



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT NAIROBI

PETITION EQ22 OF 2021

**IN THE MATTER OF ARTICLES 2, 3 (1), 10, 22 (1), 23 (1) & 3, 26, 27 (1) & 2, 28,
29, 35, 40 (1)-(3), 42 (b), 43 (1), 47 (1) & 2, 48, 56 (e), 60 (1) (b), 63, 69 (1) (b), 63,
69(1) (a) & (d), 165(3) (b) & 6, 232 (1) & 2 AND 258 (1) & (2) (b)**

OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF RULES 4(1), 10, 13, AND 23 (1) OF THE CONSTITUTION
OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)**

PRACTICE AND PROCEDURE RULES, 2013

AND

**IN THE MATTER OF SECTIONS 4 (1) AND 5 OF THE PHYSICAL AND LAND
USE PLANNING ACT, 2019 AND THE REGULATIONS MADE THEREUNDER**

AND

IN THE MATTER OF SECTIONS 3 AND 152G OF THE LAND ACT, 2012

AND THE REGULATIONS MADE THEREUNDER

AND

**IN THE MATTER OF SECTIONS 2(2) AND 58(1) OF THE ENVIRONMENTAL MANAGEMENT
AND CO-ORDINATION ACT, 1999 AND THE REGULATIONS MADE THEREUNDER**

AND

IN THE MATTER OF SECTIONS 6 & 11 (C)-(F) OF THE URBAN AREAS AND CITIES ACT

AND

IN THE MATTER OF THE ACCESS TO INFORMATION ACT

AND

IN THE MATTER OF SECTIONS 3, 8, & 11 OF THE PUBLIC SERVICE (VALUES AND PRINCIPLES) ACT

AND

IN THE MATTER OF SECTIONS 4-6 OF THE FAIR ADMINISTRATIVE ACTION ACT

BETWEEN

NUBIAN HUMAN RIGHTS FORUM.....1ST PETITIONER

KIBRA NUBIAN COMMUNITY LAND TRUST.....2ND PETITIONER

SHAFI ALI HUSSEIN, ON HIS OWN BEHALF AND AS A MEMBER OF THE

NUBIAN COMMUNIT.....3RD PETITIONER

YASIN MOHAMED BADR, ON HIS OWN BEHALF AND AS A

TRUSTEE OF THE KIBRA NUBIAN COMMUNITY LAND TRUST.....4TH PETITIONER

ISMAI KHAMIS, ON HIS OWN BEHALF AND AS A TRUSTEE OF THE KIBRA

NUBIAN COMMUNITY LAND TRUST.....5TH PETITIONER

- VERSUS -

NAIROBI METROPOLITAN SERVICES.....1ST RESPONDENT

COUNTY GOVERNMENT OF NAIROBI CITY COUNTY.....2ND RESPONDENT

KENYA URBAN ROADS AUTHORITY.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

RULING

1. This is the notice of motion dated 2nd June 2021. It is brought under Article 22 and 23(3) of the Constitution of Kenya 2010, Rules 3, 19, 23(1) and 24(1) of the Constitution of Kenya(Protection of Rights and fundamental freedoms)practice and Procedure Rules 2013,Section 3A of the Civil Procedure Act,Cap.21 Laws of Kenya, and all other enabling provisions of the law.)

2. It seeks orders:-

a. Spent.

b. Spent.

c. That pending the hearing and determination of this petition, conservatory orders do issue restraining the Respondents, either by themselves, assigns, representatives, employees or agents from demolishing any structure, home or dwelling or threatening to evict occupants in the special Planning Area(designated by Gazette Notice No.3432, p.1872 published on 8th May 2020)and within the land held in trust by the 1st Petitioner, all that is known as Grant No.IR149108,for the purposes of road construction or road improvement.

d. That costs of this application be in the cause.

3. The application is supported by the grounds stated in paragraphs 1 to 15 on the face of the application.

4. It is supported by the annexed affidavit sworn on 2nd June 2021 by Adet Adam Abdulrahman; a resident of Makina Ward, Kibra Constituency. He deponed that on 24th May 2021, he received information from his brother that men were taking measurements on Legio Maria road and he confirmed that his structures erected along Legio Maria Road which were his family's only source of income had been identified as property that would be demolished.

5. He added that he had not received any notice but he tried to salvage what he could before actual demolition began on 25th May 2021 and that the destruction of property will cause them and their tenants great financial hardship since they had not been given prior notice of the demolitions.

6. The application is also supported by the annexed affidavit sworn on 2nd June 2021 by Yassin Mohammed who described himself as a member of the Kibra Nubian Community Land Trust.
7. He deponed that in 2017, the ministry of lands allocated 288 Acres of land registered under **Grant I.R 149108** located within Lindi, Makina and Laini Saba wards of Kibra Constituency to be held in trust for the Nubian Community by the Kibra Nubian Community Land Trust.
8. He further deponed that on 25th May 2021, Nairobi Metropolitan Services erected a billboard announcing the project; “NCC/ WDT/ T / 362/ 2019-2020 Construction of Legio Maria Road” and on 22nd May 2021, individuals began marking structures along Legio Maria Road with a red “X” mark indicating that they would be subject to demolitions. He added that people were advised to tear down their structures and remove their properties.
9. He deponed that on 25th May 2021, the Respondent trespassed on the suit land and demolished structures using bulldozers along Legio Maria Road located on the Nubian Trust land without formal authorization of the Kibra Nubian Community Land Trust thus violating property rights and the dignity of members of the Nubian Community.
10. He further deponed that he is apprehensive that the Respondents will continue with the evictions and demolitions on the suit land as both Nairobi Metropolitan services and Kenya Urban Roads Authority have asserted that 28 Kms of roads will be subject to construction in the area and property along the intended road will be demolished.
11. He deponed that areas of the suit land like the area in Lindi Ward are designated as special planning areas under the Physical and land use planning Act,2019 therefore land use and planning of the area must be inclusive and take consideration of the culture, heritage and interests of the people as provided for by the Act.
12. The application was also supported by the affidavit sworn on 2nd June 2021 by Christopher Kerkerer; an employee of Katiba Institute. He deponed that he photographed and on video recorded the demolitions and evictions in Lindi ward on 27th May 2021 and annexed the photographs.
13. The application is opposed by the 1st,3rd and 4th Respondents vide the replying affidavit sworn on 23rd June 2021 by Engineer Thomas Rukenya Karatai who described himself as the Resident engineer supervising construction of Legio Maria Road in Lindi Ward Kibra Constituency.
14. He deponed that during a stake holder forum held on 30th August 2017 for preparation of FY 2018-2022 County Integrated Development plan, (CIPD),attended by 55 representatives from Lindi Ward, Legio Maria road which was said to be inaccessible was proposed for construction. He added that following public participation, construction of the road was planned and budgeted for under Ward development programme for FY 2020/2021.
15. He further deponed that construction of Legio Maria Road was first initiated through a contract between the 2nd Respondent and M/S Naskel Africa Limited long before the 1st Respondent was established and before gazettelement of the alleged special planning area but following transfer of functions vide a Deed of transfer of functions signed between the 2nd Respondent and the National government, the 1st Respondent signed a deed of variation with the contractor and took over the construction and is funding it under ward development projects fund as part of an initiative to improve accessibility in all informal settlements across Nairobi.
16. He also deponed that during site possession by the contractor, a meeting was held on 24th April 2021 where it was noted that sections of the road had been encroached by the residents and it was agreed that the contractor mark the extent of the road reserve and erect a publicity board to enable issuance of enforcement notices.
17. He deponed that since the initiative was an initiative of the locals led by the area MCA Hon. Jairus Omay, majority of persons who had structures within the road reserve voluntarily removed them but a few refused and the 1st Respondent is intending to issue them with enforcement notices. He added that the contractor has not received any resistance from the local residents within the ward since the construction started.
18. He deponed that the Petitioners have not demonstrated by way of evidence that either the 1st Respondent or the Contractor demolished any of their buildings as photographs annexed only shows the excavator excavating the road within the road reserve.
19. The 2nd Respondent also opposed the application vide the affidavit of Abwao Erick Odhiambo, the 2nd Respondent’s solicitor sworn on 26th July 2021.He deponed that the Petitioners and all residents of Lindi ward have all along been aware of the Legio Maria road project having participated in a public participation forum conducted more than four (4) years ago.
20. He further deponed that the alleged bulldozer was only tearing the road as most people who had encroached on the road reserve voluntarily removed their structures. He added that alleged demolitions can only be on illegal encroachments as structures allegedly demolished were built on the road reserve.
21. He admitted that the suit area was indeed declared a special planning area under Section 52 of the Physical and Land Use Planning Act through Gazette Notice No.3433 published on 8th May 2020 but it is immune from the conservatory orders sought as it is exempted from such orders under Section 52(3).

22. He deponed that the petition has been brought by private owners of a community land and does not in any way represent the sentiments of other residents of Kibra or members of the public in Nairobi thus it cannot override public interest.

23. On the 24th June 2021, the court with the consent of parties directed that the notice of motion be canvassed by way of written submissions.

The Petitioners'/Applicants' submissions.

24. They are dated 13th July 2021. The Applicants submitted on the following issue;-

a. Whether the Applicants are entitled to grant of conservatory/stay orders.

25. Relying on the case of **E.W.A & 2 Others v Director of Immigration & Registration of Persons & Another [2018] eKLR**, they submitted that a conservatory order is appropriate to meet the ends of justice in this matter and the court has authority to grant the orders under Article 23 of the Constitution and Section 7(a) of The Environment & Land Court Act.

26. They submitted that while the decision on whether or not to grant conservatory orders is discretionary, the court may consider the factors for grant of injunctions stated in **Cassman Brown & Co. Ltd [1973] E.A 358** quoted by the court of Appeal in **East African Development Bank v Hyundai Motors Kenya Limited [2006]e KLR**.

27. They added that the court is called upon to consider whether the Applicants have a prima facie case with a likelihood of success, that unless the order is granted, the Petition, were it to eventually succeed, would be rendered nugatory; that the petitioners would suffer irreparable harm, and that the balance of convenience should tilt in their favour.

28. It was the Applicants' submission that they had satisfied all the aforementioned limbs for grant of conservatory orders thus they deserved an interlocutory relief. They submitted that their case was not frivolous as they have a prima facie case which has brought forth constitutional controversies with regard to their right to property and future demolitions and evictions which will affect their land.

29. They added that they have established issues of procedural impropriety, irregularity and discrimination in relation to the evictions along Legio Maria Road vis a vis the Land Act. They relied on the case of **Progress Welfare Association of Malindi & 3 Others v County Government of Kilifi & 4 Others [2020]e KLR**.

30. They also submitted that if the orders sought are not granted, plans by the Respondents in relation to Developments at Kibra will continue and unlawful evictions and their attendant physical and mental harm will continue and this court may not be able to adequately compensate the damage.

31. They further submitted that the Respondent's actions are in breach of the rule of law being Section 152G of the Land Act and as such, the principle of the rule of law is at stake and the effects of its breach disproportionately affects marginalized communities such as the Nubian community thus the balance of convenience and public interest should fall to the Applicants as the Respondents' actions cannot be said to be in public interest. They added that they stood a greater and higher risk of injustice and cited the case of **Pius Wanjala vs Cleopa Mailu & 4 Others [2016] eKLR** and **Gitaru Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014]e KLR**.

The 2nd Respondent's submissions.

32. They are dated 18th October 2021. The 2nd Respondent submitted that the Supreme Court of Kenya in **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014] eKLR** not only sealed the requirements that a party has to satisfy in order to be granted conservatory orders but it also underscored their specialized nature as reliefs available only in public interest matters.

33. It further submitted that the Petitioners did not meet the threshold since the petition does not have inherent merit as discussed in **Cascade Company Limited v Kenya Association of Music Producers (KAMP) & Another** or what the court referred to as a prima facie case in **Mrao Limited v First American Bank of Kenya Limited & 2 Others [2003] eKLR**.

34. It submitted that the petitioners' case has no merit since the Petitioners hope to walk away with orders to prevent the expansion of a road to make emergency and other essential services accessible to the people of Kibra and those of Nairobi which represents a wider public interest based on the argument that the road expansion is being undertaken on a designated special planning area and that there was no public participation yet the Gazette Notice referred to is inapplicable to the impugned development as the development was proposed and approved on 30th July 2017 through a public consultation forum and as such it is exempted.

36. It also submitted that the Petitioners indicated that the persons affected are ones illegally encroaching on the access road therefore they cannot shield themselves by pleading infringement of their rights if any.

36. It also submitted that the petition has been brought in the Petitioners' private capacity as members of the Nubian community and not in public interest as defined in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2014] eKLR** thus the court should not give them a free pass for their private interests to override the public interests. It cited the case of **Kenya National Highways Authority v Shalien Masood Mughal & 5 Others [2017]e KLR**.

37. It submitted that the Petitioners' rights alleged to have been infringed are based on untruths that there was no public participation while there is evidence that public participation forums were conducted on 30th August 2017 thus the Petitioner cannot pinpoint the alleged rights

infringed on and the manner in which they were infringed thus the petition is not merited. It cited the case of **Law Society of Kenya v Office of the Attorney General & another; Judicial Service Commission (Interested Party) [2020]e KLR** & the case of **Annarita Karimi Njeru v Republic[1979]e KLR**.

38. Citing the Canadian Supreme court case of **R.V.Oakes [1986] 1 S.C.R 103**,it submitted that preservation of life and livelihoods of the overall Lindi ward residents is a pressing and substantial concern that would warrant the limiting of a narrow private right.

39. It added that the road is a central pillar to Lindi Ward residents as it upholds their right to life, property, environment, economic and social rights which is a sufficient objective that could give leeway to the limitation of rights that the Petitioners have complained about which is merely that they were never consulted.

40. It submitted that asking the people encroaching on the access road to make way for its expansion was the only reasonable and justifiable way to obtain the objective of constructing the road. It added that the 2nd Respondent took advantage of the existing infrastructure which are the roads already in place rather than creating new roads altogether thus ensuring minimal or no displacement of persons and/or destruction of property.

41. It was its submission that it did not infringe on the Petitioners' rights as the persons who encroached on the road were only required to move voluntarily and it also indicated in advance which specific road would be constructed, the costs, the period and the persons responsible which are the perfect elements of transparency, good governance, accountability and a reflection of the national values and principles under Article 10 of the Constitution of Kenya.

42. It cited the case of **Swaminarayan Flats v Attorney General [2018] eKLR** to submit that illegal encroachers of an already existing access road cannot be compensated as they constructed illegal structures with full knowledge that they were doing so on an access road.

The 1st, 3rd & 4th Respondents submissions

43. They are dated 25th October 2010 and they addressed the issue whether the Petitioners should be granted conservatory orders as sought.

44. The 1st, 3rd & 4th Respondents relied on the Supreme Court of Kenya's decision in the case of **Gatirau Peter Munya (supra)** to submit that the Petitioners' application had not met the threshold for grant of orders sought. They added that the Petitioners did not prove that they have a prima facie as they did not discharge the burden of proving that they have a prima facie case by way of evidence that would be said to have any probability of success.

45. They also submitted that the Petitioners did not show that they would suffer prejudice if the conservatory orders sought are not granted. They relied on the case of **Simon Kioko Kithaka & 18 others v County Government of Machakos & 2 Others [2018]e KLR**.

46. They added that the orders sought would not promote constitutional values as they would serve to propagate an illegality. In that regard, they cited the case of **County Assembly of Machakos v Governer, Machakos County & 4 others [2018] eKLR**.

47. They also submitted that the petition and the application do not meet the threshold of a constitutional petition in the guise presented ostensibly on behalf of the Nubian Community.

48. I have considered the Notice of Motion, affidavits in support and the annexures. I have also considered the affidavits in response, the rival submissions and the authorities cited. The issues for determination are:-

i. Whether the Plaintiff's/Applicant's application meets the threshold for grant of conservatory orders.

ii. Who should bear costs of this application?

49. It is the Petitioner's case that in 2017, the Ministry of Lands allocated the Nubian Community land in Kibra under Grant Number IR 149108 which is approximately 288 acres. The land is managed by the 1st Petitioner Kibra Nubian Community Land Trust (the "Nubian Trust Land") on behalf of the community.

50. The Petitioners further state that on 23rd April 2020, Major General Mohamed Abdalla Badi the Director –General of Nairobi Metropolitan Services declared the "informal settlements of Sangombe (with exception of Ayany and Olympic Estate), Lindi, Makina and Laini Saba within the Kibra Constituency in Nairobi as a special planning area". Under the Physical and Land Use Planning Act, 2019 by Gazette Notice No 3432 P1872 published on 8th May 2020.

51. The further state that on 23rd February 2021, the Director General Badi, announced that Nairobi Metropolitan Services would either construct or improve 28 Kilometers of tarmacked roads in Kibra. The announcement was not preceded by public participation, consultative forums, dissemination of information or citizen engagement with the persons that would be affected.

52. Yassin Mohammed in his affidavit sworn on 2nd June 2021 states that on 25th May 2021 Nairobi Metropolitan Services erected a bill board announcing the project; "NCC/WDT/T 362/2019-2020 construction of Legio Maria Road". As a result some structures were marked for demolition.

53. In his affidavit, Engineer Thomas Rukenya, the Resident Engineer, supervising construction of Legio Maria Road in Lindi Ward stated

that during a stakeholders forum held on 30th August 2017, attended by 55 representatives from Lindi ward, Legio Maria Road which was said to be in accessible was proposed for construction.

54. He further stated that following public participation construction of the road was planned and budgeted for under ward development programme for the year 2020/2021.

55. He further stated that some sections of the road had been encroached by residents and it was agreed that the contractor marks the extent of the road reserve and erect a publicity board to enable issuance of enforcement notices.

56. I find that these averments by the Resident Engineer have not been controverted by the Petitioners.

58. His averments are supported by those of Abwao Eric Odhiambo, the 2nd Respondents' Solicitor who stated that the residents of Lindi have all along been aware of the Legio Maria Road project. The claim by the Plaintiffs that there was no public participation therefore fails.

58. I agree with the 2nd Respondent's submissions that the Petitioners have brought this petition in their private capacity as member of Nubian Community and not in public interest as defined in **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others [2014] e KLR**.

59. In the case of **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014] eKLR** the Supreme Court of Kenya set out the requirements that a party has to satisfy in order to be granted conservatory orders. In the case of **Law Society of Kenya v Office of the Attorney General & another; Judicial Service Commission (Interested Party) [2020] eKLR** cited the case of **Annarita Karimi Njeru v Republic [1979] eKLR** the court summarized the said principles for grant of conservatory orders as follows:-

a. First, an Applicant must demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he/she is likely to suffer prejudice.

b. The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.

c. Thirdly, the court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.

d. The final principle for consideration is whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.

60. I find that public interest lies in favour of allowing construction of a road that will benefit all residents of the area.

61. I find that the Petitioners/Applicants have failed to demonstrate that they deserve the grant of conservatory orders.

62. This court however is of the view that the demolition ought to be carried out humanely.

63. In conclusion, I find no merit in this application and the same is dismissed. The costs do abide the outcome of the Petition.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 17TH DAY OF FEBRUARY, 2022

.....

L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the Petitioners

Mr. Kamau for the 1st, 3rd and 4th Respondents.

Mr. Mbulo for the 2nd Respondent

Steve - Court Assistant