



Nduba & 2 others v Kenya Urban Roads Authority & 5 others (Environment & Land Case 54B of 2022) [2022] KEELC 14994 (KLR) (23 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14994 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 54B OF 2022
A NYUKURI, J
NOVEMBER 23, 2022**

BETWEEN

**JOHN NDUBA 1ST PLAINTIFF
MUSYOKI KALOKI MBUI 2ND PLAINTIFF
TIMOTHY MUNYAKA MUSEMBI 3RD PLAINTIFF**

AND

KENYA URBAN ROADS AUTHORITY AND 5 OTHERS DEFENDANT

RULING

1. Before court is a notice of motion dated July 26, 2022 filed by the plaintiffs seeking the following orders;
 - a. Spent
 - b. Spent
 - c. This honourable court be pleased to issued an order of interlocutory injunction restraining the respondents either through themselves, servants or agents from carrying out development of whatever nature including digging, levelling, construction of roads, constructions of any wayleave and or any structures and from implementing any development of whatever name on the suit property; including the implementations of any project on the suit property pending the hearing and determination of the suit filed herein.
 - d. That costs of this application be provided for;
2. The application is premised on the affidavit of John Nduba the 1st plaintiff sworn on July 25, 2022. The applicants case is that they are the registered proprietors of land title number Mavoko Town Block 3/87708, title number Mavoko Town Block 3/6275 and title number Mavoko town block 3/27041 situated in Machakos County (hereinafter referred to as the suit properties). They further stated that



- the 5th and 6th respondents on instructions of the 1st respondent moved into the suit properties and commenced road construction alleging that the same had been reserved for the said use.
3. The applicants argued that the suit properties have not been compulsorily acquired by the 1st, 4th or 5th respondent and therefore the aforesaid road construction is in violation of their proprietary rights protected by the *Constitution*. They complained that the procedure adopted by the respondents in compulsorily acquiring the suit properties did not comply with the statutory and constitutional procedures for compulsory acquisitions, as no gazette notice was issued and there was no compliance with the *Land Act*. Their position was that the defendants project continue to cause irreparable damage and loss to the applicants.
 4. The application was opposed. Abdulkadir Ibrahim Jatani, the deputy director in charge of surveys at the Kenya Urban Roads Authority (KURA) swore an affidavit dated October 25, 2022 in opposition of the application. The respondents case is that there is a 25 kilometres road named Devki-Kinanie-Joska Road, which has been in use by the general public and motorists for many years without objection from the applicants, which has all along been maintained and upgraded by KURA.
 5. The respondent stated also that after a long usage, the road became due for improvement and KURA procured the services of the 5th and 6th respondents to upgrade the road on July 15, 2021. Their position is that the improvement works were confined to the existing road corridor or reserve of the said Mombasa Road – Kinanie - Joska road.
 6. Further that prior to commencement of the improvement of the road the 1st defendant held consultative meetings with the applicants and others on September 8, 2021, September 28, 2021 and February 23, 2022. That this was to create awareness and seek support and cooperation of the plaintiffs, which they accepted and allowed the works to proceed.
 7. The 1st respondent was categorical that the portion claimed by the applicants is part of the road that had not been developed and that the same was public land. They stated that injunctive orders will forestall the project and elevate private interests contrary to public policy and that any damage that may be suffered by the applicants will be compensated by way of damages.
 8. Although parties were directed to file submissions, none of them complied.

Analysis and determination

9. I have carefully considered the application as well as the replying affidavit. The issue for determination is whether the applicants have met the conditions for grant of interlocutory injunction.
10. Principles for grant of interlocutory injunctions are well settled. The applicant must demonstrate a prima facie case with chances of success; that if the injunction is not granted, he will suffer irreparable injury and where the court is in doubt, it will decide on the balance of convenience. (See *Giella vs Cassman Brown (1973) EA 358*).
11. The applicants have stated that they are the registered proprietors of the suit properties. They annexed copies of their titles to demonstrate that fact. The respondents position is that there is a 25 kilometres road named Devki-Kinanie-Joska road; which has been in use by the public and motorists, which has for a while been maintained by the 1st respondents without objection from the applicants and that the improvements are only in the road corridor/reserve, hence the portion claimed is public land. Have the applicants demonstrated a prima facie case? In my considered view, they have. They have shown ownership of the land and also their contention that no procedures for compulsory acquisition have been undertaken by the defendant, have not been substantively rebutted



12. On whether the plaintiffs have demonstrated that they may suffer irreparable injury if the injunction is not granted, the applicants argued that the project by the defendants will cause tension in the community and the same was in violation of the applicants' rights. An irreparable injury was described in the case of *Pius Kipchirchir Kogo vs Frank Kimeli Tenai (2018) eKLR* as follows;

Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.

13. The applicants assertion that improving/constructing the road in issue will violate their proprietary rights is not in my view an injury beyond compensation in damages. Once the applicants demonstrate ownership of the suit property at the hearing, they will have opportunity to seek for compensation which any person whose property is compulsorily acquired, is entitled to. In my view therefore, there is no demonstration on the part of the applicants that they stand to suffer irreparable injury incapable of being compensated in damages.
14. In the premises, the application dated July 26, 2022 lacks merit and the same is dismissed with costs to the 1st respondent.
15. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 23RD DAY OF NOVEMBER, 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A NYUKURI

JUDGE

In the Presence of;

Ms Mutinda holding brief Mr Ayieko for Plaintiffs.

Ms Adomeyon holding brief for Mr Motari for 1st, 3rd, 4th and 5th Respondents

No appearance for 2nd Respondent

Court Assistant – Josephine

