



THE COMMISSION ON ADMINISTRATIVE JUSTICE
“Office of the Ombudsman”
‘Hata Mnyonge ana Haki’

THE BRIDGE OF AGONY



INVESTIGATIONS REPORT BY THE OMBUDSMAN-KENYA

ON

**ALLEGATION OF ENCROACHMENT ON MARGERY MARIGU'S PARCEL
OF LAND IN EMBU COUNTY**

OCTOBER 2014

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Foreword

The Commission on Administrative Justice (CAJ) undertook investigations into alleged encroachment on a parcel of land belonging to Mrs. Margery Marigu, a resident of Embu County. Mrs. Margery Marigu complained that her crops and trees were destroyed by contractor during the construction of a public access road and bridge.

The investigations were undertaken based on a complaint lodged at the Commission by Mrs. Margery Marigu, a resident of Embu County.

The Commission wrote to the Embu County Governor, Honourable Martin Wambora, requesting him to investigate the complaints received by the Commission against the County Government of Embu.

This report is informed by the examination of documents recovered and interviews held with the complainant, Mrs. Margery Marigu, Embu County Land Registrar, Embu County Land Surveyor and the area chief.

The Commission has made recommendations to the Embu County Government to assess the losses incurred by the complainant and compensate her accordingly.

The Commission is confident that the findings of this investigation will help in doing justice to the complainant and act as a caution to County Governments and other public institutions to protect private property while seeking to provide public service.

Signed this.....day of October, 2014

Cmmr. Otiende Amollo, E.B.S
Chairperson of the Commission on Administrative Justice
(Office of the Ombudsman)

Preamble

The Commission on Administrative Justice (Office of The Ombudsman) is a Constitutional Commission established under Article 59 (4) and Chapter Fifteen of the Constitution, and the Commission on Administrative Justice Act, 2011.

The Commission on Administrative Justice (CAJ) has a mandate, *inter-alia*, to investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct.

In addition to the CAJ's investigative powers under Article 252 (1) (a), Sections 26, 27, 28 and 29 of the CAJ Act gives the Commission powers to conduct investigations on its own initiative or on a complaint made by a member of the public, issue Summons and require that statements be given under oath, adjudicate on matters relating to Administrative Justice, obtain relevant information from any person or Governmental authorities and to compel production of such information.

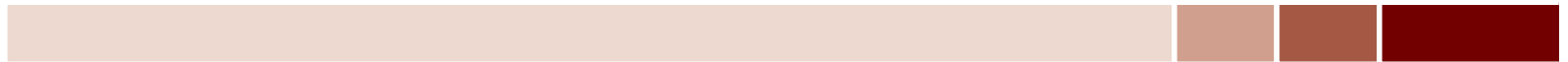
Under Section 31 of its Act, CAJ has power not limited by other provisions to investigate an administrative action despite a provision in any written law to the effect that the action taken is final or cannot be appealed, challenged, reviewed, questioned or called in question.

After undertaking its investigations, the Commission is required under Section 42 of its constitutive Act, to prepare a report to the State organ, public office or organization to which the investigation relates. The report shall include the findings of the investigation, action the Commission considers to be taken and reasons whereof and recommendations the Commission deems appropriate.

CAJ may upon an inquiry into a complaint, undertake such other action as it may deem fit against a concerned person or persons where the inquiry discloses a criminal offence as provided for under Section 41 of the CAJ Act.

Section 8 (g) of the CAJ Act gives the Commission power to recommend compensation or other appropriate remedies against persons or bodies to which the Act applies.

Section 42 (4) states; If there is failure or refusal to implement the recommendations of the Commission within the specified time, the Commission may prepare and submit to the National Assembly a report detailing the failure or refusal to implement its recommendations and the National Assembly shall take the appropriate action.



Section 52 (b) and (d) of the CAJ Act 2011, provides that a person who knowingly submits false or misleading information to a member of staff of the Commission commits an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings or imprisonment for a term not exceeding two years or both.

Further, Article 59(2) (j) of the Constitution of Kenya, 2010 empowers the Commission to report on complaints investigated under paragraph (h) and (i) and take remedial actions.

The report addresses the following:

- Introduction to the investigations
- Investigations strategy
- Normative framework
- Analysis and findings
- Consequential observation
- Conclusion
- Recommendations

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Acronyms

EIA	Environmental Impact Assessment
IFAD	International Fund for Agricultural Development
KERRA	Kenya Rural Roads Authority
MOA	Ministry of Agriculture
NEMA	National Environment Management Authority
RIM	Register Index Map
SHOMAP	Smallholder Horticultural Marketing Programme

Executive Summary

The Commission received a complaint from Mrs. Margery Marigu, a resident of Kithimu Location, Nembure Division, Embu West District, Embu County. The complainant alleged that the County Government of Embu had encroached on her parcel of land **Gaturi/Nembure/4348 and 4349** and constructed a bridge and public road on it without her consent. In the process, her crops and trees were destroyed. She also lamented that she complained to various public offices and did not get assistance.

Upon receipt of the Complaint CAJ wrote a letter dated 17th December 2013 to the Governor Embu County, Hon. Martin Wambora, to inform him of the complaint and seeking his intervention and response on the matter.

The Embu Government did not respond to CAJ's letter and a subsequent reminder prompting the Commission to inquire into the allegation of encroachment on Margery Marigu's parcels of land, **Gaturi/Nembure/4348 and 4349** by the County Government of Embu, the status of construction of the public access road and the bridge, the extent of destruction and damage, as well as the loss occasioned by the construction.

Summary of findings, conclusions and recommendations

Findings

Investigations revealed that there was a road diversion into and across parcels number **Gaturi/Nembure/4348 and 4349** registered in the name of Mr. John Mwaniki Mvungu, the complainant's husband. The diversion which is a re-routing of the public access road was created to bypass a big rock lying across the original road as captured in the Register Index Map (RIM), sheet number 61 for Central Province, Kenya.

The public access road was supposed to pass between parcels number 2342 and 4348 but the rock made it impassable and an illegal diversion through parcels number **Gaturi/Nembure/4348 and 4349** was created.

It was thus confirmed that there was a road diversion into the complainant's parcel of land and that the County Government of Embu had actually constructed a bridge on the road traversing Ms. Margery Marigu's family land.

During the construction of the bridge, the Contractor M/s Kamuhuri General Merchants Ltd. destroyed trees and crops to pave way for the road construction work. M/s. Epiconsults Ltd valued the trees and crops planted in 1980s by the

complainant, Mrs. Margery Marigu at Kenya shillings one million four hundred and eleven thousand nine hundred and seventy (KSh 1,411,970).

It is worth noting that the Embu County Registrar called for a meeting at the disputed site to deliberate on the exact position of the public access road which took place in the absence of the complainant.

According to letter Ref. No. AL/209/E501/21/249 dated 7th February, 2014 from the Embu District Surveyor to the Director of Survey Kenya, the public access road had been diverted to pass through parcel No. Gaturi/Nembure/4348 from the original mapped location in the Registry Index Map.

Minutes of the deliberation of a meeting called by the District Registrar of Lands, reveal that the road had been diverted to pass through parcel No. Gaturi/Nembure/4348 to avoid a rock outcrop. The community and the County Administrators felt that with modern technology, the rock outcrop could be levelled.

The Embu County Registrar in consultation with other officers and community members realigned the public access road to its original position as per the Register Index map (RIM). The District Surveyor and Land Registrar marked the location of the road according to the RIM. The road was redirected to its original route after the rock was broken down.

Mrs. Margery Marigu enlisted the services of a private surveyor to establish whether the construction of the new bridge and public access road had removed the encroachment on her parcels of land. The private surveyor confirmed that a section of the newly constructed bridge was on her parcel of land.

The Governor Embu County did not respond to CAJ's letter of inquiry as well as a subsequent reminder.

Consequential Observation

It was observed that the Environmental Impact Assessment (EIA) report done in November, 2013, a month after the commencement of Mvangua-Rwang' Ondu Bridge/Road works revealed that the contractor had contravened Section 58(1), (2) and (3) of the Environmental Management and Co-ordination Act, No 8 of 1999.

Conclusions

- There was an illegal public access road diversion through parcels of land number **GATURI/NEMBURE/4348 and 4349** registered under Mr. John Mwaniki Mvungu, the complainant's husband. The public had used the road diversion since the 1980s.
- The public access road passing through Mrs. Margery Marigu's parcel of land had been there for over thirty years hence rendering the portion agriculturally unproductive.
- The Land Registrar and the District Surveyor, in the presence of other public officers and members of the community, realigned the disputed public access road to the original location as captured in the Registry Index Map
- The County Public Works Officer failed to make a request for an environmental impact assessment to be undertaken prior to the commencement of the construction of the realigned public access road as provided for under Section 58 (1), (2) and (3) of the Environmental Management and Coordination Act No. 8 of 1999.
- The contractor destroyed trees and crops belonging to Mrs. Margery Marigu which was given a value of Kenya Shillings one million four hundred and eleven thousand nine hundred and seventy (KSh. 1,411, 970) by a private valuer.
- The contractor also stored a lot of waste materials on the complainant's land during the construction process affecting its use.
- The road has since been realigned to pass through its official position as per RIM. The residents had no objection to the realignment of the public access road to its original position.
- The allegation by Mrs. Margery Marigu that the Embu County Government had encroached on her parcel of land was found to hold.
- The Governor Embu County is unresponsive not only to the complaint by Mrs. Margery Marigu but also to CAJ's inquiry letters.

Recommendations

- i. The County Government of Embu jointly with the National Government (Ministry of Transport and Infrastructure and Ministry of Lands, Housing and Urban Development) should assess the loss of use of the land by Mrs. Margery Marigu for thirty years and compensate her.
- ii. The County Government of Embu jointly with the National Government (Ministry of Transport and Infrastructure and Ministry of Lands, Housing and Urban Development) should also compensate Mrs. Margery Marigu for the trees and crops that were destroyed by the contractor during the construction of the public access road and bridge.
- iii. The County Government of Embu should also value the portion of Mrs. Margery Marigu's parcel of land still occupied by the constructed bridge and compensate her accordingly.
- iv. The County Government of Embu to compensate Mrs. Margery Marigu for using her land to store constructions materials and causing her to lose use of her land.
- v. The National Environmental Management Authority (NEMA) to take action against the Embu County Public Works Officer for failing to submit a report and the statutory fee to NEMA for environmental impact assessment as required by law.
- vi. CAJ takes great exception to the unresponsiveness of the Governor, Embu County and will monitor the trend of complaints against the Governor and may consider declaring him unfit to hold public office.

Introduction to the investigation

The Commission on Administrative Justice (Office of The Ombudsman) is a Constitutional Commission established under Article 59 (4) and Chapter Fifteen of the Constitution, and the Commission on Administrative Justice Act, 2011.

The CAJ has a mandate *inter-alia*, to investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. Further, the Commission has a quasi-judicial mandate to deal with maladministration through conciliation, mediation and negotiation where appropriate.

In the conduct of its functions the Commission has powers to conduct investigations on its own initiative or on a complaint made by a member of the public, issue summons and require that statements be given under oath, adjudicate on matters relating to Administrative Justice, obtain relevant information from any person or Government authorities and to compel production of such information.

The Commission is also mandated to inquire into systemic issues within Government bodies, and make recommendations and advisories aimed at improving public service and the administration of justice.

In this regard, the Commission received a complaint from Mrs. Margery Marigu, a resident of Embu County. In her complaint, she indicated that the County Government of Embu got sponsorship in year 2013, from Smallholder Horticultural Marketing Programme (SHOMAP) and International Fund for Agricultural Development (IFAD) through the Ministry of Agriculture.

The objectives of the project were to construct a bridge and improve a public access road that connects two sub-locations, Rwang'ondu and Mvangua in Embu. The improvements required breaking a rock which had rendered the public access road impassable. The bridge and road construction project was launched on 5th August 2013 by Honorable Martin Wambora Nyaga, Governor, Embu County.

In her complaint to the Commission, Mrs. Margery Marigu stated that the County Government of Embu constructed the public access road connecting Rwang'ondu and Mvangua and the bridge through her parcels of land number **GATURI/NEMBURE/4348 and 4349** without her consent (**see Annexure A1**).

Mrs. Marigu also alleged that the contractor destroyed her crops and trees during the construction of the said road. She further stated that she planted the trees in the 1980s.

The complainant was dissatisfied with the positioning of the new bridge hence her decision to lodge a complaint with the Governor and Deputy Governor Embu County, County Commissioner, National Land Commission, Embu Land Offices, NEMA, Ministry of Agriculture and Kenya Rural Roads Authority (KERRA). Mrs. Margery Marigu indicated that her decision to lodge a complaint at the Commission on Administrative Justice was informed by several visits to the aforementioned offices without getting assistance.

Issues under investigation

The following are the issues under investigations:-

- Allegation of encroachment on Mrs. Margery Marigu's parcels of land number **GATURI/NEMBURE/4348 and 4349** by the County Government of Embu
- Extent of destruction and the value of the loss that has been occasioned by the diversion of the public access road and the subsequent construction of the road and bridge, to the complainant
- Stage of construction and the position of the bridge and road in relation to the alleged encroachment.

Investigation Process

The Commission wrote an initial letter of inquiry dated 17th December 2013 REF: CAJ/M.LAN/022/804/13-AOL to the Governor, County Government of Embu requesting him to investigate the complaint received by the Commission against the County Government (**see Annexure A2**). A further reminder was written to the Governor on 27th February, 2014 (**see Annexure A3**). In both instances no response was received and the Commission decided to undertake investigations into the issues raised in the complaint.

The Commission's investigator visited the site, Mvangua-Rwang'ondu Bridge/Road works, on 21st May, 2014 to look into the matter on the ground.

Offices Visited

The following offices were visited and interviews were conducted:

- Embu District Registrar
- Embu District Surveyor
- Area Chief

Documents Recovered

- Register Index Map
- Photographs
- Chief's letter to the Land Registrar Embu
- Boundary dispute Summons
- Private Surveyor's Report
- Boundary Dispute Resolution Report by the Embu District Land Registrar
- Statement by Embu District Land Registrar
- Statement by Embu District Surveyor
- Letter by the Embu District Surveyor
- Environmental Impact Assessment Report
- Private Valuer's Valuation Report

Legal Framework

Following are excerpts of the relevant provisions:

1. CAJ Act,2011:

Section 8: The function of the Commission shall be to –

(a) investigate any conduct in state affairs, or any act or omission in public administration by any state organ, state or public officer in National and County Government that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice;

(b) investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector;

(d) inquire into the allegations of maladministration, delay administrative injustice, discourtesy, incompetence, misbehavior, inefficiency or ineptitude within the public service;

(g) recommend compensation or other appropriate remedies against persons or bodies to which the Act applies;

Section 28 (2): *For the purpose of investigating any matter pertaining to an inquiry, a public officer or agency whose services are employed under subsection (1) may, subject to the direction and control of the Commission-*

(a) Summon and enforce the attendance of any person for examination;

(b) Require the discovery and production of any documents; and

(c) Subject to the Constitution and any written law requisition and any public records or copy thereof from any public officer.

2. Trespass Act, Chapter 294

Section 4. Passing through or tampering with fences

Any person who, without reasonable excuse, whereof the burden of proof shall lie on him, passes through, over or under, or tampers with, a fence shall be guilty of an offence.

Section 8. Trespass in stock enclosure

Any person who without reasonable excuse, whereof the burden of proof shall lie upon him, passes through, over or under, or tampers with, any fence enclosing a stock enclosure or enclosure in or upon which agricultural produce is habitually stored or grown shall be guilty of an offence and liable to imprisonment for a term not exceeding six months or to a fine not exceeding two thousand shillings, or to both such imprisonment and fine.

3. The Environmental Management and Co-Ordination Act, No 8 of 1999

Part vi – Environmental Impact Assessment

Section 58.(1) Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.

(2) The proponent of a project shall undertake or cause to be undertaken at his own expense an environmental impact assessment study and prepare a report thereof where the Authority, being satisfied, after studying the project report submitted under subsection (1), that the intended project may or is likely to have or will have a significant impact on the environment, so directs.

(3) The environmental impact assessment study report prepare under this subsection shall be submitted to the Authority in the prescribed form, giving the prescribed information and shall be accompanied by the prescribed fee.

Analysis and Findings

In-depth examination of the Register Index Map (RIM), sheet number 61, reveals that the public access road under question was supposed to pass between parcel numbers **Gaturi/Nembure/4348 and 2342** (See annexure marked A4).

Investigations confirmed that the public access road had been diverted to pass through parcels of land numbers **GATURI/NEMBURE/4348 and 4349** belonging to Mr. John Mwaniki Mvungu, husband of the complainant. (See annexure A5 and A6)

The original public access road as indicated in the Registry Index Map was rendered impassable by a big rock lying across the strip of land reserved for the construction of the public access road. According to the complainant, the public access road diversion had been there for over thirty years. (See photograph below)



The complainant had lodged complaints in several public offices regarding this illegal road diversion but no action had been taken (See annexure marked A7).

CAJ established that the area chief wrote a letter dated 12th August 2013 to Embu County Land Registrar informing him of the disputes in relations to parcel numbers **GATURI/NEMBURE/4348 and 4349** registered under Mr. John Mwaniki Mvungu, complainant's husband. (See annexure marked A8).

In responding to chief's concern, the Embu County Land Registrar vide a letter dated 23rd August 2013 **(See annexure marked A9)**, summoned the persons affected by the proposed construction project in question (Mr. John Mwaniki Mvungu, Mr. Misheck David Njiru and Mr. Genesio Njiru) for a deliberation meeting at the disputed boundary. The objective of the meeting was to realign the road to its original position as per RIM so that construction process may commence immediately.

According to the minutes dated 29th August 2013 obtained from the Embu County Land Registrar, the meeting took place as scheduled. The meeting was chaired by County Land Registrar and attended by County Surveyor, Area Chief, Several Officials and members of the community. Neither Mrs. Magery Marigu nor any of her family members was present in the meeting. The minutes also indicate that those who attended the meeting resolved to realign the road to its original position as per the Register Index Map (RIM). **(See annexure marked A10).**

Minutes of the deliberation of a meeting called by the District Registrar of Lands, reveal that the road had been diverted to pass through parcel No. Gaturi/Nembure/4348 to avoid a rock outcrop. The community and the County Administrators felt that with modern technology, the rock outcrop could be levelled.

According to letter Ref. No. AL/209/E501/21/249 dated 7th February, 2014 from the Embu District Surveyor to the Director of Survey Kenya, the public access road had been diverted from its original location in the Registry Index Map to pass through parcel No. Gaturi/Nembure/4348. **(See annexure marked A11).**

CAJ confirmed that Mrs. Marigu had planted trees and crops on the part of the land where the official public access road was meant to pass but had been abandoned after the diversion into her land. The trees and crops were destroyed by contractor during the construction of the re-aligned public access road. **(See photographs below).**



The investigator established that the contractor used Mrs. Margery Marigu's parcel of land while transporting materials to the site during the construction

process. The contractor also dumped a lot of debris on the complainant's parcel of land. **(See photographs below).**



The complainant provided the Commission with the report compiled by a private surveyor whom she hired to establish whether there is encroachment on her parcels of land (**GATURI/NEMBURE/4348 and 4349**). According to the survey report dated 5th March 2014, by the private surveyor, the District Registrar realigned the road to its original official position but encroached parcel Gaturi/Nembure/4348 by 15 x 2.5 metres near the new bridge. (**See annexure marked A12**).

Mrs. Margery Marigu also enlisted the services of a private valuer in order to quantify the damage to the property caused by the trespass and encroachment on the parcels number **Gaturi/Nembure/4348 and 4349**. The damage was valued at Kenya shillings one million four hundred and eleven thousand nine hundred and seventy (KSh. 1, 411, 970) (**See annexure marked A13**).

It is worth mentioning that the newly completed bridge and public access road is now in use. (**See photographs below**)



Consequential Observation

Analysis of Environmental Impact Assessment (EIA) report reveals that the assessment was done in November, 2013, three month after the commencement of Mvangua-Rwang'onde Bridge/Road works. This is a contravention of Section 58 (1), (2) and (3) of the Environmental Management and Co-ordination Act, No 8 of 1999. **(See annexure marked A14).**

Conclusions

- There was an illegal public access road diversion through parcels of land number **GATURI/NEMBURE/4348 and 4349** registered under Mr. John Mwaniki Mvungu, the complainant's husband. The public had used the road diversion since the 1980s.
- During the construction of the realigned access road and bridge, the contractor destroyed trees and crops belonging to Mrs. Margery Marigu valued at Kenya Shillings one million four hundred and eleven thousand nine hundred and seventy (KSh. 1,411, 970) by a private valuer.
- The contractor also dumped a lot of waste materials on the complainant's land during the construction process affecting its use.
- The public access road passing through Mrs. Margery Marigu's parcel of land had been there for over thirty years hence rendering the portion agriculturally unproductive despite having complained to different public offices.
- The Land Registrar and the District Surveyor, in the presence of other public officers and members of the community, realigned the disputed public access road to the original location as captured in the Registry Index Map, thus confirming the illegality of the diversion.
- The Governor Embu County is unresponsive not only to the complaint by Mrs. Margery Marigu but also to CAJ's inquiry letters.
- The road has since been realigned to pass through its official position as per RIM. The residents had no objection to the realignment of the public access road to its original position.
- The allegation by Mrs. Margery Marigu that the Embu County Government had encroached on her parcel of land was found to hold.

- The County Public Works Officer failed to make a request for an environmental impact assessment to be undertaken prior to the commencement of the construction of the realigned public access road as provided for under Section 58 (1), (2) and (3) of the Environmental Management and Coordination Act No. 8 of 1999.

Recommendations

- i. The County Government of Embu jointly with the National Government (Ministry of Transport and Infrastructure and Ministry of Lands, Housing and Urban Development) should assess the loss of use of the land by Mrs. Margery Marigu for thirty years and compensate her.
- ii. The County Government of Embu jointly with the National Government (Ministry of Transport and Infrastructure and Ministry of Lands, Housing and Urban Development) should also compensate Mrs. Margery Marigu for the trees and crops that were destroyed by the contractor during the construction of the public access road and bridge.
- iii. The County Government of Embu should also value the portion of Mrs. Margery Marigu's parcel of land still occupied by the constructed bridge and compensate her accordingly.
- iv. The County Government of Embu to compensate Mrs. Margery Marigu for using her land to store constructions materials and causing her to lose use of her land.
- v. The National Environmental Management Authority (NEMA) to take action against the Embu County Public Works Officer for failing to submit a report and the statutory fee to NEMA for environmental impact assessment as required by law.
- vi. CAJ takes great exception to the unresponsiveness of the Governor, Embu County and will monitor the trend of complaints against the Governor and may consider declaring him unfit to hold public office.