petitioner has largely complied with the procedural requirements and therefore met the threshold as set in the case law of Anarita Karimi Njeru vs AG and Mumo Matemu vs Trusted Society (supra), such that the respondents were able to respond to it.
17. Coming to the second test as to whether the petition has disclosed a constitutional controversy and or questions, in the case of Uhuru Muigai Kenyatta vs Nairobi Star Publication Ltd (2013) eKLR, the court cited with approval in NM & others vs Smith & others (Freedom of Expression Institute as Amicus Curiae) 200 (5) S.A 250 (CC) where the court held:

“Even if a case does raise a constitutional matter the essential of whether the case should be heard by this court must be in the interests of justice and not every matter will raise a constitutional issue worthy of attention.”

The court also cited with approval the case of Minister of home affairs vs Brickle and others (1985) LRLC Cost 75 S where George C.J held as follows:

“It is an established practice that where a matter can be disposed off without recourse to *the Constitution the constitution* should not be involved at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so”.

The judge went on to state that:

“Courts will not consider a constitutional question unless the existence of the remedy depends on it. If a remedy is available to an applicant under some other legislative provision or on some other basis whether legal or factual, a court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights”.
18. The petitioner has averred that his right to property under Article 40 of *the Constitution* was violated by the respondents when they purported to impose and erect a public road of access across his properties without following the already existing public road on the ground, as a result of which they committed acts of destruction and damage assessed at Kshs.1,054,340/-.
19. On the other hand, the respondents have averred that they lawfully exercised their statutory powers, duties and obligations as set out under Sections 15, 16, 17, 18, 19, 20 & 23 of the *Land Consolidation Act* which empowers them to create public rights of way to access public roads or water in order to avoid any landlocking to other parcels of land or holders thereof.
20. Further, the respondents averred that the only role that they undertook on 13.4.2021, was the marking of the road and the clearing of the encroachment on the road as it is customary when the road is identified and in this particular case, they averred that the road was already in existence on the map but narrower on the ground.
21. The respondents averred that the road had previously been cleared in 2016 only for the petitioner to encroach on the same alongside other parcels of land that had touched the access road. Additionally, the respondents averred that the adjudication section was at the objection to the register stage in accordance



with Section 26 of the Act. The respondents attached a copy of the map as annexure marked “MMM” showing that the access road opened was to provide a right of way to other land owners so as to access the tarmacked Maua – Kanuni public road. Lastly, the respondents averred that the petition was a non-starter and premature since the petitioner had failed to exhaust the procedures provided for under the [Land Consolidation Act](#).

22. In the written submissions dated 13.1.2023, the petitioner submitted that a public access road still existed on the ground as demarcated which was not even close to his land, but he only came to learn recently that an access road was created on his land, without his knowledge or consent. In particular, the petitioner averred attempts to obtain the map have been futile until he filed the petition. He maintained that the respondents were in law mandated to observe the rights of land owners even as they executed their statutory mandates and that in this case, they acted ultra vires, maliciously, wrongfully, illegally and failed to hear or explain to him the justifications of their actions.
23. To sustain his petition, the petitioner invoked Articles 19 & 20 of [the Constitution](#), that these rights and freedoms bind every state organ and on state officers who execute statutory powers; Article 19 on equality and freedoms from discrimination; Article 40 on right to protection of property; Article 47 on Fair Administrative Action and Article 50 on fair hearing.
24. Article 47 of [the Constitution](#) grants the petitioner a right to an administrative action that is expeditious, effective, lawful, reasonable, with procedural fairness and above all based on written reasons if the administrative action shall adversely affect the petitioner. Sections 4 & 6 of the [Fair Administrative Action Act](#) mandates the 1st and 2nd respondents to undertake and exercise their statutory powers while mindful of the constitutional rights and freedoms of citizens as expected of them under Article 20 (1) of [the Constitution](#). The right to fair administrative action includes informing parties about their rights on the manner, place and the period within which to appeal or apply for review against a decision made by an administrator in accordance with Section 5 thereof.
25. Under Section 6 thereof, the respondents were required to be supply the petitioner on demand, the decisions and the proceedings as may be necessary to facilitate for any intended application for review or appeal against the said decision or proceedings.
26. In this case, Section 6 (3) of the Act mandatorily required the 1st respondent to supply the petitioner with the decision and the reasons thereof, within 30 days upon request, in absence of which, in any proceedings for review or appeal against such an action or decision, there is a rebuttable presumption that the action or decision was taken without good reasons(s).
27. The implications and the ramifications of Article 47 of [the Constitution](#) were underscored by the Supreme Court of Kenya in the case of Shollei vs JSC & another (Petition 34 of 2014 (2022) KESC S (KLR) (Civil) (17th February 2022) (Judgement). The court took the view that Article 47 (2) implies the giving of a written decision and the burden to demonstrate the effect on an administrative action lays with the person to whom the action had been taken against. The court found that the applicant had discharged her burden by providing the letters where she had sought for inter alia, the reasons for her removal from office. The court made a finding that the right to fair hearing under Article 50 (2) of [the Constitution](#) binds both judicial and quasi – judicial bodies and that the burden to justify the limitation of the right lay with the person limiting the same.
28. In the written statement dated 10.11.2020, accompanying the petition, the petitioner and his witnesses averred that the 1st respondent failed to notify him of the intention to curve out the access road. He said that he requested for the area map and was denied the same. Instead, the petitioner averred that the respondents proceeded to forcefully effect the action without a fair hearing. The petitioner attached a



- confirmation letter dated 12.1.2009 and a sketch map from the said 1st respondent duly certified. In the interlocutory application dated 10.11.2020 filed simultaneously with the petition, one of the orders sought by the petitioner was to be provided by the 1st respondent, with the map used curve out the road of access.
29. The court proceeded to issue conservatory orders on 28.4.2021 and directed that the 1st respondent supplies to the petitioner the said demarcation map. The said orders were never obeyed until the court had to cite and committed the 1st & 2nd respondents for contempt of court, a year later on 27.4.2022. Incidentally and in utter contempt of this proceedings the demarcation map supplied and filed before court was not even verified or authenticated.
 30. In the replying affidavit dated 30.11.2022 annexure marked JMM “1” was indicated clearly as “this map is not an authority on a boundary” yet the court is asked by the respondents to find it authentic and the legal basis upon which the public road of access was established across the petitioner’s parcels of land.
 31. The respondents in this petition failed to disown and or discredit the sketch map which was filed alongside the petition and countersigned by the 1st respondent. A cursory glance of annexure marked JMM “1” to the replying affidavits confirms that it is materially different from the one Moses M Mwangangi attached to his mitigation statement as MMK “1” on 1.5.2022.
 32. The respondents have admitted that their powers, obligations and mandate are derived from the [Land Consolidation Act](#). Section 14 thereof provides that any decision of a committee of arbitration board shall be in writing and signed by the chairman or the executive officer thereof. Section 15 thereof requires a Record of Existing Rights for every adjudication section to be prepared and to include inter alia, any interest or encumbrance affecting the land including land set apart. None of the above adjudication records showing the alleged public access road were availed before this court including the Adjudication Register. Further, if at all the petitioner was supposed to object to the curving out of his land to pave way for a road of access across his parcels of land, the respondents have given no evidence to show that and or justify why they did not avail to the petitioner a copy of the demarcation map, decision or reasons thereof on time so as to exercise his right under Section 16, 17,18 and 26 of the [Land Consolidation Act](#). Additionally, under Sections 19 thereof the decision of the Adjudicator officer is final and so is the RER under Section 20.
 33. Moreover, if at all it was the land adjudication committee which set aside the land for a right of way under Sections 21 thereof, the 1st respondent owed a duty to the petitioner for him to know if he was entitled to any compensation under Sections 21 (4) and 22 thereof. Coming to Sections 23 thereof, the 1st respondent did not supply to this court, any demarcation plan which formed part of the adjudication register including any notice of the completion of the Adjudication Register or any invitation for the objection, perhaps sent to the petitioner or other affected parties so as to lodge a claim against the imposed public road of access, yet the respondents now urge the court to find the petitioner failed to abide by Section 26 of the Act.
 34. In *James Muthiane M’Mbirithu vs Land Adjudication & Settlement Igembe Central/North Sub Counties & 3 others; James Kirema Baikunda (Interested Party) (2022) eKLR*, the court held that the undue withholding of the decision and the proceedings by the respondents was unjustified under Articles 47 of Constitution and as read together with Sections 5, 6 (3) of the [Fair Administrative Action Act](#). Using the same reasoning, the respondents herein failed to give the petitioner an opportunity to protest, to lodge an objection, to apply for a review and or give him a justification why a public road of access was going to be effected on his parcels of land, yet there was an alternative and an already existing access road as per a sketch map initially supplied to him.



35. Even after effecting the access road, the respondents failed to supply on demand to the petitioner the demarcation map used to justify the decision to curve out his land, provide him with a written notice, the decision, reasons thereof and above all, accord him a fair hearing during the exercise. To compound the whole issue, despite a valid court order to supply the map to the petitioner, so as to exercise his rights to lodge an objection, the respondents unjustifiably withheld that vital document from the petitioner for a whole year.
36. Given this flagrant disregard of the law, the respondents are estopped in law from raising a defense that the petitioner failed to exhaust the statutory rights under Section 26 of the [Land Consolidation Act](#).
37. Having established that the petitioner's rights were violated by the respondents, the next question is whether the court should grant him the reliefs sought. By an order dated 23.11.2022, the court directed that the 1st & 2nd respondents do purge the contempt of court as per the ruling made on 27.4.2022 by re-fixing the access road in line with the demarcation maps to its designated position to the satisfaction of the petitioner. The costs for the restoration of the fence were also to be met by the 1st & 2nd respondents. The 1st & 2nd respondents were granted two months to implement the order. Afterwards, the respondents filed their replying affidavits to the main petition. The said replying affidavits were silent on the demarcation maps and or on whether there was restoration of the access road. Instead, the respondents stated that they were immune under Section 34 of the [Land Adjudication Act](#) while undertaking their lawful duties.
38. In the replying affidavits none of the respondents addressed themselves to paragraphs 18A and 18B of the amended petition regarding the special damage of Kshs.1054, 340/= arising out of the events of 13.4.2021. The respondents did not challenge the valuation report dated 3.5.2021 including the items, the description, the quantity, the units and the cost of the damaged properties. By the time this occurred the petition herein had already been served upon the respondents and instructions given to the Hon. Attorney General who entered appearance on 8.3.2021 for the 1st & 2nd respondents.
39. In his affidavit dated 8.11.2021, the 1st respondent admitted that they visited the locus in quo on 14.4.2021 in the presence of the 2nd respondent and the area Assistant County Commissioner. On the part of the 2nd respondent, he admitted that on 3.4.2021, he visited the locus in quo and later on 14.4.2021 alongside the 1st respondent. So obviously the respondents knew as early as 13.4.2021 of the alleged claim for destruction and damage by the petitioner prior to the amendment of the petition to include the valuation report and amount. In absence of a rival valuation report, evidence on restoration expenses and or challenge to the assessed damage, I find the claim for special damages as unopposed.
40. Coming to the aspect of general damages the petition has sought for Kshs.5,000,000/= based on the case of *Gitobu Imanyara & 2 others vs AG (supra) Peter Ndegwa Kiai (supra)*. Articles 22 & 23 of [the Constitution](#) grants this court powers to enforce and uphold the Bill of Rights in claims of infringement of rights and to grant the appropriate reliefs including an order for compensation. As held in *Peter Ndegwa (supra)*, general damages are given for losses that the law will presume as the natural and probable consequence of a wrong such as for pain, suffering or loss of reputation. The court held that general damages as flowing from comparable jurisprudence as at the discretion of the court and depending on the circumstances of each case. That notwithstanding, a court must indicate the factors and the circumstances it has taken into consideration. In the case of *MWK & another vs AG & 3 others (2017) eKLR*, the court held that an award of compensation goes towards indicting an infringement right or freedom by emphasizing the importance of the right and to deter further breaches.



41. In this petition, what the respondents did was in furtherance of a public good albeit at the expense of the rights and freedoms of the petitioner. There exists no mathematical formula to award general damages. See *Zipporah Seroney & 5 others vs AG (2020) eKLR*.
42. Unfortunately, the respondents still insist that they are immune and are under no obligation to adhere to *the Constitution* as they undertake their mandate under the *Land Adjudication Act*. Unfortunately, the *Land Adjudication Act* must be read subject to the supreme law of the land. It is the 1st & 2nd respondents to submit to *the Constitution* and not the other way around. In my consideration what is just and reasonable as general damages in this case is Kshs.1,000,000/=. The upshot is that I issue the following reliefs:
- a. A declaration be and is hereby issued that the respondents violated the petitioner's rights under Articles 27, 40, 47 & 50 of *the Constitution* by purporting to impose, erect a road of access across his properties without giving him a fair hearing and or adhering to his rights as to fair administration action and to property prior to, before and after the events of 13.4.2021.
 - b. An order do and is hereby issued directed at the 1st respondent to adhere to *the Constitution* and statutory law while effecting an access road, with a view of serving the petitioner and other land users in the locality.
 - c. The respondents to pay the petitioner Kshs.1,054,340/= as special and general damages of Kshs.1,000,000.
 - d. Costs and interests.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 15TH DAY OF FEBRUARY, 2023

In presence of:

C/A: Kananu

Muthomi Njeru for Kiruai for plaintiff

HON. C.K. NZILI

ELC JUDGE

