



REPUBLIC OF KENYA



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**Mbau & 10 others v Kenya Railways Corporation; National Land
Commission (Interested Party) (Environment & Land Petition 1 of 2021)
[2022] KEELC 14894 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 14894 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT & LAND PETITION 1 OF 2021
AK BOR, J
SEPTEMBER 22, 2022**

BETWEEN

**STEPHEN MUTHAMI MBAU 1ST PETITIONER
VIRGINIA WAMBUI WANGOMBE 2ND PETITIONER
PAULINE WANJIRU GITHETHWA 3RD PETITIONER
JOSEPH NJAKU THUKU 4TH PETITIONER
STEPHEN NDUNG’U 5TH PETITIONER
AUNAR DINEBUCO 6TH PETITIONER
PAUTASSI GIACOMO 7TH PETITIONER
JOSEPH KABUGI 8TH PETITIONER
REGINA WAITHUKI 9TH PETITIONER
MARGARET WAIHUINI WACHIRA 10TH PETITIONER
GODWIN GITHUI GACHAGUA 11TH PETITIONER**

AND

KENYA RAILWAYS CORPORATION RESPONDENT

AND

NATIONAL LAND COMMISSION INTERESTED PARTY



JUDGMENT

1. The Petitioners, who are residents of Nanyuki Town, Laikipia County filed the petition dated 6/07/2020 against the Respondent seeking declarations that being the registered proprietors of the parcels of land known as Nanyuki Municipality land reference number (L.R. No.) 2787/130 (Nanyuki Municipality Block 8/609), Nanyuki Municipality Block 8/615 and Nanyuki Municipality L.R. No. 2787/135 (Nanyuki Municipality Block 8/616), Nanyuki Municipality Block 8/1085, Nanyuki Municipality Block 8/682, Nanyuki Municipality Block 8/631, Nanyuki Municipality L.R. No. 2787/138 (Nanyuki Municipality Block 8/617), Nanyuki Municipality Block 8/608, Nanyuki Municipality Block 8/699, Nanyuki Municipality L.R. No. 2787/131 (Nanyuki Municipality Block 8/610) and Nanyuki Municipality Block 8/613 (“the Suit Properties”) they are entitled to enjoy their rights to property enshrined in Article 40 of *the Constitution* and that those rights cannot be limited arbitrarily without due process and regard to the constitutional and statutory requirement for procedural and fair hearing.
2. They sought a declaration that their rights to acquire and own property had been infringed by the Respondent through its actions of threatening to demolish their developments, fencing off the Suit Properties thereby blocking access into those properties and interfering with the access, occupation and use of the Suit Properties and the buildings on their land without written notice, reasons or a fair hearing.
3. Further, the Petitioner’s sought a declaration that their parcels of land being separate from the Respondent’s parcel of land which is Nanyuki Municipality Block 8/1080, the unilateral entry into the land and marking it for demolition, and erection of a fence in the Petitioners’ parcels of land by the Respondent’s agents was an act of illegal trespass constituting a breach of the Petitioners’ rights. They sought a permanent injunction to restrain the Respondent from dealing with the Suit Properties and general damages for infringement and violation of their constitutional rights arising from the trespass into their parcels of land, fencing off and threatening to demolish the structures on the Suit Properties. They also sought the costs of the petition.
4. The Respondent is a State Corporation constituted under the Kenya Railways Act as a body corporate with powers to sue and be sued in its name. The National Land Commission (NLC) was added to this petition as an interested party because it is established under *the Constitution* and mandated to initiate investigations into present or historical land injustices and recommend appropriate redress.
5. The Petitioners averred that they owned the Suit Properties and that they held valid documents of title which had never been invalidated by a court of law nor had they been subjected to any investigations which concluded that those parcels of land were illegally acquired. They added that they continue to remit rates to the County Government and land rent to the National Government on a yearly basis.
6. The Petitioners stated that they were allotted their parcels of land which were surveyed at different times before they were issued ownership documents in conformity with the municipal maps and plans on the allocation. They averred that they have massively developed their Suit Properties with permanent and approved structures, and that the ones which have not been developed have been properly fenced off with various economic activities being undertaken on those plots.
7. The Petitioners averred that the Suit Properties lay within the vicinity of the Kenya Railways Complex in Nanyuki Town. However, they emphasised that their parcels of land are not by any stretch of imagination within the Kenya Railways compound. They claimed that this can be confirmed by



various national and county government survey documents and the survey report prepared by the private surveyor who they commissioned.

8. They claimed that in June 2020, the Respondent in its bid to revive the Nairobi- Nanyuki Railway commissioned its agents who entered the Petitioners' Suit Properties without any notice and marked for demolition the buildings on their land while threatening the Petitioners that demolitions would soon follow. This prompted the Petitioners to write to the Respondent on 10/6/2020 and to other departments of government such as Survey, NLC, the Lands and Infrastructure Ministry of the County Government as well as the Land Registrar, Laikipia County seeking their intervention over the looming demolitions but their pleas did not elicit any response.
9. That on 3/7/2020 the Respondent commissioned officers of the National Youth Service (NYS) who acting as the Respondent's agents, commenced fencing around what the Respondent believed to be its land in the process of which they fenced off the Petitioners' land in the misguided belief that the Petitioners' developments fell within the Respondent's land. The Petitioners contended that the effect of the Respondent's actions was to block ingress and egress into their properties and was bound to interfere with the access, occupation and use of the Suit Properties.
10. The Petitioners contended that the Respondent had never given them notice that the Suit Properties and developments fell within their land and neither had there been any judicial forum or otherwise in which the Petitioners were afforded a hearing to defend their titles and occupation of the Suit Properties.
11. The Petitioners contended that the Respondent had blatantly violated their constitutional rights by disregarding their right to acquire and own property enshrined in Article 40 of *the Constitution* by threatening to demolish the Petitioners' developments, fencing off the Suit Properties and blocking access to those properties. The Petitioners contended that the Respondent had violated their right to fair administrative action under Article 47 of *the Constitution* and the Fair Administrative Actions Act as well as their right to a fair hearing pursuant to Article 50 of *the Constitution* by failing to give them written notice, reasons for the decision and not affording the Petitioners a chance to be heard before undertaking the actions complained of.
12. The Petitioners contended that the Respondent had violated Sections 25 and 26 of the *Land Registration Act* by purporting to forcefully take possession of the Suit Properties and demolish the buildings on the land which in effect purported to invalidate the Petitioners' titles without the power to do so under the law.
13. At the time of preparing this petition, the Petitioners averred that their buildings had been marked for demolition by the Respondent through its agents and they had been threatened that the buildings would be demolished any time which the Petitioners contended would cause them great loss and prejudice. The Petitioners contended that the Respondent had fenced off the Petitioners properties purporting to be within its land thereby blocking access to the Suit Properties and interfering with their occupation and use of the properties. They contended that the arbitrary acts of the Respondent were causing them great mental anguish and torture because they were staring at the risk and possibility of being deprived of their property which they acquired from hard earned savings.
14. The petition was supported by the affidavit of the 1st Petitioner who is the proprietor of Nanyuki Municipality Block 8/09 formerly (L.R. No. 2787/130). He averred that he was allotted this land in 1979 and was issued a certificate of title on 13/05/1980. When the certificate of title was issued to him, the land was surveyed and discernible and he took possession and developed it. He was categorical that his property did not encroach on the Respondent's land and relied on the Registry Index Map (RIM) and the survey plan.



15. He went further to state that the other Petitioners commissioned a licensed private surveyor to establish whether their properties fell within the Kenya Railways land and the surveyor was categorical in his report that their properties and developments were not within the Respondent's land which is parcel no. 1080. Further, he averred that some of the Petitioners' parcels of land were surveyed as far back as 1952 and others upon allocation by the Nanyuki Municipal Council. He reiterated the averment in the petition regarding the entry of the Respondent's agents onto their land following its plan to revive the Nairobi Nanyuki Railway.
16. He produced a copy of the letter which their advocates wrote to the Respondent on June, 2020 as well as the photographs showing the marking of the Suit Properties for demolition as well as the fencing by the Respondent's agents. He believed that the Respondent's acts constituted breaches of the constitutional rights as contended in the petition. The other Petitioners also swore affidavits in support of the petition and attached their documents of title as well as other documents in support of their claim.
17. The Respondent filed what it termed as a response to the petition in which it clarified that it is established under Section 3 of the *Kenya Railways Corporation Act* and charged with the exclusive mandate to construct or improve any railway, operate trains and carry on the business necessary for the purposes of the Corporation.
18. The Respondent argued that each Petitioner's title was acquired distinctively and therefore the legality of each title must be scrutinised separately. It denied that the Petitioners' allegations were supported by documents to prove ownership. The Respondent argued that the right to property under Article 40 of *the Constitution* was not absolute and was limited where the title was acquired fraudulently. It contended that payment of yearly rates was not conclusive proof of ownership of land.
19. The Respondent contended that the allotment and subsequent issuance of leases to the Petitioners was irregular and fraudulent due to the fact that the Petitioners misled various Ministry of Lands officials to issue those titles to them and yet they were allegedly allotted the Suit Properties by the Municipal Council of Nanyuki. It added that developing property which was illegally acquired only aggravated the problem.
20. The Respondent faulted the Petitioners for describing their properties as being within the vicinity of the railway land without giving measurements to show the distance between their Suit Properties and the railway reserve or the Respondent's compound. The Respondent denied the allegation that its employees or representatives entered the Petitioners' properties for marking or other activity. It denied engaging the services of NYS while arguing that its actions were aimed at and will have the effect of ensuring effective transfer of both human and cargo from Nairobi to Nanyuki through the revival and revamping of the railway transport system.
21. The Respondent averred that the Petitioners were the authors of their own misfortune and that if they suffered any injury, that was occasioned by their participation and involvement. The Respondent contended that equity demanded that whoever comes to it must do equity and come with clean hands. It maintained that the existing occupation of the Suit Properties was detrimental to the services provided by the railway line. Further, that the law allowed it in the circumstances of encroachment or grabbing of land demarcated for railway line to reclaim this through many methods including self-help. It added that the Petitioners had failed to demonstrate that they would suffer irreparable injury which cannot adequately be compensated by an award of damages if this court does not grant the orders they seek. It urged the court to dismiss the petition with costs.



22. Parties filed submissions which the court considered. The Petitioners pointed out that the 9th Petitioner withdrew her claim and that despite service, NLC, the interested party did not participate in these proceedings. The Petitioners submitted that the petition was supported by the affidavit sworn by each Petitioner exhibiting their ownership documents. They contended that they had demonstrated to sufficient legal standards that they hold genuine titles over the Suit Properties. They argued that their properties were marked for demolition without notice and relied on the Registry Index Map (RIM), survey plans and part development plans (pdp) showing the Respondent's land vis-à-vis their own parcels of land. They relied on the report prepared by the surveyor whom they commissioned to give the actual location of the Suit Properties on the ground.
23. The Petitioners submitted that the Respondent had failed to substantiate its claim through evidence that they acquired the Suit Properties fraudulently. They maintained that there had not been any inquiry, investigation or court findings which established that the ownership documents which they hold over the Suit Properties were fraudulently acquired. They pointed out that in its ruling of 17/12/2020 the court held that the Petitioners had demonstrated that they were the registered owners of the Suit Properties having been issued with titles and that prima facie their titles were indefeasible and the burden to demonstrate that the titles were subject to challenge fell on the Respondent.
24. The Petitioners maintained that the Respondent had owned up to the actions of marking for demolition and fencing off the Suit Properties even though it attempted to qualify this on the ground that it was aimed at ensuring effective transport of both human and cargo from Nairobi to Nanyuki through the revival and revamping of the railway transport system. The Petitioners maintained that their assertion that they have been in possession and had developed their respective parcels of land was not controverted by the Respondent.
25. The Petitioners argued that being the registered owners of the Suit Properties, they were entitled to enjoy the property rights envisaged in *the Constitution* and statutes. Additionally, that they were entitled to procedural fairness whenever any action that affects their rights is taken. They argued that under Article 40 of *the Constitution*, the right to acquire and own property is only limited where the property is found to have been unlawfully acquired yet no such findings has been made in this case. They urged that the Respondent disregarded their right to own property and their right to fair administrative action.
26. The Petitioners relied on the decision in *Evlyne College of Design Limited v Director of Children's Department and Another* [2013] eKLR where Justice Majanja observed that even where it is alleged that land had been illegally acquired, the State must use due process to recover it. They also relied on Sections 25 and 26 of the *Land Registration Act* on the protection the law afforded to them through the issuance of certificates of title and the indefeasibility of their titles over the Suit Properties.
27. The Petitioners relied on *Harjot Singh Dhanjay v Attorney General and Kenya Railways Corporation* [2020] eKLR where the court delved into the issue of due process and held that in as much as the land in question was found to have been illegally acquired, the actions of the Respondent to enter into the land and erect a fence around it with the intention of blocking access and interfering with the quiet enjoyment was a violation of the rights protected under Articles 40 and 60 of *the Constitution* and a violation of the Petitioners' right to fair administrative action.
28. The Petitioners also relied on the Supreme Court decision in *Attorney General v Zinj Limited* (Petition 1 of 2020) [2021] KESC 23 (KLR) in which the court held that the only way through which the government could lawfully deprive the Respondent of parts or all of its property was through compulsory acquisition in conformity with Article 40 (3) of *the Constitution* and the procedures stipulated in the repealed Land Acquisition Act which was applicable at the time.



29. The Petitioners submitted that by reason of the brute force and impunity through which the Respondent marked for demolition and proceeded to fence off their properties, they could not utilise their properties since June 2020 and had lost business. They sought general damages in the sum of Kshs. 3 million for each Petitioner making a total of Kshs. 21 million. To buttress their argument, they relied on the decision in *Attorney General v Zinj Limited* where an award of Kshs. 51, 129, 000/= was made to the Petitioner. Further, that an award of Kshs. 5 million was made in *David Moranga Oyugi v County Government of Kisii & 4 Others 2022 eKLR* for infringement of Articles 40, 47, 48 and 50 of *the Constitution* for forcibly entering and constructing on the Petitioner's plot. The Petitioners sought the costs of the suit.
30. The Respondent summarised the issues for determination as: whether the Petitioners are the legitimate proprietors of the Suit Properties; whether the Respondent's actions were justified; and whether the Petitioners were entitled to the prayers they seek in this suit. The Respondent maintained that the Petitioners had not sufficiently proved ownership of the Suit Properties within Nanyuki Town. It contended that the mere production of a certificate of lease was not proof that the Petitioners are the legal owners of the land. It urged that the court should scrutinise the legality of each of the Petitioners titles since they were acquired distinctively while contending that it was a puzzle as to how the Petitioners acquired the Suit Properties while they were not legally available for allocation.
31. The Respondent submitted that the certificates of lease which the Petitioners relied on were irregularly acquired and they cannot confer any right of ownership over the Suit Properties. It relied on Section 26 of the *Land Registration Act* and urged that courts had time and time again held that any title obtained illegally cannot be protected by the law. It cited the decision in *Henry Muthee Kathurima v Commissioner of Lands & Another* (2015) eKLR where the court held that a title acquired irregularly was defeasible. It also relied on the decision in *Daudi Kiptugen v Commissioner of Lands & 4 Others* (2015) eKLR where the court stated that it was not enough for one issued with a lease or certificate of lease to assert that he had a good title by the mere possession of a lease or certificate of lease. That where there was a contention that the lease was improperly acquired the holder had to demonstrate through evidence that the lease was properly acquired. The court observed that the acquisition of title could not be constricted only in the end result because the process of acquisition was also material. It also relied on *Teresia Wangari Mbugua v Jane Njeri Nduati & Another* (2020) eKLR where the Judge stated that when ownership of property is called into question, the owner must show the root of its ownership.
32. The Respondent contended that the Petitioners had not demonstrated that they followed due procedure in obtaining their titles. More specifically, that they had not provided the consent from the Kenya Railways Authority since the Suit Properties fall within the Corporation's reserve, receipts evidencing payment of stamp duty and for the leases, consents from the Commissioner of Lands and the National Environment Management Authority. The Respondent submitted that this court should not be used to regularise the illegal occupation of the Respondent's land by the Petitioners which they claim was within the vicinity of the Respondent's land.
33. The Respondent submitted that under the *Kenya Railways Corporation Act*, it had the power to construct or improve any railway, inland water way, port, ferry, road, bridge, building or any other necessary works required for the Corporation's purposes. That in carrying out its powers, the Respondent reserved the Suit Properties for the utilisation of its mandate of constructing and improving railways across the country. It contended that the Petitioners were in the wrong for they encroached or grabbed land that had been demarcated and reserved for railway lines and that that the Respondent was simply attempting to reclaim its property whose purpose would benefit millions of Kenyans. It was emphatic that the Suit Properties fall within the railway reserve and that it was therefore justified in its attempt to reclaim the Suit Properties.



34. The Respondent submitted that the Petitioners failed to prove that they were deserving of the prayers they seek in the petition. It maintained that the Petitioners were not the owners of the Suit Properties while pointing out that the right to the enjoyment of property under Article 40 was not absolute if the title was acquired illegally. It relied on *Githunguri Dairy Farmers Co-operative Society Limited v Attorney General & 2 others* (2016) eKLR where the court observed that Article 40 was not absolute and *the Constitution* provided a clawback if the deprivation of a right was through statutory provision, was for a public purpose, or was in the public interest.
35. The Respondent argued that the Petitioners had not raised any constitutional issues for determination by this court. It urged the court to weigh the public interest involved vis-à-vis the private interests of the Petitioners in this case. It urged that the Petitioners' occupation of the Suit Properties offended railways safety and was detrimental to the services provided by the railway line. It relied on the decision in *Susan Waitthera Kariuki and 4 Others v The Town Clerk, Nairobi City Council & 3 Others* (2013) eKLR where the court held that when there is a conflict between public interest and private interest, public interest must prevail.
36. The Respondent argued that the Petitioners had failed to satisfy the conditions to be met before an order of injunction can be issued. It maintained that the Petitioners had not shown that they followed due process in acquiring the parcels of land which they allege fall within the vicinity of the Respondent's land. It argued that mere occupation of the Suit Properties did not constitute a prima facie case against it and relied on the decision of *Lady Justice M. Odeny in Margaret Njambi Kamau v John Mwatha Kamau & Another* (2019) eKLR where the court stated that it was not a blanket principle that if a person was in occupation of land then the court should find that a prima facie case had been established. The Judge stated that the court cannot be used to deodorise illegal or unprocedural occupation of a person's land.
37. The Respondent submitted that the rights of millions of Kenyans who use the Nairobi- Nanyuki Railway should not be defeated by the illegal occupation of the Suit Properties by the Petitioners. It added that there was a higher risk of injustice which would befall users of the railway system if the selfish interests of the Petitioners are encouraged while urging the court to dismiss the petition and award it costs.
38. The issue for determination is whether the court should grant the orders sought by the Petitioners. The Petitioners who own the Suit Properties seek declarations that being the registered proprietors of the Suit Properties they are entitled to enjoy the rights enshrined in Article 40 of *the Constitution* which rights cannot be arbitrarily limited. They seek a declaration that their parcels of land being separate from the Respondent's land, the marking of their land for demolition and fencing by the Respondent amounted to illegal trespass constituting a breach of their constitutional rights for which they seek damages. In addition, they seek a permanent injunction to restrain the Respondent from interfering with their rights over the Suit Properties.
39. Article 23 of *the Constitution* as read with Articles 40, 42, 70 and 162 (2) (b) of *the Constitution* confers jurisdiction on the Environment and Land Court (ELC) to hear and determine suits for redress for denial, violation, infringement of or threat to a right to a clean and healthy environment, and the right to acquire and own land in any part of Kenya without being deprived of such land unless such deprivation is in the manner specified in *the Constitution*. However, not all claims brought before the ELC relating to the use and occupation of, and title to land raise constitutional questions. The Court of Appeal stated in *Eaton Towers Kenya v Kasingá & 5 Others* (Civil Appeal 49 of 2016) [2022] KECA 861 (KLR) that for a claim to fit a constitutional petition, even when other avenues are available, a party ought to demonstrate that the respondents who caused the injury were barring him from using the



- other avenues available for redress. The Petitioners did not demonstrate that the Respondent barred them from pursuing other avenues for redress.
40. The court directed parties to avail an amended Registry Index Map (RIM) showing the location of the railway land vis-à-vis the Suit Properties. One cannot tell from looking at the map whether or not the Suit Properties formed part of the railway land before it was allocated, surveyed and titles issued to individuals.
 41. Under the repealed Registered Land Act which is the statute under which the titles over the Suit Properties were issued, the numbering of parcel numbers in each registration section or block is consecutive pursuant to Section 18(4) of the Act. Looking at the parcel number given to the Respondent's being Nanyuki Municipality/ Block 8/1080 and the Petitioners' parcels which range from Nanyuki Municipality/ Block 8/609 to Nanyuki Municipality/ Block 8/699, it is apparent that the survey of the Respondent's land was undertaken after the survey of the Suit Properties yet the railway land must have been in existence before the Suit Properties were surveyed and allocated to the Petitioners.
 42. From the documents attached to the petition, it is evident that the Petitioners acquired their separate titles and distinct interests over the Suit Properties at different times through different processes. The Petitioners averred that the Suit Properties fall within the vicinity of the railway land. It is the process through which the Petitioners acquired their titles that the Respondent is challenging in its response to the petition. It is not practical for this court to undertake a mini trial within this petition and scrutinise the maps and survey plans produced by the parties to determine the legality of the Petitioners' titles over the Suit Properties vis-à-vis the Respondent's claim that the Suit Properties form part of railway land.
 43. The Petitioners ought to seek redress under an ordinary suit for a conclusive determination to be made on the ownership of the Suit Properties. A proper determination as to whether or not the Petitioners' parcels of land fall within the railway line or land reserved for the railway as the Respondent contends can only be made in an ordinary suit and not a constitutional claim. An inquiry into the propriety or otherwise of the process through which the Petitioners acquired the Suit Properties can only be done at a trial where the parties will tender evidence to establish whether or not due process was followed in the alienation of the Suit Properties and whether it really formed part of the railway land.
 44. As the Court of Appeal reiterated in the Eaton Towers Kenya case, where a matter can be disposed of without recourse to the Constitution, then it should be so resolved without it being made a constitutional petition. If every claim touching on ownership of land were to be presented as a constitutional petition, it would create an avalanche of petitions which would hamper the expeditious and efficient disposal of cases besides rendering the Civil Procedure Act and the Rules made under it otiose.
 45. The petition does not raise any constitutional question for determination by this court. The court declines to grant the orders sought in the petition dated 6/7/2020. Each party will bear its own costs.

DELIVERED VIRTUALLY AT NANYUKI THIS 22ND DAY OF SEPTEMBER 2022.

K. BOR

JUDGE

In the presence of: -

Mr. Thuku Mbaaro for the Petitioners

Ms. Esther Wambui for the Respondent



Ms. Stella Gakii- Court Assistant

