



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CIVIL PETITION NO. 4 OF 2014**

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

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS AND  
FREEDOM UNDER ARTICLE 22 AND 40 OF THE  
CONSTITUTION**

**AND**

**IN THE MATTER OF: PROTECTION OF RIGHT OF PROPERTY UNDER  
ARTICLE 40(3) OF THE CONSTITUTION 2010**

**AND**

**IN THE MATTER OF: PROTECTION OF RIGHTS AND FUNDAMENTAL  
FREEDOM PRACTICE ANDPROCEDURE RULES  
2013**

**AND**

**IN THE MATTER OF: THE PRINCIPLE OF LEGITIMATE EXPECTATION  
AND FAIRNESS**

**SALIM ABDALA BAKSHUWEIN (*suing in his capacity s the administrator of the estate  
of the late ABDALLA SALIM BAKSHUWEIN*).....PETITIONER**

**=VERSUS=**

- 1. MINISTRY OF TRANSPORT AND INFRASTRUCTURE**
- 2. KENYAN URBAN ROADS AUTHORITY**

### **3. ROSAKI DESIGNS LIMITED**

### **4. THE HONOURABLE ATTORNEY GENERAL.....RESPONDENTS**

## **J U D G M E N T**

### **Introduction:**

1. This matter was commenced by way of a Petition. In the Petition, the Petitioner has averred that he is the administrator of Land portion number 6108 (original number 780/3) Malindi.
2. The Petitioner has further averred that the 2<sup>nd</sup> Respondent has contracted the 3<sup>rd</sup> Respondent to build a road which is passing through the suit property without consulting him or seeking his consent; that the actions of the Respondents amount to compulsory acquisition of his property without following the laid down procedures and that the Respondents have breached his constitutional rights pursuant to Article 10 and 47 of the Constitution.
3. The Petitioner is seeking for a declaration that the construction of the road on the suit property by the Respondents is illegal and unconstitutional. The Petitioner is also seeking for a permanent injunction to issue as against the Respondents.
4. In his Replying Affidavit, the Manager of the 2<sup>nd</sup> Respondent deponed that the 2<sup>nd</sup> Respondent is overseeing the implementation of Routine maintenance works on two roads in Malindi; that the ongoing works are in respect of the existing roads and that the road in question, Stadium Road, has been in existence since it was established vide F/R No.61/72 of 1952.
5. According to the 2<sup>nd</sup> Respondent, the road in question is being used to date by the members of the public to access their houses and Malindi stadium.
6. The 2<sup>nd</sup> Respondent's Manager finally deponed that the grabbing of the road reserves was facilitated through a survey plan number F/R No. 226/43 of 1992 which purported to sub-divide plot number 94/R ignoring its public utility character and the existing road alignments and infrastructure on the ground.
7. The Petition proceeded by way of viva voce evidence.

### **The Petitioner's case:**

8. The Petitioner's surveyor, PW1, informed the court that he was instructed to carry out investigations in respect to the suit property.
9. According to the evidence and report of PW1 dated 11<sup>th</sup> August 2014, the first survey in respect to the suit property was carried out in the year 1913 and 1936 and recorded as plot number 94. In the year 1952, plot number 94 was sub-divided to create plot numbers 735 and 780.
10. It was the evidence of PW1 that in 1967, the government compulsorily acquired a road measuring 0.671 acres from plot number 780. The road that was acquired was given number 780/1 leaving plot number 780/R as private land. It was the evidence of PW1 that plot number 780/R was not and has never been government land.
11. PW1 informed the court that in 1992, portion number 780/R was sub-divided into portion number 780/2 and portion numbers 6108 to 6110. It was his evidence that portion number 6108 was further sub-divided to create portion numbers 6108/1 and portion numbers 10483 and 10484.
12. It was the evidence of PW1 that the Petitioner has always been the proprietor of portion number 6180 and that the property is freehold.

13. According to PW1, portion number 6108 is intact and there is no road going through it.

14. PW1 provided to the court the topographical survey of the area and the strip of the road in question. It was his evidence that the construction of the said road amounts to encroachment on a private land.

15. The Petitioner, PW2, reiterated the evidence of the surveyor, PW1. It was the evidence of PW2 that the road in question was passing through his land.

### **The Respondents' case:**

16. Mr. Iminza, DW1, informed the court that he identified the road in question as one of the roads that needed maintenance in Malindi.

17. DW1 produced a map which according to him showed the roads that were in existence in the year 1952. It was the evidence of DW1 that in the drawing of 1967, portion number 94/R was subdivided to create plot number 780/1 where there is Jamhuri road and that the remaining plot was known as portion number 780/R. According to him, portion number 780/R is government land.

18. DW1 stated that plot number 780/R was sub-divided to create portion numbers 6108 and 780/2, 780/4 (6109) and 780/5 (6110) where Tourist road was already existing.

19. DW1 informed the court that the aerial photographs shows the existence of the disputed road; that portion number 6108 was sub-divided without creating access roads for the public and that the road in question is indeed in existence.

### **Submissions:**

20. The Petitioner's advocate filed brief submissions which reiterated what is contained in the affidavits. I have considered the said submissions.

21. The Respondents' counsel on the other hand submitted that the land in question was at the material times governed by the provisions of the repealed Government Act; that Section 85 of the said Act protects proclaimed and reserved roads, thoroughfares and out spans; that it is the Municipal Council which has the general control and care of all public streets and that the Act prohibits the transfer of land forming part of a road.

22. Counsel submitted that where public property is found to have been acquired for public purposes, the court ought not to interfere.

### **Analysis and findings:**

23. The only issue for determination is whether the construction or maintenance of the road in question is in respect to a road that was in existence or is over private property.

24. It is not in dispute that the Petitioner is the registered proprietor of portion number 6108. According to the copy of the Indenture and the Deed Plan that was annexed on the Supporting Affidavit, the original number of the said portion is portion number 780/3.

25. It is not in dispute that in 1952, portion number 94/1 was subdivided to create portion numbers 735 and 780. The sub-division of the said land is shown in the survey plan number 61/72.

26. According to the evidence of PW1, the government acquired compulsorily approximately 0.704 acres of portion number 780 for a road. Upon the said acquisition, portion number 780 was sub-divided to create portion number 780/1, for the road and portion number 780/R.

27. Although DW1 informed the court that portion number 780/R should have remained as government

land, PW1 informed the court that portion number 780/R remained as private land after the acquisition of portion number 780/1 for the road.

28. I entirely agree with the evidence of PW1. According to the letter dated 18<sup>th</sup> September 1970, the government acquired only 0.704 acres of plot number 94, which had already been subdivided to create plot numbers 735 and 780 in 1952

29. After the acquisition of the 0.704 acres, the government paid the late Abdala Salim Bakhshin Kenya Pounds 500. There is no evidence that the government acquired the remaining portion number 780/R which was private land.

30. The documents produced by both the Petitioner and the 1<sup>st</sup> Respondent shows that after the acquisition of portion number 780/1 by the government, portion number 780/R was subdivided vide survey plan number 226/43 to create plot numbers 780/2 and 6108 upto 6110 in 1992.

31. Portion number 6108 was further sub-divided to create portion numbers 6108/1, 10483 and 10484.

32. I have perused the 1952 survey plan together with the survey plan that created portion numbers 780/1, 780/2 and 6108-6110.

33. Having perused those survey plans, I am clear in my mind that the two roads that were in existence in 1952 off the old Mombasa-Malindi road are not the roads in dispute herein. The road in dispute and marked as "A" by PW1 is on the upper part of portion number 6108.

34. That portion of land has never been acquired by the government for the purpose of creating a public road as defined by the Public Roads and Roads of Access Act, Cap 399 which came into force on 10<sup>th</sup> August 1920. Under the Act, a "public road" is defined as any road which the public had a right to use immediately before the commencement of the Act. The road in question was not in existence before 10<sup>th</sup> August, 1920.

35. From the Topocadastral Survey Plan that was produced by PW1, although there is a road which was created probably upon the subdivision of the neighbouring plots, neighbouring plot number 6108, a road was created which runs upto where plot number 6108 is, without connecting to the Malindi-Mombasa road.

36. If the Respondents' case is that portion numbers 6108, 6109 and 6110 were part of public land, which is not true, then they ought to move the court and have the title documents to those plots cancelled first before they can encroach on them.

37. If the intention of the Respondents is to connect the said road to the Malindi-Mombasa road, through plot 6108, then the Respondents should compulsorily acquire the same by following the procedures laid down in the law.

38. The construction of a public road through portion number 6108 constitutes an encroachment onto private property and infringes on the right of the Petitioner to own property and not to be arbitrarily deprived of the said property by the Respondents. The Respondents actions are in contravention of the provisions of Article 40(1) of the Constitution.

39. For those reasons, I allow the Petitioner's Petition in the following terms:

**(a) A declaration be and is hereby issued that the construction of a road on the Petitioner's land known as portion number 6108 (Original number 780/3) Malindi be and is hereby declared illegal and unconstitutional.**

**(b) An order of permanent injunction be and is hereby issued restraining the Respondents,**

**their servants, agents, employees or any other person claiming interest through them from trespassing, entering, remaining, selling, alienating, or dealing with the suit property in any manner whatsoever and cease undertaking any further construction of roads and any other works upon the Petitioner's portion of land known as portion number 6108 (original number 780/3) Malindi.**

**(c) The 1<sup>st</sup> and 2<sup>nd</sup> Respondents to pay the costs of the Petition.**

Dated and delivered in Malindi this 22<sup>nd</sup> day of **May**, 2015.

**O. A. Angote**

**Judge**