



Commissioner for Human Rights and Justice v Mwakubo & 5 others (Environment & Land Petition 8 of 2021) [2023] KEELC 18167 (KLR) (21 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18167 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION 8 OF 2021
NA MATHEKA, J
JUNE 21, 2023**

BETWEEN

COMMISSIONER FOR HUMAN RIGHTS AND JUSTICE PETITIONER

AND

MWAKA MULUNDONDA MWAKUBO 1ST RESPONDENT

**LAND PHYSICAL PLANNING AND HOUSING COUNTY GOVERNMENT OF
MOMBASA 2ND RESPONDENT**

KENYA NATIONAL HIGHWAY AUTHORITY 3RD RESPONDENT

KENYA NATIONAL CONSTRUCTION AUTHORITY 4TH RESPONDENT

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 5TH
RESPONDENT**

THE HONOURABLE ATTORNEY GENERAL 6TH RESPONDENT

RULING

1. The Application is dated February 22, 2021 and is brought under article 20,22 (1) ,232 and 258 of *the Constitution* of Kenya and ru1es 13 and 19 of the *Constitution of Kenya (protection of Rights and Fundamental Freedoms Procedures Rule Practice* 2013 seeking the following orders;
 - a. That this application and the annexed petition be certified as urgent.
 - b. That pending hearing and determination of the application and the petition this Honorable Court be pleased to issue conservatory orders restraining the 1st Respondent by herself, her servants ,agents ,employees and any other person acting on their behalf from developing ,constructing building and/or putting up and fixture on the land Adjacent Plot



203 Likoni which land is road reserve and is reserved for construction of road and/or expansion thereof .

- c. That pending hearing and determination of the application and petition the court be please to issue an order compelling the 2nd 3rd ,4th and 5th Respondent to remove and demolish any building, house and/or fixture standing on the road reserve adjacent to Plot No 203 Likoni.
 - d. That pending hearing and determination of this petition the court be pleased to issue an order compelling the Respondents to remove all building materials debris and any other thing that may hinder free use of the suit parcel of land by road users and the public in general.
 - e. The cost of this application be provided .
2. It is supported by the annexed affidavit of Julius Ogogoh and is based on the following grounds that the 1st Respondent has alienated and encroached on public land which is road reserve adjacent to Plot No 203-Likoni. That 1st Respondent in the process of carrying on with construction of a building on said parcel of land. That the said construction is without approval and/or permission from the relevant state agencies such as the National Construction Authority and County Building Inspectorate and National Environment Management Authority and it is calculated to dispossess the National Highway Authority and the public in general of public land reserved for road construction and/or expansion of the same. The said construction being done by the 1st Respondent has inhibited free movement of vehicle, pedestrians and other road user and the public in general. The 1st Respondent acts are violation of rights and freedoms of the citizens of Kenya. That unless the orders sought therein are granted the public and citizenry shall stand robbed of this public property and shall disadvantage and posed to suffer loss and damage.
3. The 2nd Respondent states that the Application is a waste of the Courts precious judicial time as the Orders sought particularly Order No.2 calling for demolition of the building allegedly constructed on a road reserve cannot be issued at the interim stage of the proceedings. Consequently, Order No. 3 calling for removal of debris upon demolition of the building allegedly constructed on a road reserve should also await full hearing of the Petition. The Orders sought are ill timed as such the Application is frivolous and should be dismissed with costs to the 2nd Respondent.
4. This court has considered the application and the submissions therein. The Applicant states the 1st Respondent has alienated and encroached on public land which is road reserve adjacent to Plot No 203-Likoni. That 1st Respondent in the process of carrying on with construction of a building on said parcel of land. That the said construction is without approval and/or permission from the relevant state agencies. The Applicant now seeks apart from the conservatory order, a mandatory injunction to an order compelling the 2nd 3rd , 4th and 5th Respondent to remove and demolish any building, house and/or fixture standing on the road reserve adjacent to Plot No 203 Likoni. In the case of *Kenya Breweries Ltd & Another vs Washington O. Okeya* (2002) eKLR, the Court of Appeal stated as follows on mandatory injunctions.

“A mandatory injunction ought not to be granted on an interlocutory application in the absence or special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear



that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

5. In the case of *Nation Media Group & 2 Others vs John Harun Mwau* (2014) eKLR, the court of appeal said;

“It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrate as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.”

6. The above cited cases lay down the principles of law to be considered in an application for mandatory injunction and the condition that stands out is that the applicant must establish the existence of special and exceptional circumstances that warrant the granting of orders of mandatory injunction. The Applicant seeks final orders at this interlocutory stage. I find this has not been established but however the Applicant has raised a prima facie case and hence I order that the parties set down the Petition for hearing. This application is dismissed and costs of this application to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 21ST JUNE 2023.

N.A. MATHEKA

JUDGE

