

**REPUBLIC OF KENYA**  
**IN THE ENVIROMENT AND LAND COURT AT BUNGOMA**  
**PETITION NO. 15 OF 2016**

**IN THE MATTER OF ARTICLES 22,23,40(1), (2), (3), 43(c),47 AND  
259 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF SECTIONS 107-115 OF THE LAND ACT NO.6  
OF 2012**

**AND**

**IN THE MATTER OF CONTRAVENTION OF THE CONSTITUTION  
OF KENYA 2010**

**BETWEEN**

**DAVID MURAMBI, AQUINAS WANYONYI AND ANTHONY  
WANYONYI (suing on behalf of the estate of the late VINCENT  
WANYONYI MURAMBI.....PETITIONERS**

**VERSUS**

**THE COUNTY GOVERNMENT OF BUNGOMA.....1<sup>ST</sup> RESPONDENTS  
KIBABII UNIVERSITY.....2<sup>ND</sup> RESPONDENTS**

**JUDGMENT**

**a) INTRODUCTION AND PLEADINGS**

1. By a petition filed herein on 30<sup>th</sup> December 2016, **DAVID MURAMBI, AQUINAS WANYONYI AND ANTHONY WANYONYI (the petitioners herein and suing on behalf of the estate of the late VINCENT WANYONYI MURAMBI)** sought for the following orders

against the respondents herein i.e **THE COUNTY GOVERNMENT OF BUNGOMA and KIBABII UNIVERSITY;**

- a) **A declaration that the respondents conduct jointly and severally was in breach of the constitutional rights of the petitioners and beneficiaries of the estate of the deceased.**
- b) **That a permanent injunction do issue restraining the respondents either by themselves, servants, agents, employees, assignees, students, proxies and/or representatives from trespassing, walking through, driving through, parking, interfering with crops, up-rooting crops or in any way whatsoever interfering with title number East Bukusu/ West Kanduyi/1659.**
- c) **That the respondents be condemned to pay general damages.**
- d) **That the respondents be condemned to pay special damages.**
- e) **That the respondents be condemned to pay exemplary damages.**
- f) **That the respondents be condemned to pay costs of this petition.**
- g) **That any other relief that this Honourable Court may deem just and fair to order.**

2. It was the petitioners claim that they are the legal representatives of the estate of the deceased and the registered proprietors of EAST BUKUSU/WEST KANDUYI/1659("the suit land") measuring approximately 5 acres or thereabouts and which abuts the 2<sup>nd</sup>

respondents land title number EAST BUKUSU/WEST KANDUYI/1660 which is situated off Bungoma-Chwele road within Bungoma County.

3. They averred that on 21<sup>st</sup> October 2015 at the instance of the 2<sup>nd</sup> respondent, the 1<sup>st</sup> respondent illegally opened a road measuring about 18 meters in width which runs through the suit land for about 65 metres thus destroying the petitioners' crops and have purported to compulsorily acquire the suit land. They further stated that the respondents in opening the said road during its annual graduation 2016 directed vehicular and human traffic onto the suit property further destroying the remaining crops and grazing land. It was their contention that the respondents' actions were in total disregard of the Constitutional and statutory provisions of the law and more specifically Article 28, 31, 40, 43(1)(c), 47 and 50(1) of the Constitution, 2010.

4. Upon being served with the said petition, the 1<sup>st</sup> respondent filed their replying affidavit sworn by one ROBERT JUMA SIMIYU, the Chief Officer in Charge of lands, Urban and Physical Planning docket in the County Government of Bungoma on 20<sup>th</sup> April, 2017. It was deposed that on 24<sup>th</sup> November, 2016 the 2<sup>nd</sup> respondent held its inaugural graduation ceremony which was graced by the then president Uhuru Kenyatta and in the course of preparing for the said ceremony, the 2<sup>nd</sup> respondent requested the 1<sup>st</sup> respondent to smoothen and widen the narrow marram road passing outside its gate. That the said road was about 9 metres in width and has always been in existence even before the filing of this petition. That prior to the said ceremony, the 2<sup>nd</sup> respondent had made arrangements with neighboring schools as well as other adjacent



institutions for provision of parking space and sufficient traffic officers were deployed to direct both human and vehicular traffic. The 1<sup>ST</sup> Respondent contents that if at all any members of the public parked their vehicle(s) on the suit property, they did so on their own volition and not at the instance and/or directions of the 1<sup>st</sup> respondents. They stated that the petitioner had not placed material before court of the alleged damage to crops and they prayed to have the petition dismissed with costs as it failed to prove that they are deserving of the remedies sought.

5. The 2<sup>nd</sup> Respondent also filed their replying affidavit sworn by one DAVID BUTALI NAMASAKA, the administrative Registrar on 28<sup>th</sup> March, 2017. The said David Butali Namasaka deposed that the 2<sup>nd</sup> respondent is the registered proprietor of E.BUKUSU/N.KANDUYI/2388 measuring 28.3 Ha and that on 24<sup>th</sup> November 2016, they held their inaugural graduation ceremony and requested the 1<sup>st</sup> respondent to smoothen and widen the road passing behind its gate. The said road was said to be an existing road and denied that the 2<sup>nd</sup> respondents had compulsorily acquired the suit land but added that should the need to do so arise in the future, the laid down legal procedures would be followed. The 2<sup>nd</sup> respondent refuted the allegation that the petitioners had grown crops on the suit land capable of being destroyed and stated that the petitioners seek to benefit from public resources without any basis and with the guise of Constitutional violation. It was further deposed that if the prayers in petition herein is allowed, it will encourage other private land owners to file frivolous claims against the 2<sup>nd</sup> respondent. They urged the court to dismiss the petition with costs.

6. Simultaneously with this petition, the petitioners filed a notice of Motion under certificate of urgency dated 20<sup>th</sup> December, 2016 in which they sought for various orders. After pre-trial directions were taken, this petition was fixed for hearing but the parties on numerous occasions requested for adjournment to explore an out of court settlement. Later on, 15<sup>th</sup> February 2022, a consent was endorsed by the Deputy Registrar wherein the parties agreed to appoint an independent ground surveyor to conduct a joint ground survey on the suit land on behalf of the parties herein and to have the survey report filed within forty-five (45) days of the date of consent. From the record, it appears that parties were unable to meet the terms of the said consent and the petitioners filed an application dated 14<sup>th</sup> July, 2022. Upon hearing the said application, the court dismissed the same with costs to the 2<sup>nd</sup> respondent. Thereafter, the suit was set down for hearing.

**b) PETITIONERS' FACTUAL EVIDENCE**

**PW1 DAVID NYONGESA MURAMBI** testified on his behalf and that of his co-administrators. His evidence was majorly as stated in the petition. He produced into evidence PExhibit 1-4 and marked photographs of the suit land. He testified that the county machinery which he identified with their green registration plates poured marram on their suit property and compounded the road destroying their crops. He testified that their fence and beacons were uprooted and destroyed and he sought for the road to be removed and for damages to be paid as compensation for damages to their crops.

7. When cross-examined, the witness stated that the map produced as P-Exhibit 4 read East Bukusu/ N. Kanduyi as the location and that land title number East Bukusu/ W. Kanduyi/1660 belongs to Kibabii University although he did not produce a certificate of search in support. It was further his evidence that despite stating that the 1<sup>st</sup> defendant deployed excavators, lorries and earth movers to the suit land where they created a road, he did not personally see the machinery since he admitted he was away and that he was informed of the activities by his cousin. The witness testified that he did not have with him evidence to support the assertion that vehicular and human traffic was directed into the suit land and that as a result damage was caused to his crops. It was his further testimony that the alleged damage was not reported to the police or the agricultural officer to assess the damage caused, if any.

8. **RWI PROFESSOR ISAAC IBARA ODEYO** identified himself as the vice chancellor, Kibabii University and the chief executive officer as well as a lecturer. He relied on the replying affidavit sworn on 23<sup>rd</sup> March, 2023. He also produced into evidence the university charter, a copy of title for E.Bukusu/N.Kanduyi/2388, an extract of a map of the area certified by the County Surveyor Bungoma on 27<sup>th</sup> March, 2017 and a letter requesting for parking from various institutions as DExhibit 1-4.

9. During cross examination, the witness stated that they were not the owners of East Bukusu/ W. Kanduyi/1660 and that the main gate of the university was on the southern part on Kibabii-Butuli road while the other gate is situated on the northern side bordering St. Mary's Kibabii High School. He testified that the university had requested for the



smoothing and not widening of the existing road which is a ring road adjacent to land parcel no. E. Bukusu/W.Kanduyi/1659. The witness further testified that all vehicular and human traffic was properly directed to the designated parking areas by the traffic police who were deployed on the material day.

10. **RW2 ROBERT JUMA SIMIYU** also identified himself as the chief officer Agriculture in the County Government of Bungoma who previously worked as the Chief Officer lands and Physical Planning with the same county government. He relied on his replying affidavit sworn on 20<sup>th</sup> April, 2017. He also produced a map of the area surrounding Kibabii University as DExhibit 5. He reiterated that the 2<sup>nd</sup> respondent through its chancellor requested to have the existing 9 metre ring road left as a buffer zone between the university and its neighboring plots smoothed and the county deployed resources and had the assignment done. The witness testified that the road was not to be used for parking as there were designated parking areas.

c) **PARTIES SUBMISSIONS.**

11. The 2<sup>nd</sup> respondent filed its submissions dated 9<sup>th</sup> February, 2024 and submitted on four issues. It was submitted that the petitioners had not established their case and that they are not deserving of the reliefs sought since they did not have a genuine and true claim. It was argued that the provisions of Section 108 and 109 of the Evidence Act Cap 80 Laws of Kenya had not been met since material evidence had not been placed before the court to enter judgment in favour of the petitioners. The 2<sup>nd</sup> respondent cited the case of *Stephen Wasike Wakhu & Another*

vs. Security Express Limited (2006)eKLR. It was further argued that the allegations of trespass and damage to crops by the petitioner had not been substantiated since they were fully aware of the existence of the 9 metre road that was being used by the public and that all the respondents did was improve its state.

12. The 2<sup>nd</sup> respondent argued that the issues raised in the petition did not meet the threshold of questions of Constitutional petition and relied on the cases of Kiambu County Tenants Welfare Association vs. Attorney General & Another (2017) eKLR High Court Constitutional Petition 392 of 2013 , CNM vs. WMG (2018) eKLR Constitutional Petition 586 of 2017 and Gabriel Mutava & 2 Others vs. Managing Director Kenya Ports Authority & Another [22].

13. It was further submitted that the 2<sup>nd</sup> respondents did not arbitrarily deprive the petitioners of their land and there was no intention on their part to acquire their land compulsorily thus, they did not contravene the provisions of Article 40 of the Constitution, 2010 as alleged by the petitioners. Reliance was placed in the case of Hellen Wachuka Njoroge vs. Attorney General & Another [2016]eKLR, High Court Petition no. 157 of 2016. It was also their submission that the tort of trespass had not been proved since the road was an existing road and the element of unjustifiably intruding into the petitioners' land. Reliance was place in the case of Zacharia Onsongo Momanyi vs. Evans Omurwa Ongochwa (2014)eKLR.



14. The 2<sup>nd</sup> respondent submitted that the petitioner had not met the 3 key requirements for granting of orders of a permanent injunction against the respondents in their evidence as required in the *locus classicus* case of **Giella Vs. Cassman Brown & Co Ltd(1979) EA 958**. It was submitted that the petitioners were guilty of material non-disclosure and as such, they were not entitled to the remedies sought. They argued that the petitioners had not placed any material before court warranting the granting of the orders sought. In conclusion, they sought to have the petitioners claim dismissed with costs.

**d) ANALYSIS AND DETERMINATION**

15. I have carefully considered the petition, the replying affidavits in opposition thereto, evidence by the parties and submissions as filed and note that the issues that commend for determination are;

- i)whether the petition as drawn has met the requirements for drawing of a constitutional petition,**
- ii)whether the petitioners are entitled to the orders as sought and**
- iii)who bears the costs.**

16. Perusal of the petition herein reveals, that it is founded under Articles 28,31,40,43(1)(c),47 and 50(1) of the Constitution of Kenya 2010. This is shown on the face of the petition. In Constitutional petitions, it is incumbent upon the petitioner to state in what manner and by whom; the alleged provisions are infringed, violated or threatened. It is not sufficient to just state the said Articles have been infringed, violated or threatened and fail to demonstrate how the Respondents have infringed,

violated or threatened those provisions of the constitution. The manner of instituting constitutional petitions are set out under Article 22(1) of the Constitution and Rule 4 of the Constitution of Kenya (*Protection of Rights and Fundamental Freedoms*) Practice and Procedure Rules 2013. The aforesaid provisions of the law makes it mandatory that a constitutional petition should raise issues regarding breach of a right contained in the bill of rights, breach of fundamental freedoms as well as breach of any provisions of the constitution.

17. In this Petition, the petitioners contend that their constitutional right to hold property was deprived arbitrarily by the respondents who sought to acquire their land compulsorily without ensuring compliance of the Constitutional and statutory provisions. At the center of the dispute is the protection of private property i.e. **title number E.Bukusu/W. Kanduyi/1659** as enshrined in Article 40 of the Constitution, 2010.

18. The petitioners contend that at all material times, they were the legal representatives of the estate of Vincent Wanyonyi Murambi-deceased who is the registered owner of the suit land. They allege that the 2<sup>nd</sup> respondents are the registered owners of land **title number E.Bukusu/W. Kanduyi/1660** which abuts the suit land along Bungoma-Chwele Road. They alleged that the 1<sup>st</sup> respondent, at the instance of the 2<sup>nd</sup> respondent deployed bulldozers, lorries and other earthmovers on the suit land and opened a road that is not recognized therein. These actions are said to have opened up the petitioner's property to the public thereby causing damage to their crops and grazing fields. As a

result, the petitioners are seeking for a declaration that the actions of the respondents breached their Constitutional rights, a permanent injunction against the respondents and damages for the loss suffered.

19. The respondents in denying the assertions made by the petitioner averred that the road complained of was an existing road created on a buffer zone on the 2<sup>nd</sup> respondents land i.e. **title number E. Bukusu/N.Kanduyi/2388** and that all the 1<sup>st</sup> respondents did which is within their mandate was smoothen the road. The allegations that human and vehicular traffic was directed into the Petitioner's land was denied with the 2<sup>nd</sup> respondents producing letters written to various neighboring institutions to provide parking areas for its guests. Further, the 2<sup>nd</sup> respondents denied that they were the owners of **title number E.Bukusu/W. Kanduyi/1660** as alleged by the petitioners.

20. The 2<sup>nd</sup> respondent contends that the petitioners guised a criminal law claim as a constitutional petition in contravention of their rights to fair trial as guaranteed under Article 25 of the Constitution as their claim was not genuine and true for determination as a constitutional dispute. In the case of *Anarita Karimi Njeru v Republic [1979] Eklr*, it was held; ***“that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”***



21. On examination of the petition and facts as pleaded, the subject matter in dispute in my view is complaint of trespass which falls under a claim of tort and could have been resolved by way of a civil claim. Courts have noted with concern the increase in filing of constitutional petitions and held time and again that not each and every violation of the Law must be raised as a constitutional question. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first. In my view there are statutory laws that are in place that govern the enforcement of rights to use of private land.

22. In the case of Patrick Mbau Karanja -vs- Kenyatta University (2012) eKLR Lenaola, J expressed himself as follows in regard to when the Constitutional interpretative mandate of the Court may be invoked:-

***“I should only say this as I conclude; in Francis Waithaka -vs- Kenyatta University Petition No. 633 of 2011, this Court was categorical that it is imperative that the Bill of Rights and the Constitutional interpretative mandate of this Court should not be invoked where other remedies lie. Further, the Court also cited with approval, the decision in Teitinnang -vs- Ariong (1987) LRC (const.) 517 where it was held as follows:-***

***“Dealing now with the questions, can a private individual maintain an action for declaration against another private individual or individuals for breach of fundamental rights provisions of the***

*Laws? The rights and duties of individuals, and between individual, are regulated by private laws. The Constitution, on the other hand, is an instrument of government. It contains rules about the government of the Country. It is my view, therefore that duties imposed by the Constitution under the fundamental rights provisions are owed by the government of the day, to the governed. I am of the opinion that an individual or group of individuals, as in this case, cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or group of individuals. Since no duty can be owed by an individual or group of individuals to another individual under the fundamental rights provisions of the Constitution no action for a declaration that there has been a breach of duty under that provision can lie or be maintained in the case before. me, and I so hold”.*

23. Lenaola, J went on to observe as follows after citing the above case:-

*“I maintain this position and it is important that simple matters between individuals which are of a purely Civil or Criminal nature should follow the route of Article 165 (3) (a) and be determined as such. To invoke the Bill of Rights in matters where the state is not a party would certainly dilute the sanctity of the Bill of Rights”*

24. Turning to the pleadings and evidence as presented, the petitioners in their claim asserted in paragraph 6 that “... *the suit land abuts the 2<sup>nd</sup> respondent’s land title number E. Bukusu/W. Kanduyi/1660.*” This

evidence was controverted by the respondents where RW1 testified that the 2<sup>nd</sup> respondents land is title number E.Bukusu/W.Kanduyi/2388 and produced a title deed to that effect as ***DExhibit 2***. In their evidence however, the petitioners did not support their claim by providing proof that indeed the said land was owned by the 2<sup>nd</sup> respondent. The basis of the petitioners' claim lies in the assertions delineated in this paragraph. It is on the account of this single fact that they claim the respondents encroached upon their private land and violated their Constitutional right to property.

25. PW1 in his evidence simply stated that the land bordering the suit property belongs to St. Mary's Kibabii High School on one side and Kibabii University on the other side. It was further his evidence that the land for St. Mary's Kibabii High School was L.R. No. E.Bukusu/W.Kanduyi/2388 while that of the 2<sup>nd</sup> respondent was L.R. No. E.Bukusu/W.Kanduyi/1660. As the initiator of this petition, the petitioner bears the responsibility of providing evidence, as stipulated under Sections 107, 108 and 109 of the Evidence Act, which must be fulfilled. In this instance, the burden of proof did not shift to the respondents.

26. Further, evidence must always flow from the pleadings. In the Ugandan case of; **LIBYAN ARAB UGANDA BANK FOR FOREIGN TRADE AND DEVELOPMENT & ANOR Vs. ADAM VASSILIADIS** [1986] UG CA 6, the Uganda Court of Appeal (judgment of Odoki J.A) cited with approval the dictum of Lord Denning in **JONES Vs. NATIONAL COAL BOARD** [1957]2 QB 55 that;



**“In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries.**

27. Further, in the case of *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR* which referred to the decision of the Malawi Supreme Court of Appeal in *MALAWI RAILWAYS LTD Vs. NYASULU [1998] MWSC 3*, in which the learned judges cited with approval from an article by Sir Jack Jacob entitled “The Present Importance of Pleadings.” The same was published in [1960] *Current Legal problems*, at P174 whereof the author stated;

***“The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....***

***In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."***

28. Again, in establishing their case to the required standard, the petitioners were expected to prove on a balance of probabilities that it is indeed the respondents who entered their land and caused damages. PW1 in his testimony testified that on the date the lorries, earthmovers and heavy machinery engaged in the alleged illegal activities, he was not around and that his relative informed him of the occurrences of that day. The said relative being an eye witness was not called to testify to the truthfulness of the allegation that the 1<sup>st</sup> respondent was responsible for the works conducted on the suit land as alleged. It should be noted that the rules of the law of evidence are peremptory and mandatory in that hearsay evidence is inadmissible. Further, it was alleged that the heavy machinery that created the road had green registration Number plates which connotes that they belonged to Bungoma county government. The petitioners failed to provide the registration numbers of these earthmovers, and no motor vehicle certificate of search was presented to substantiate the allegations that they were indeed owned by the 1<sup>st</sup> respondent. In my considered view, the petitioner's case is built on a mere speculation since no material has been placed before this court to prove the set of facts as pleaded.

29. The petitioners further sought for General damages, special damages and exemplary damages. However, they did prove that they suffered any of the damages. The allegations that their crops were destroyed was not supported by a report from an agricultural officer that indeed crops were damaged and the extent of the damage, if any. As for the special damages, it is trite law that such relief ought to be strictly pleaded and proved. Again, this was not done and therefore no basis was laid for this prayer.

30. As regards the prayer for exemplary damages, the petitioners having failed to prove their claim for general and special damages cannot succeed for exemplary damages which are awarded on specific instances. In the case of Mikidadi vs. Khaigan & Another [2004] eKLR, the court listed the circumstances under which exemplary damages can be awarded as follows:

***“Exemplary damages are only to be awarded in limited instances namely. (a) Oppressive arbitrary or unconstitutional action by servants of government. (b) Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff, or (c) Cases in which the payment of exemplary damages is authorized by statute.***

31. Having held that the petitioners did not prove their claim to the required standards I find that they are not deserving an order of permanent injunction.



32. On the issue of costs, it is trite law that costs is a discretionary power of the Court. While generally in civil proceedings the principle on costs is that *costs follow the event* (see section 27 of the Civil Procedure Act), in constitutional litigation, however, the Rules make special provision for the guidance of the Court. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure, 2013 provides guidance at Rule 26 as follows:

26. (1) *The award of costs is at the discretion of the Court.*

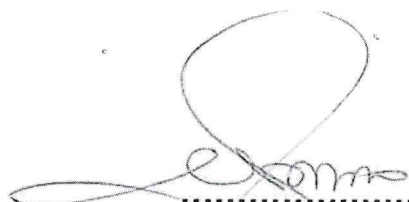
(2) *In exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms*

33. It should however be noted that in the current petition, the questions raised did not meet the criteria for public interest litigation which would otherwise override the general principle that costs follow the event.

34. In the end, I find court that the petitioners petition dated 30<sup>th</sup> December, 2016 lacks merit and the same is hereby dismissed with costs to the respondents.

35. Orders accordingly.

**DATED and SIGNED and DELIVERD at BUNGOMA** this 14<sup>th</sup> day of March, 2024.



.....  
**HON.E.C CHERONO**  
**ELC JUDGE**

In the presence of;

1. M/S Nekoye H/B Omuya for petitioners
2. Mr. Wangila for the Respondents
3. Bett C/A

