



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT NAROK

ELC PETITION NO. 1 OF 2020

**IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND
FREEDOMS AND CONSTITUTIONAL VALUES AND PRINCIPLES**

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT

AND

IN THE MATTER OF ARTICLES 1, 2, 10, 21, 27, 28, 29, 40, 50 AND 259

**OF THE CONSTITUTION OF KENYA, 2010 AS READ WITH THE
FAIR ADMINISTRATIVE ACTION ACT, THE LAND REGISTRATION ACT,
THE LAND ACT AND ALL OTHER ENABLING PROVISIONS OF THE LAW**

AND

IN THE MATTER BETWEEN MAKERE OLE LEMARA.....PETITIONER

–VERSUS–

COUNTYLAND REGISTRAR, NAROK.....1ST RESPONDENT

COUNTY LAND SURVEYOR, NAROK.....2ND RESPONDENT

COUNTY COMMISSIONER, NAROK.....3RD RESPONDENT

COUNTY POLICE COMMANDER, NAROK.....4TH RESPONDENT

HON. ATTORNEY GENERAL.....5TH RESPONDENT

RULING

1. This ruling is in respect of the Petitioner/Applicant's Notice of Motion application dated 26th November, 2020 anchored on the provisions of Articles 27, 28, 29, 40, 50 and 259 of the Constitution of Kenya, 2010, as well as Rules 13 and 19 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. In that application, the Petitioner/Applicant is seeking the following orders from the court:

a) Spent;

b) Spent;

c) That interim conservatory orders does issue stopping and/or halting and/or staying the implementation of the decision contained in the Notice issued on 30th July, 2020 by the 2nd Respondent requiring the Petitioner/Applicant to pave way and allow demarcation and alienation of land parcel CISMARA/ENTIANI/377 and pave way for creation of a non-existent public road pending the hearing and determination of the pending inter partes hearing and determination of the instant petition;

d) That the costs of this application be borne by the Respondents; and

e) That any other remedy that the court deem fit and just to so grant.

2. The grounds upon which the application is founded on are set out on the face of the motion as well as in the supporting affidavit of the Petitioner/Applicant sworn on 26th November, 2020 where he deposed that he is the absolute registered proprietor of CISMARA/ENTIANI/377 (suit property), and that he is in occupation thereof with his larger family. It is the Petitioner/Applicant's case that according to the Registry Index Map sheet obtained from the District Survey Office dated 24th October, 2016 and 17th November, 2020, there is no existence of an alleged access road as claimed by the Respondents.

3. According to the Petitioner/Applicant, over the years, the suit property has been continually subdivided to family members who have done extensive physical developments to suit property. The Petitioner/Applicant further deposed that on 30th July, 2020, he received a letter from the District Surveyor Narok North/South informing him that there was an impending survey to be conducted on 12th August, 2020 to open up a road access on the suit property and that he should avail himself during that exercise.

4. On 7th August, 2020, the Petitioner/Applicant states that he wrote to the Assistant County Commissioner, Olokurto Sub-County expressing his concerns in the manner in which the exercise was being conducted, and that he requested that he be granted an opportunity to ventilate his opinion on how best the matter could be handled. It was the Petitioner/Applicant's case that in spite of his request, on 16th November, 2020, the aforesaid Assistant County Commissioner accompanied by Narok Land Registrar, Narok County Surveyor and OCS Olokurto Police Station together with a contingent of police officers arrived at his home and illegally declared that they were going to use whatever means and force to ensure that the access road is demarcated. He deposed that they went ahead and issued an oral notice of fourteen (14) days and thirty (30) days with effect from 16th November, 2020 requiring him to vacate the alleged demarcated boundary and move houses and trees and any other properties thereon.

5. Immediately upon issuance of the aforesaid oral notice, the Petitioner/Applicant deposed that hired goons and hoodlums invaded the suit property and destroyed his fence in a bid to deface the original boundary. Consequently, the Petitioner/Applicant stated that on 17th November, 2020, he made a report to Olokurto Police station vide OB No 13/17/2020, and that the OCS refused to take action in spite of having been presented with the names of the perpetrators of the crimes.

6. It is also the Petitioner/Applicant's case that the hired goons and hoodlums went on to viciously attack his family members occasioning serious injuries to them. Having not received an assistance from Olokurto Police Station, the Petitioner/Applicant deposed that he made yet another report at Likia Police Station vide OB No 13/20/13/2020 but no action was taken.

7. According to the Petitioner/Applicant, all his efforts to have the road demarcation exercise stopped have seen his family members receive threats of attacks and burning of their homes from hired goons. The Petitioner/Applicant also deposed that he has suffered trauma, and that the subsequent turn of events strained his health. He contended that the conduct of the Respondents is contrary to the provision on fair administrative action, the right to fair trial and the right to equal protection of the law.

8. Further, the Petitioner/Applicant argues that the Respondents have arbitrarily and in misuse of their powers summarily made a decision to demarcate a road on his land without adhering to due process. It was also said that the Respondents are in violation of the Constitutional values and principles under Article 10, and principles of Public Service under Article 232 of the Constitution of Kenya, 2010. The Petitioner/Applicant also pleaded that he had been condemned unheard, denied peaceful and quiet possession of his land, and that as a result, his livelihood and that of his family has been greatly prejudiced. He also argued that his rights to own a property under Article 40 of the Constitution of Kenya, 2010 had been greatly jeopardized and infringed upon.

9. It was therefore contended by the Petitioner/Applicant that it is in the interest of justice for this court to intervene and arrest the illegality and violations of the Constitution and the law by allowing the application. To the Petitioner/Applicant, no prejudice will be suffered by the Respondents should the orders sought be granted, in fact, the Petitioner/Applicant argued that he stands to suffer greater prejudice by denial of the orders sought. The court was therefore urged to allow the application and grant the orders sought.

10. The Respondents opposed the application vide a replying affidavit sworn on 16th February, 2021 by the 1st Respondent, Tom M. Chepkwesi, wherein he deposed that the Petitioner/Applicant was issued with written notices informing him of the implementation of the existing access road as per the Registry Index Map (RIM). All registered proprietors of land parcels adjacent to the said access road, parcels No CISMARA/ENTIANI11-534, including the Petitioner/Applicant are said to have been duly issued with written notices informing them of the opening of the existing access road as per the RIM.

11. On 30th July, 2020, the Respondents deposed that a written notice was issued to the registered proprietors of parcels No. CISMARA/ENTIANI/11-534 including the Petitioner/Applicant informing them of the opening of the access road and a site visit to be carried out on 12th August, 2020. Another written notice is said to have been issued to the said persons including the Petitioner/Applicant on 13th August, 2020 informing them of the visit of the District Land Registrar and the District Surveyor on 18th August, 2020. A further written notice is said to have been issued once again to the aforesaid persons including the Petitioner/Applicant on 12th October, 2020 informing them of to be available for the site visit on 16th November, 2020.

12. It was contended by the Respondents that the access road has been in existence as it was visibly being maintained by a number of registered proprietors of land adjacent to it and other neighboring parcels. The opening of the access road was said to have been based on the Registry Index Map which the court was told indicates the correct designated position and demarcation of the access road vis-à-vis the adjacent parcels of land. The opening of the access road was therefore said to be pre-planned and its existence lawful.

13. According to the Respondents, there is no parcel of land that was alienated for purposes of the access road since the same was opened and implemented as originally planned following the full guidance of the Registry Index Map.

14. Further, the Respondents also contended that the decision to open the access road adhered to due process and requirements of the law. They also averred that they acted impartially within the purview of their duties, mandate and confines of the law.

15. Narok County Land Surveyor was said to have visited the ground for the exercise of opening the access road and that a surveyor's report was compiled to that effect. During the exercise, the surveyor is said to have widened the width of the access road by twelve (12) meters thereby pulling six (6) meters on both sides of the opposite parcels of land. It was therefore the Respondents' case that the surveyors did not encroach into any land whatsoever.

16. The Respondents further stated that the suit property borders parcel No. **CISMARA/ENTIANI/381** on the opposite side across the road, and that the two parcels are located towards the end of the access road where the survey exercise is said to have ended. The Respondents maintained that the access road did not encroach into the Petitioner/Applicant's land, and that neither was the access road cut from it.

17. In light of the above, the Respondents urged that the suit against them is without basis and unmerited.

18. The Petitioner/Applicant filed his written submissions on 16th December, 2021 wherein he submitted that the actions of the Respondents amount to an infringement of his rights to an equal protection of the law, right to fair administrative action as well as an infringement to his right to fair hearing. It was also the Petitioner's/Applicant's submission that he has made out a case for the issuance of the orders sought in his application.

19. Further, the Petitioner/Applicant contended that this court has powers to safeguard fundamental rights and freedoms and to prevent an abuse of power by various state organs such as the Respondents herein. The court was therefore urged not to shut its eyes to what the Petitioner/Applicant called an injustice being meted against him, and that the actions of the Respondents were said not to be made in good faith.

20. The Petitioner/Applicant therefore urged the court to allow his Notice of Motion application dated 26th November, 2020 as prayed. To buttress his submissions, the Petitioner/Applicant relied on the case of **Kenya Human Rights Commission vs Communications Authority of Kenya [eKLR]**, **Republic vs Director of Public Prosecutions & Others ex – parte Bedan Mwangi Nduati & Another Judicial Review No 332 of 2014, Ronald Leposo Musengi vs DPP & Others Petition No 436 of 2014** and the case of **Stanley Munga Githunguri vs Republic**.

21. The Respondents argued their case through their written submissions dated 12th April, 2021 and filed in court on 19th April, 2021. It was the Respondents' submission that they are not seeking to have road access created, rather they contend that there is already an existing public road and that no consent ought to have been sought from the Petitioner/Applicant.

22. It was also the Respondents' submission that they had not infringed upon the Petitioner/Applicant's rights in opening the access road which they contended is meant to serve the public within **CISMARA/ENTIANI** section. According to the Respondents, the access road was already in existence as per the Registry Index Map and that the Petitioner/Applicant cannot have exclusive proprietary rights over the access road to the exclusion of his neighbors.

23. On issuance of written notices, the Respondents submitted that they issued notices on three (3) different occasions to all registered proprietors of land parcels adjacent to the access road including the Petitioner/Applicant. The Respondents urged the court to put public interest over individual rights of the Petitioner/Applicant.

24. The Respondents further submitted that conservatory orders can only be granted on merit bearing in mind the public interest vis-à-vis the interest of an individual. Thus, it was urged that the balance of convenience lies in favour of the Respondents and the public affected by it, and that there is no irreparable damage to be occasioned to warrant the reliefs sought as the access road is already in existence for use.

25. In support of their submission, the Respondents relied on the cases of **Kenleb Cons Ltd vs. New Gathu Services Ltd & Another [1990]eKLR**, **Homescope Properties Ltd & Another vs. David Gachuki & Another [2014]eKLR**, **Kenya Hotel Properties vs. Willesden Investment Ltd [2013]eKLR**, and the case of **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014]eKLR**.

26. Having considered the Notice of Motion application and the material in support thereof including the submissions in support as well as the response thereto and the submissions in reply, the following substantive issues arise for determination by the court:

i) *Whether the Petitioner/Applicant has made out a case for the issuance of the orders sought in the application; and*

ii) *Whether the application dated 26th November, 2020 is merited.*

I will address the two issues together

27. The law on issuance of conservatory orders are now well settled. In the case of **Board of Management of Uhuru Secondary School vs.**

City County Director of Education & 2 others [2015]eKLR, Onguto, J, outlined the factors to be taken into consideration in determining an application for conservatory orders as follows:

Foremost, the applicant ought to demonstrate a prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice...

It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The prima facie case ought to be beyond a speculative basis...

Once the applicant has established to the court's satisfaction a prima facie case with a likelihood of success the court is then to decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of rights...

Thirdly, flowing from the first two principles, is whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. It is indeed the business of the court to ensure and secure so far as possible that any transitional motions before the court do not render nugatory the ultimate end of justice...

The fourth principle which emerges from the various cases and is well captured by the Supreme Court of Kenya in the case of Gatirau Peter Munya –v- Dickson Mwenda Githinji & 2 Others [2014] eKLR is that the court must consider conservatory orders also in the face of the public interest dogma.

Finally, the court is to exercise its discretion in deciding whether to grant or deny a conservatory order. The court must consequently consider all relevant material facts and avoid immaterial matters. The court will consider the applicants credentials, the prima facie correctness of the availed information, whether the grievances are genuine legitimate and deserving and finally whether the grievances and allegations are grave and serious or merely vague and reckless...

28. The question is whether the Petitioner/Applicant has met the conditions for grant of conservatory orders. In a nutshell, the grounds as disclosed on the face of the application and in the affidavit in support is that the Petitioner/Applicant is challenging the opening of an access road which he contends that the process to open the same did not adhere to due process and requirements of the law.

29. On the other hand, the Respondents contended that the decision to open the access road adhered to due process and requirements of the law. They also averred that they acted impartially within the purview of their duties, mandate and confines of the law.

30. In an application seeking conservatory orders, it is imperative that the court warns itself that it is required not to make any definitive findings of fact or law. This was the position enunciated by the High Court in ***Kevin K. Mwiti Others v Kenya School of Law & Others*** where the court held that:

“...It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success.”

31. Turning to the purpose of conservatory orders, this court is alive to the fact that one of the purposes of granting conservatory orders is to preserve the subject matter pending the hearing and determination of a pending case or Petition. In ***Judicial Service Commission v Speaker of the National Assembly & Another {2013} eKLR***, it was held as follows with respect to the purpose of granting conservatory orders:

“Conservatory orders are in my view not ordinary civil Law remedies but are remedies provided for under the Constitution, the Supreme Law of the Land. They are not remedies between one individual as against another, but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders why only attach to a particular person may.”

32. In the instant case, it is apparent from the material on record that the access road in dispute has already been opened thus making the prayers sought by the Petitioner/Applicant spent. As it stands, the court is of the opinion that the conservatory orders sought have been overtaken by events, hence, they cannot be granted at this stage. Therefore, the court holds the view that the Petitioner/Applicant has failed to aver and prove, that he faces imminent, evident and real actual danger.

33. In light of the foregoing, the court is further of the opinion that the Petitioner/Applicant's available recourse at the hearing of his petition would be to demonstrate to the court how his rights and fundamental freedoms were infringed upon by the opening of the access road in issue.

34. It is, therefore my finding that the Petitioner/Applicant has failed the test for the grant of conservatory orders. The upshot of the foregoing is that the Notice of Motion application dated 26th November, 2020 is hereby dismissed with costs to the Respondent for lack of merit.

SIGNED, DATED AND DELIVERED AT NAROK VIA EMAIL THIS 26th DAY OF JANUARY, 2022.

MBOGO C.G,

JUDGE

26/1/2022

IN THE PRESENCE OF:

CA:Chuma