



Onditi & another v Kenya Rural Roads Authority & 2 others; National Land Commission (Interested Party) (Environment & Land Petition E001 of 2023) [2023] KEELC 15810 (KLR) (2 March 2023) (Ruling)

Neutral citation: [2023] KEELC 15810 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT & LAND PETITION E001 OF 2023**

E ASATI, J

MARCH 2, 2023

BETWEEN

EDWIN OMULAMA ONDITI 1ST PETITIONER

EMILLY M'MBONE MULINYA 2ND PETITIONER

AND

KENYA RURAL ROADS AUTHORITY 1ST RESPONDENT

WORLD SYSTEM ENGINEERING LIMITED 2ND RESPONDENT

LAND REGISTRAR VIHIGA DISTRICT LAND REGISTRY 3RD RESPONDENT

AND

NATIONAL LAND COMMISSION INTERESTED PARTY

RULING

1. This Ruling is in respect of the Petitioner's Notice of Motion Application dated January 5, 2023 seeking a temporary injunction to restrain the 1st and 2nd Respondents by themselves, their servants or agents from constructing, maintaining or improving Mago-Mululu-Wangulu (E 240) Road in a manner to trespass out the suit property namely North Maragoli/Kedoli/1422 pending hearing and determination of the Petition. The application was stated to be brought pursuant to the provisions of Article 23(3)(b) of the *Constitution* of Kenya, 2010 Section 1A, 1B and 3A of the *Civil Procedure Act* and Order 40 Rule 1, 2, and 8 and Order 51 of the *Civil Procedure Rules 2010*. The ground upon which the application is brought are contained in the application and the Supporting Affidavit sworn by Edwin Omulama Onditi on January 5, 2023.
2. The application was opposed. The 1st Respondent opposed the application vide the grounds contained in the Replying Affidavit of Fredrick Otieno Okong'o on January 16, 2023.



3. The application was argued by way of written submissions.
4. The applicants' case is that they are the joint registered properties owners and occupiers of land parcel known as North Maragoli/Kedoli/1422 situated in Sabatia Sub-county of Vihiga County (the suit land herein). That the suit property is located along Mago-Muluku-Wangulu(E 240) road towards the direction of Chamakanga shopping centre from Busali. That the Applicants had carried out due diligence during purchase and established that the suit land was not in the road reserve.

That the 3rd Respondent undertook a boundary determination exercise on September 22, 2012 but is to date yet to avail the report in respect thereof. That on November 15, 2022 and without notice the 2nd Respondent using earth moving machines brought down the gate to the suit property and posts supporting the barbed wire fence, uprooted the live Cyprus fence hooked down a first constituting at 45 fully grown exotic trees that were planted thereon and encroached onto the suit land by 0.02 hectares. That the Petitioners reported the incident to the police and the same is recorded as OB.05/17/11/2022 at Chamakanga police post.

That the 1st and 2nd Respondents are continuing at full stream into the project works to complete, utilize and use the compulsorily acquired portion of the suit land without paying compensation to the prejudice of the Petitioners as required under Part VIII of the Land Act No.6 of 2012. That the Respondents have tampered upon the Petitioners' fundamental rights and freedom and that they should be held to account.

5. The 1st Respondent's case is that the 1st Respondent was undertaking the construction and/or upgrading to bitumen Standard of Mago-Mululu-Wangulu road under contract number KeRRA/RWC/625. That the public was informed that the construction of the road shall be contained within the available road reserve and that no additional land would be required from the neighbouring parcels. That the 1st Respondent had contracted M' Big Company Limited as the contractor for the works. That the works done by the contractor on the Petitioner's land was without the authority of the 1st Respondent and against express instructions of the 1st Respondent to the effect that there was no need for the expansion of the road, brought down the gate, exported the barbed wire fence, hacked down a forest and encroached onto the Petitioner's parcel of land. That the 1st Respondent is not interested in exercising any compulsory acquisition of land and is fully aware of the procedures of law when acquiring private land.

That the application is bereft of the requirements for the grant of compulsory injunction as sought because the dispute is within a stretch of about 100 metres (km 3 + 450) and not the entire Mago-Mululu-Wangulu road which is being upgraded for the benefit of the Petitioners and the general public. That the 2nd Respondent did some maintenance works on the road in the year 2019 but the current dispute involves works done by M'Big Company Limited. That the 2nd Respondent has nothing to do with the current works. That the application ought to be dismissed.

6. It was submitted on behalf of the 1st Respondent that the grounds for grant of orders of injunction have not been demonstrated. That the 1st Respondent is not vicariously liable for the actions of the Contractor and that the court should consider the public interest in the matter. It was further submitted that the Applicants will not suffer irreparable injury as damages are an adequate remedy in the circumstances of the case. That court should no make an order in vain.
7. That 2nd Respondent has so far not filed any response to the application.
8. The 3rd Respondent entered appearance and filed response to the petition but did not respond to the application.



9. Counsel for the Interested Party relied on the provisions of Section 18 of the Land Registration Act, the case of Kamau Macharia vs Dexka Limited [2019] eKLR and Shadrack Korir vs Felix Kipkemboi Simei & 2 Others [2020] eKLR and submitted that it is the Land Registrar who has the mandate to resolve the boundary dispute. Relying on the case of Trusted Society of Human Rights Alliance vs Mumo & 2 Others [2015] Eklr, Counsel submitted further that the Interested Party is wrongly joined in the suit as it has no interest in the matter not will it be affected by the decision of the court.
10. I have considered the contents of the Notice of Motion application, Supporting Affidavit, the Replying Affidavit and submissions made. It is not in dispute that the 1st Respondent is undertaking works on Mago-Mululu-Wangulu road along which the suit land is situated. It is not in dispute that the suit land belongs to the Petitioners/Applicants. It is the 1st Respondent's case that the Boundary between the Petitioners' land the road reserve is not disputed and that the road reserve was enough for the works and that the Petitioners and general public were so assured and the Contractor instructed to confine the works within the road reserve. It is further not disputed that nonetheless, the Contractor encroached onto the suit land and destroyed property thereon belonging to the Petitioners. The 1st Respondent's defence is that the Contractor exceeded its instructions and trespassed onto the suit land and destroyed property and hence should bear responsibility for its actions. Whether that is a valid defence or not is a matter for determination in the petition that seeks for apportioning of liability, compensation and damages. At this stage what is sought from the court is protection of the suit property from further encroachment and destruction. My view is that whether it be the 2nd Respondent or M' Big Company Limited who is the Contractor, there is need to preserve the suit property.
11. When measurements were taken, it was established and the Petitioner and the general public were assured that the road reserve was sufficient for the works and that the Petitioners' property, the suit land herein could not be affected or trespassed onto during the works. It is further not disputed that nonetheless, the contractor encroached onto the suit land and destroyed property belonging to the petitioners on the suit land. It is not also not disputed that the 1st Respondent is the one undertaking the upgrading works on the road and the Contractor has been contracted by the 1st Respondent. The 1st Respondent is not the one responsible for the works. My view is that whereas it be the 2nd Respondent or M' Big Company trusted there to preserve the suit property.
12. The grounds for grant of interlocutory order of injunction as set out in the case of Giella vs Cassman Brown are that the Applicant must demonstrate a *prima facie* case with a probability of success, that irreparable loss will be occasioned to the Applicant if the order sought is not granted and that when the court is in doubt, it shall decide the matter on a balance of convenience.

I have read the wordings of the prayer sought for temporary injunction in the application and notice that the Petitioners do not seek to stop the whole exercise of constructing or upgrading the road. They seek to stop construction works that will be done in a manner to trespass onto the suit property. In other words, the Petitioners are seeking to have 1st and 2nd Respondents restricted to the road reserve only early as assured by the 1st Respondent.

I find that a *prima facie* case has been established and that failure to grant the prayers sought will cause the Petitioners irreparable injury as the Contractor who could not abide by the instructions of its Principal may once again interfere with the suit land.

I find merit in the application and allow it as follows:-

- i. An order of temporary injunction is hereby granted restraining the 1st and 2nd Respondents by themselves, their servants or agents from constructing, maintaining or improving Mago-



Mululu-Wangulu (E 240) Road in a manner to trespass onto the suit property namely; North Maragoli/Kedoli/1422 pending hearing and determination of the Petition.

ii. Costs in the Petition.

Orders accordingly.

RULING DATED AND SIGNED AT KISUMU, DELIVERED VIRTUALLY THIS 2ND DAY OF MARCH, 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI

JUDGE

In the Presence of:

Maureen: Court Assistant

Omulama Advocate for the Petitioners/Applicants

No appearance for the 1st Respondent

No appearance for the 2nd Respondent

No appearance for the 3rd Respondent

No appearance for the Interested Party.

