



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Petition 1 of 2013**

**MOHAMED KALAMA ABEID**

**YUSUF KARAMA TIMINI**

**OMAR ABDALLA HASSAN**

**MOHAMED MBARAK ALI**

**TWAHA MBARAK ALI**

**MBARAK TAISIR MBARAK.....PETITIONERS**

**VERSUS**

**THE MVITA CONSTITUENCY DEVELOPMENT FUND COMMITTEE.....1ST  
RESPONDENT**

**ROLINS INVESTMENT LIMITED.....2ND RESPONDENT**

**RULING**

(1) The Petitioners who are the registered proprietors of parcels of land set out in the Petition dated 9/1/2013 seek relief by way of (a) a declaration that the Respondents' decision to arbitrarily and capriciously construct a road encroaching on the Petitioner's parcels of land is in breach/violation of the Constitution and the Bill of Rights Articles 10, 27, 40, 47 and 50 (1) of the Constitution of Kenya (b) a mandatory order directing a joint survey as to the beacons identifying the road limits in relation to the Petitioners' plots and (c) an injunction restraining the Respondents by themselves their servants and/or agents from constructing of road of whatever nature encroaching into the Petitioners parcels of land, together with costs of the proceedings.

(2) Pending the hearing of the Petition, the Petitioners by Chamber of Summons dated 9/1/2013 sought a conservatory order in terms of the injunction order (now spent); an order for a surveyor's report or alternatively an order for a joint survey regarding the extent of the subject road in relation to the Petitioner's parcels of land; and an interim injunction in the same terms as the permanent injunction sought in the petition. The prayer for an order for a surveyor's report was granted by consent of the Parties when the application first came for hearing before me on 15/1/2013. It is the application for interim injunction which is the subject of this ruling.

(3) The Applicant's case as set out in the Petition and the affidavit of the 1<sup>st</sup> Petitioner in support is that the Petitioners' subject property whose title deeds and certificates of official search are annexed are located at Mwembe Tanganyika area of Mvita Constituency and are fronted by an access road on which

maintenance works had began early in the year. In undertaking the said maintenance works, the Respondents, respectively the CDF Committee for the constituency and the roads contractor hired for the job, had unlawfully and without due process relating to acquisition of private property caused to be enlarged the said access road so as to encroach approximately 65% into the Petitioners' property. The Petitioners' efforts to have the Respondents stop the construction had been fruitless and the Respondents had engaged police security for bulldozers to carry out the alleged illegal construction.

(4) In a Replying Affidavit by Collins Ochieng Ouma, a Director of the 2<sup>nd</sup> Respondent opposed the application on three principal grounds namely;

i. THAT the access road is a well known road appearing on map of Mombasa and google map as an existing road.

ii. THAT the Petitioners' title deeds are suspect and that an earlier suit filed by two named persons, who are not the Petitioners, seeking to stop the road construction and respecting the same parcels of land, being HCCC 223 of 2006 had been dismissed on 2/7/2012.

iii. THAT **“on the ground no developments have been made on the road at all and by constructing we have not demolished any building or structures at all including even Tin Kiosks which are by the side of the road.”**

(5) During the hearing of the present application, it turned out that the Respondents had obtained an ex-parte order from the Chief Magistrate's Court, in **CMCC No. 1 of 2013**, against the two persons named as Plaintiffs in the HCCC 223 of 2006, restraining the two said persons who are not parties to the present proceedings, **“by themselves, their friends, members of their group, followers, servants and agents [from] stopping, stalling, obstructing or in way by whatsoever interfering with the construction, repair and maintenance by the Plaintiff through its servants and agents of Mwembe Tanganyika access road in Mvita Constituency pending inter-partes hearing on th application on 28th January 2013.** The order which was made ex-parte and could therefore only last for 14 days was illegally granted for 24 days with a further directive that **“the OCS Makupa Police Station do provide security during the construction work.”**

(6) Against that background, counsel for the parties, **Mr. Mogaka** for the Petitioners and **Mr. Katete** for the Respondents, made oral submissions in support of their clients' respective positions. In urging the Petitioners case, Counsel set up the Petitioners' right to protection of property under Article 40 of the Constitution and the sanctity of title under the Registered Land Act Cap 300 and the new Land Registration Act. Counsel submitted that the Petitioners were not against the construction of the road, only that due process be followed in the exercise. He cited the South African case in **Fedsure Life Assurance and 9 others V Greater Johannesburg Transitional Metropolitan Council and 4 others (1998) ZACC 17** on the proposition that public power is only legitimate where lawful and a local government could thus only act within the power lawfully conferred upon it.

Regarding the effect of court case **HCCC 223 of 2006 and CMCC No. 1 of 2013**, aforesaid, Counsel underscored the principle of fair hearing under Art. 50 of the Constitution in pointing out that the Petitioners were not parties to the two suits. Counsel emphasized the unlimitability of the right to fair trial in terms of Article 25 of the Constitution and cited the **National Director of Public Prosecutions & Another v. Yasien Mac Mohamed and 3 others CCT 44/02** on the need to observe the *audi* rule to grant fair trial to individuals.

(7) Relying on the principles for the grant of temporary injunctions, Counsel for the Respondents analyzed the Applicant's case on the **Giella v. Casman Brown [(1973) EA 385]** tests of prima facie case, appropriateness of damages and balance of convenience and submitted that the Applicants had not made out a case for the grant of the interlocutory injunction. Counsel said;

**“The Plaintiff does not establish a prima facie case. Only three aspects of documents, 6 title deeds and 6 certificates of search and lastly a map. The existence of a title deed alone does not amount to**

**sufficient evidence with regard to the boundaries and issue of encroachment and with regard to the searches, the same consideration. The map annexed appears to be a subdivision plan. The source of the map is not indicated.”**

Counsel observed the discrepancy between the maps relied on by the Applicants and the Respondents as regards to the existence of the road. Counsel further submitted that the injury to the Petitioners could adequately be compensated by an award of damages and that the balance of convenience lay with construction of the road because **“by the time the Petitioners came to court, tenders for the works had been given and construction had been started and a big portion of the road had been done.”**

(8) Both parties agree as to the existence of the road and only its extent in relation to the Petitioners' parcels of land is to be established. That aspect of the matter is underway following the consent order for the Provincial Surveyor to establish the boundaries of the road in relation to the Petitioners' parcels of land, issued on 15/1/2013. Counsel for the Applicant submitted that **“there is a road fronting the plots. The maps shown by the Applicants indicate a road and the plots. The dispute is about the boundary and beacons of the property.”**

(9) The issue for determination in this application, therefore, is whether the Respondents will be restrained from proceeding with the construction of the access road pending the hearing of the Petition. I have considered that in accordance with the decision in **Mbuthia v. Jimba Credit Corp. Limited (1988) KLR 1** that the correct approach in dealing with an application for interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relative strength of each side's propositions.

(10) The Applicants have title deeds to the parcels of land and there is no evidence, apart from the Respondents' suspicion, that the titles were unlawfully obtained. As such, the Petitioners are entitled to Article 40 rights for protection of property until it can be demonstrated and a finding of the Court made that the parcels of land were unlawfully acquired in terms of Article 40(6) of the Constitution. It can be no answer to Petitioners whose constitutional property rights are threatened to be told that damages in compensation will be adequate. A court of justice must aim to preserve the property pending determination of the rights of the parties. The State does however have power to compulsorily acquire private property subject to payment of just compensation through a process under the law which has not been put in place in the present case. The matter in my view calls for the balance of the private rights of the Petitioners against the public interest in the development in the access road. Without prejudice to the right of compulsory acquisition of the State under Article 40(3)(b) of the Constitution, the Petitioners' private right to the property must be upheld up to the point where the State initiates procedure for compulsory acquisition or upon a finding of illegality by Court.

(11) In the meantime, as the parties agree to the existence of a road, fronting the petitioners parcels of land according to the Petitioners, the same may be upgraded to the existing dimensions only, assuming that these are outside the Petitioners' parcels, without expansion into the Petitioners' parcels of land as alleged by the Petitioners. The Provincial Surveyor who has been directed by the court with the consent of the parties to establish the extent of the road in relation to the Petitioners' parcels of land will assist in demarcating the existing extent of the road for purposes of the construction. Any further extension of the road must await the final determination of the Petition.

(12) Accordingly, for the reasons set out above, I make the following orders on the Petitioners' Chamber Summons dated 9/1/2013:

(a) The Respondents are restrained by themselves, their servants and/or agents from constructing any road or other construction on the Petitioners' parcels of land set out in the Petition.

(b) The Respondents are at liberty to proceed with the upgrading of the existing road to the extent that it does not encroach into the Petitioners' parcels of land aforesaid and should such upgrading not be possible, further construction on the road to await the hearing and determination of the Petition.

(c) The Provincial Surveyor is directed to demarcate the existing road for purposes of the upgrading

pursuant to (b) above.

(13) In view of the need to settle the matter once and for all to permit the full development of the road, if necessary upon acquisition with payment of just compensation to the Petitioners, I, in accordance with Order 1 Rule 10 of the Civil Procedure Rules, direct that the Petitioners' Petition be served upon the Municipal Council of Mombasa, the Land Registrar, Mombasa and the Hon. Attorney General as necessary parties, and that hearing dates for the Petition be fixed on priority basis.

**Dated and delivered this 22nd day of January 2013.**

**EDWARD M. MURIITHI**  
**JUDGE**

In the presence of:

..... for the Applicant

..... for the Respondents

..... Court Clerk