



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC PETITION NO. 12 OF 2021

PRAIRIE COOPERATIVE SOCIETY LTD.....PETITIONER

VERSUS

KENYA URBAN ROADS AUTHORITY.....RESPONDENT

RULING

Application

1. The petitioner moved the court through notice of motion dated 29/7/2021 brought under **Articles 10, 46, 60(1) (b) 64, 22 and 23** of the **Constitution of Kenya** and **Sections 25 and 26** of the **Land Registration Act** seeking the following orders:

(1) ...spent

(2) That pending the hearing and determination of the petition, there be a conservatory order restraining the respondents, their employees, servants and/or agents from trespassing/constructing a road on the applicant's land measuring 4 meters from one end to the other of the road running through L.R Nos 4730/373, 4730/374, 4730/375, 4730/376, 4730/372 and L.R No. 4730/6/18.

(3) That pending the hearing and determination of this application there be a conservatory order staying the illegal actions of the respondent of grabbing a portion measuring 4 meters out of L.R 4730/45 running from one end to the other encroached upon by the respondent for purposes of constructing a road running between L.R No. 4730/373, 4730/374, 4730/375, 4730/376, 4730/372 to 4730/6/18.

(4) That this Honourable court do make such further orders as may meet the ends of justice in this matter.

(5) That the cost of this application be borne by the respondent.

2. The application is supported by the affidavit sworn on 29/7/2021 by Titus Kiragu where he deposed that he is a secretary to the petitioner; that **L.R No. 4730/42 and 4730/45** are the properties of the petitioner and have been combined into one title that is the suit property herein; that the petitioner has **23** members who reside within the suit property and that around **1993** the petitioner engaged the services of a surveyor who subdivided the suit land into **41** portions to its members.

3. He further deposed that from the map, it is indicated that the disputed road is **9** meters wide and that around in early **July 2021** the respondent embarked on the construction of the road complained of; that the members showed the respondent the map of the area and the width of the road which the respondent followed at first and by midday, the respondent changed the width and trespassed on a part of the petitioner's land measuring **4** meters and running from one end of the road to the other which is about **500** meters long; that after a lengthy discussion the respondent requested the petitioner to add $\frac{1}{2}$ a meter to the original road width which the petitioner agreed but instead of adhering to the said agreement, the respondent proceeded to construct a road of **13** meters instead of **9** meters.

4. He finally deposed that the action of the respondent is illegal and is meant to deprive the petitioner of its property without following the right channels and that the respondent's actions are a clear disregard of the law and a violation of the petitioner's right to property; it urged the court to grant it the said conservatory orders.

Response

5. The respondent did not file any response to the application.

Submissions

6. The petitioner/applicant filed their submission dated 7/10/2021 on 13/10/2021. I have perused through the court record and I have found no submissions filed on behalf of the respondent.

Determination

7. The main issue for determination in the instant application is whether the petitioner/applicant is entitled to the conservatory orders sought. The petitioner/applicant has applied for conservatory orders restraining the respondent from trespassing and or constructing a road on the applicant's land.

8. The principles to be satisfied in granting of a conservatory order was expressed by the court in the case of **Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others [2015] eKLR** as follows:

“In summary, the principles are that the Applicant ought to demonstrate *an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the Court should decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of a specific right or freedom in the Bill of Rights, and whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion whether to grant or deny a conservatory order.*”

9. Further the Supreme Court of Kenya also rendered itself on conservatory orders in the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others eKLR** as follows:

“Conservatory orders bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as ‘the prospects of irreparable harm’ occurring during the pendency of a case; or ‘high probability of success’ in the applicants case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes and priority levels attributable to the relevant causes.”

10. In the instant case, it is important for this court to establish whether the petitioner/applicant has demonstrated a *prima facie* case with a probability of success and that unless the court grants the conservatory orders there is danger that the applicant will suffer real prejudice. The petitioner/applicant has annexed a title confirming that it is the owner of the suit property. It has also annexed a copy of the map of the area showing the location of the suit land and it is a clear fact from the filings herein that a road is being constructed. From the heaps of fresh soil placed adjacent to what is described as the petitioner/applicant's property the construction appears to be recent. The petitioner/applicant submitted that the respondent has commenced construction of the said road but instead of constructing a road of 9 metres width, it has extended and encroached to the petitioner/applicant's land by 4 meters to widen the road to 13 metres. The map attached by the petitioner shows the road is 9 metres wide.

11. As stated above in the Supreme Court case, conservatory orders are of a public law connotation to facilitate ordered functioning within public agencies. The petitioner/applicant submitted that the suit property is private land and the government cannot encroach, trespass or deprive it of the land without following the laid down procedure of compulsory acquisition. It is my opinion that what is being undertaken by the respondent herein is not compulsory acquisition of land but rather the improvement of an existing road, but the respondent is now being accused of going beyond the proper measurements of that road such that it has encroached on the petitioners land in the name of building the road.

12. **Section 148** of the **Land Act** deals with compensation in respect of a public right of way.

(1) Subject to the provisions of this section, compensation shall be payable to any person for the use of land, of which the person is in lawful or actual occupation, as a communal right of way and, with respect to a wayleave, in addition to any compensation for the use of land for any damage suffered in respect of trees crops and buildings as shall, in cases of private land, be based on the value of the land as determined by a qualified valuer.

13. It is unfortunate that the respondent is not in court to explain by what authority it is carrying out its duties so as to include the petitioner's land in the construction of the subject road.

14. The other issue is whether public interest lies in granting the orders sought by the petitioner/applicant. In the **Black's Law Dictionary**, “*public interest*” is defined as:

“The general welfare of the public that warrants recognition and protection; or something in which the public as a whole has a stake especially an interest that justifies governmental regulation.”

15. It is my opinion that the public interest here lies in the construction of road for use by the public and the court should balance between the public interest with that of the petitioner/applicant's private rights. If the orders are not granted, the respondent will proceed with construction of the road, possibly infringing on the petitioner/applicant's constitutional right to property as provided under **Article 40**. The aim of the respondent's action is the improvement of an existing road. It is not that there is no road at all. In the instant case, public interest would not be greatly jeopardized if the court is to grant the conservatory orders as the road is still under construction.

16. It is not this court's duty to look into the merits of the case as that is to be heard and determined in the petition. However, from the evidence adduced by the petitioner/applicant, the same has not been rebutted by the respondent and the court should be inclined to rely on the

same as being the true position. It is therefore this court's opinion that the petitioner/applicant has satisfied the requirements for grant of a conservatory order and should be granted the same as it appears that it will suffer prejudice from the ongoing road construction if the same continues. Further, it is my opinion that if the conservatory orders are not issued at this point, the petition may be rendered nugatory hence the need to secure the substratum of the suit. In any event, granting of the said conservatory orders will only serve the purpose of preserving the status of the suit property pending hearing and determination of the petition therefore, the respondent does not stand to suffer any harm.

17. In view of the foregoing, it is my opinion that the petitioner/applicant's application dated **29/7/2021** has merit and it is hereby allowed in terms of **prayer no 2** thereof. The costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 3RD DAY OF NOVEMBER, 2021.

MWANGI NJOROGÉ

JUDGE, ELC, NAKURU.