



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Mingate v Director General, Kenya Rural Roads Authority & 2 others  
(Petition E003 of 2022) [2022] KEELC 3344 (KLR) (30 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3344 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA  
PETITION E003 OF 2022**

**JM KAMAU, J**

**MAY 30, 2022**

**BETWEEN**

**DOROTHY KWAMBOKA MINGATE ..... PETITIONER**

**AND**

**DIRECTOR GENERAL, KENYA RURAL ROADS AUTHORITY .... 1<sup>ST</sup>  
RESPONDENT**

**PERMANENT SECRETARY, MINISTRY OF ROADS, PUBLIC WORKS,  
TRANSPORT AND HOUSING ..... 2<sup>ND</sup> RESPONDENT**

**MAHAN LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The petitioner/applicant has moved this court for an order that pending the hearing and determination of this petition, there be an interim order of injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents from entering upon, trespassing onto, taking possession, building a road and/or in any other way whatsoever interfering with the petitioner's/ applicant's rights over the parcel of land LR No. Central Kitutu/ Bogetaorio/ 2173. There is also a second prayer for a Conservatory Order. The application is based on the grounds that the suit property is registered in the name of the petitioner yet the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents have commenced and sanctioned activities on the suit land which activities have restricted, interfered with and/or limited the petitioner's rights over the suit land viz. creating a road on the petitioner's parcel of land which may amount to compulsorily acquiring the Petitioner's land unlawfully and without regard to the due process of the law. This, if effected, would lead to the petitioner suffering substantial and/or irreparable loss.
2. These averments are contained in the petitioner's supporting affidavit sworn on February 23, 2022. The 1<sup>st</sup> respondent through a replying affidavit sworn on April 19, 2022 by her Engineer Philemon K. Kandie opposed the petitioner's application. Mr. Kandie states that the 1<sup>st</sup> Respondent is undertaking



the construction and/upgrading to bitumen standard the Kemera – Kendege – Eberge – Gachuba – Keumbu road which road has always been in existence on the ground. He further depones that the survey work plans acquired from the Ministry of Lands established that there was encroachment into the road boundary especially at Kemera market since the available road reserve does not conform to the authentic road reserve of 12.5 metres wide as scaled from the Registry Index Maps. He says he is aware that the petitioner had constructed a brick wall on the boundary of the road reserve which perimeter wall had encroached onto the road corridor and that construction works on the disputed area have stopped, awaiting the Land Registrar’s Report. The 1<sup>st</sup> Respondent wrote to the petitioner explaining to her the findings of investigations conducted by the Authority vide letter dated February 8, 2022 and even gave her a sketch map of the area showing the extent of her encroachment.

3. On 26/4/2022 the petitioner swore a further affidavit protesting that in the replying affidavit, Engineer Kandie does not disclose the size of the road corridor and that she never participated in the survey work in which she was not involved and she continues to lament that her neighbours’ fences and houses on the other side of the road, which she believes encroach onto the road reserve, were not affected in this exercise.
4. When they appeared before me, I asked both Counsel to make oral submissions in court but they failed to do so by arguing outside the court that on the day they were supposed to come and make the oral submissions in court, they would request the court to give them time to file written submissions. After the court overruled them, both Counsel asked the court to make a Ruling on the application placed before court which I am duty bound to do.
5. The petitioner is seeking for interim conservatory orders against the respondents.
6. The law on conservatory orders is now well settled in this jurisdiction and is backed by myriads of authorities for instance, in *Centre for Rights Education and Awareness (CREAW) & another v Speaker of the National Assembly & 2 others* [2017] eKLR the court was emphatic that: -

A party who moves the court seeking conservatory orders must show to the satisfaction of the court that his or her rights are under threat of violation; are being violated or will be violated and that such violation, or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending case or Petition.”
7. Article 23 of *the Constitution* of Kenya as read with the provisions of article 165 and rule 23 of *the Constitution of Kenya (Protection of rights and Fundamental Freedom) Practice and Procedure Rules, 2013*, (otherwise referred to as “the Mutunga Rules”) clearly grants this Honorable court powers to hear and determine an application for conservatory orders or interim orders in order to secure the subject matter in dispute. Rule 23 of the Mutunga Rules provides: -
  - 1) Despite any provision to the contrary, a Judge before whom a petition under rule 4 is presented shall hear and determine an Application for conservatory or interim order.
  - 2) Service of the application in sub rule (1) may be dispensed with, with leave of the Court.”
8. From various authorities of the courts the principles required to be satisfied before granting conservatory orders or interim conservatory orders comprise of the following: -
  - 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.
9. I do not think there is any harm that will result more than has already so far occurred necessitating immediate remedial attention or redress by the court. Further, whatever has been done or is to be committed is capable of being redressed by way of damages. The balance of convenience and public interest tips in favour of the respondents and the general public at large rather than the applicant. However, should the interests of the applicant be found to have been trodden down illegally, the applicant will invariably be compensated.
10. In conclusion, I find that the applicant has not met the threshold for the grant of conservatory Orders. As such her application dated 23/02/2022 is disallowed.
11. The costs of the application shall abide the outcome of the petition.
12. It is so ordered.

**RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 30<sup>TH</sup> DAY OF MAY, 2022.**

**MUGO KAMAU**

**JUDGE**

**In the Presence of: -**

Court Assistant: Sibota

Appellant: N/A

Respondents: N/A

