



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC PETITION NO. E006 OF 2021

IN THE MATTER OF ARTICLES 1 (1), 2(1) (5), 3, 10, 22(1) (2), 23, 27(1), 28, 40, 43(1) (F), 47 AND 258(2) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTION 13 OF THE ENVIRONMENT AND LAND COURT ACT NO. 5 OF 2011

AND

IN THE MATTER OF THE ALLEGED CONGTRAVENTION OF THE RIGHT TO PROPERTY UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTISE AND PROCEDURE RULES, 2013

BETWEEN

LT.COL (RTD) MOHAMMED JUMA.....1ST PETITIONER/APPLICANT

THE MANAGER WESTWOOD PREMIER ACADEMY.....2ND APPLICANT

OMAR JUMA.....3RD PETITIONER/APPLICANT

IDD HAMIS JUMA.....4TH PETITIONER/APPLICANT

IDD RAJAB JUMA.....5TH PETITIONER/APPLICANT

SADIQ RAJAB JUMA.....6TH PETITIONER/APPLICANT

VERSUS

KENYA RURAL ROADS AUTHORITY.....1ST RESPONDENT

M/S TAJ ENTERPRISES LIMITED.....2ND RESPONDENT

ENG. E.K CHESEREK -

THE REGIONAL DIRECTOR KeRRA.....3RD RESPONDENT

ENG. K. OCHIENG' RESIDENT ENGINEERR

MUMIAS MUSANDA ROAD.....4TH RESPONDENT

ENG. RONALD OKAPOSE-DEPUTY RESIDENT ENGINEER

MUMIAS MUSANDA ROAD.....5TH RESPONDENT

FREDRICK OTIENO-PROJECT SURVEYOR

MUMIAS MUSANDA ROAD.....6TH RESPONDENT

R U L I N G

1. The Applicant filed the present application under the Judicature Act, CAP 8 Rule 3(2), High Court Vacation Rules, Under Sections 1A, 1B, 3A, 78(2) and 79 of the Civil Procedure Act, CAP 21 Laws of Kenya, Articles 1 (1), 2(1) (5), 3, 10, 22(1) (2), 23, 27(1), 28, 40, 43(1) (F), 47 And 258(2) Of the Constitution of Kenya 2010, Section 13 of the Environment and Land Court Act No. 5 of 2011 for orders:

a) Spent;

b) Spent;

c) That an order of temporary injunction be issued restraining the 1st, 2nd, 3rd and 4th Respondents, their servants, agents and/or any other person deriving authority from them from proceeding with the construction of that section of Mumias-Musanda Road from point 0+323M to 0+605M pending the hearing and determination of this application *inter partes*;

d) That a prohibitory injunction be issued restraining the Respondents, their servants, agents and/or any other person deriving authority from them from proceeding with the construction of that section of Mumias-Musanda Road from point 0+323M to 0+605M pending the hearing and determination of this application *inter partes*;

e) That an Order do issue directing the 1st Respondent to carry out the road mapping of the Mumias-Musanda Road from point 0+323M to 0+605M in the manner and procedure as directed by the 3rd Respondent in the letter dated 19/04/2021;

f) That an Order do issue directing the Respondents to fully comply with the directions for road mapping using the cadastral maps as per the instructions and directions of the Regional Director, Kenya Rural Roads Authority in the letter dated 19th of April, 2021;

g) Any other Orders deemed appropriate to serve the ends of justice; and

h) The costs of this application be provided for.

2. The Application was supported by the affidavit of LT. COL (RTD) MOHAMMED JUMA dated 16th August, 2021 and on the grounds *inter alia*;

a) *The Applicants are the registered owners and occupants of land parcels EKERO/1590, S. WANGA/EKERO/1587 and S.WANGA/EKETO/1588 and have legitimate interest in the construction of the Mumias-Musanda Road from point 0+323M to 0+605M which borders their land;*

b) *The Respondents drastically changed and varied the initial plan for the construction of Mumias-Musanda Road from point 0+323M to 0+605M, from the official survey they carried out on 11th March, 2021 which would have been: less intrusive, not encroaching on private land without notice and much safer for the public and students in theta read to a rigged road plan puts solely into consideration the interests of one individual, the local area Chief, over the interests of the Applicants, the local students and the general public. The Respondents have bent and meandered the road construction at this point to look like a snake to avoid the road reserve as surveyed by the Respondents own surveyors on 11th March, 2021;*

c) *That the Respondents have refused to listen to reason and are placing the lives of many local residents and students of Westwood Premier Academy in jeopardy and peril just to please the local area Chief, by not touching the road reserve on his side of the property and in this way creating a risky blind corner which endangers the applicants and the public in general and then allows for the Respondents to vary the road reserve into the Applicants/Petitioners private land;*

d) *That the Respondents, their agents and/or servants, or people acting with their authority are being used by the local administrator or are acting as mere puppets of the local administration who have joined the Respondents to rubber stamp and push through this colossal injustice and infringement of the rights of the Applicants, private citizens, the public and students who are trapped in that dangerous zone artificially made so as to accommodate the local area Chief in whose land they have been manipulated to avoid the road reserve as confirmed by the survey conducted on 11th March, 2021;*

e) *That it is just and proper and in the interests of justice that the orders sought in this Notice of Motion and Petition be granted in the interim pending the hearing of the Petition to avoid anarchy, breach of the rights of the Applicants, Respondents disregarded for the Rule of Law and to stem impunity.*

3. The 4th Respondent filed a Replying Affidavit on the 23rd of August, 2021 on his behalf and on behalf of the 1st, 3rd, 5th and 6th Respondents stating partly that: On 19th April, 2021, he received a letter from the 3rd Respondent on the complaints raised by the

Petitioners/Applicants regarding the construction of a section of Mumias-Musanda Road from point 0+323M to 0+605M which letter required him to engage the County Surveyor and carry out road mapping of the affected areas on the road using the cadastral maps from the Ministry of Lands and address the complaints by the Petitioners. That he engaged Surveyors from the Ministry of Lands and the County Government of Kakamega and thereafter the Deputy County Commissioner released communication that all members of the public to attend a meeting on the 29th of May, 2021 do demarcation of the road corridor by the Ministry of Lands. The 4th Respondent deposed further that the 1st Petitioner was allowed to invite a surveyor of his choice but he opted to attend the meeting without a surveyor.

4. The 1st, 3rd, 5th and 6th Respondents annexed the County Surveyor's report, which indicated that the Petitioners encroached on the road corridor by approximately 9 meters over a length of 280 meters. That the report was unanimously adopted following the meeting and mapping of the road exercise, as well as the erection of road reserve marker posts, so that structures within the road corridor could be removed by the affected parties.

5. According to these said Respondents, the construction of the road has since continued and the issuance of the orders sought by the Petitioners will be detrimental to the completion of the project within the agreed timelines that could lead to the loss of hundreds of millions of shillings keeping in mind that the Petitioners have not provided any security for such expenses. They added that the road design is safe and does not create a dangerous blind corner that endangers lives as alleged by the Petitioners. That the Petitioners' reliance on annexure marked MJ2B, which was an activity completed on the 31st of July, 2021, when the joint survey was completed on the 19th of May, 2021, is misplaced, and that there has been no realignment of the road to the right-hand side by 2m as alleged by the Petitioners.

6. The water lines in the disputed area along the suit road have been remained intact throughout the period of the construction of the road and there is no threat whatsoever to the supply of water within the school and the local community contrary to the allegations by the Petitioners. That the Petitioners lack the capacity to institute the present petition over the land parcel known as S.WANGA/EKERO/1589 as they have failed to demonstrate ownership of the land. That Westwood School lies on parcel number S.WANGA/EKERO/1587 and not parcel number S.WANGA/EKERO/1589 as alleged by the Petitioners;

7. The 2nd Respondent filed its Replying Affidavit on the 24th of August, 2021 sworn by ENGINEER JOHN C. CHERONGONY. He stated that on 17th June, 2020 the 2nd Respondent applied for a tender for upgrading the bitumen standards and maintenance of Mumias-Musanda road which tender was accepted by the 1st Respondent on the 1st of September, 2020. The 2nd Respondent on the 9th of September made an unconditional acceptance of the award. That before commencement of the project, due process of the law was adhered to as the survey was done on the parcels of land bordering the road to establish ownership, which survey was conducted by licensed surveyors and a report furnished to all the Respondents.

8. That the 1st Petitioner's complaints and concerns were dealt with prior to the commencement of the project by the relevant government agencies all of whom concluded that the 1st Petitioner's school had encroached on the public land where the road was to be constructed. That it is not true that the area chief refused to allow the surveyors on his land. That beacons were placed on the parcel on the opposite side of the road as the parcel was not encroaching onto public land. That the Petitioners had not provided any evidence to prove that the said parcel belongs to the area Chief as alleged, neither has the Chief ever chaired a meeting of stakeholders nor bulldozed his way in the meeting;

9. That the Petitioners' intent is to obstruct the construction of the road which has already incurred a lot of costs in machinery and labour and it is in the interest of justice that they be allowed to complete the construction. That the right to property under Article 40 (6) of the Constitution of Kenya does not extend to property that has been unlawfully acquired. He deposed that if the injunctive orders are granted, the Respondents stands to suffer irreparable loss and damage in part of the machinery being used was hired from other companies and if the Respondents were to succeed, the Petitioners might not be able to adequately compensate them for the losses.

10. The Petitioner filed a further affidavit to respond to issues raised by the Respondents in their replying affidavits. Briefly, it is deposed that the notice to attend the survey exercise was given on the same day of the exercise thus making it difficult to the Petitioners to engage a private surveyor to accompany them to the meeting. That the 4th Respondent is being careful with his language in par 30 & 31 of the replying affidavit as it serves no purpose to take extra precautions if there was no danger on the stretch complained of.

11. During the virtual hearing, I directed the filing of brief submissions because my decision was limited to granting interim reliefs pending a decision on the merits of the application. All the parties complied supporting their submissions with relevant case law. I have considered the Petitioner's brief submissions arguing that if the orders sought are not granted, their right to property will be violated. The Petitioners also claimed that the dangerous blind on the road endangers the lives of young schoolchildren. According to the Respondents, the Petitioners have not demonstrated that they have a prima facie case, as explained in their replying affidavits. That the balance of convenience weighs in their favor because the Petitioners have not demonstrated that the loss likely to be suffered is irreparable, urging the Court to deny the requested orders.

12. In response to the Petitioners' first concern, the first, third, and sixth Respondents provided a survey report indicating a 9-meter encroachment. The Petitioners, on the other hand, argue that the notice served on them was insufficient to allow them to hire a surveyor of their choice to accompany them during the exercise. The Petitioners' affidavit in support of the application detailed the steps they took to resolve the dispute, including writing several letters and attending various meetings. Despite these meetings, the Petitioners felt that their rights to fair administrative action were being violated, and that this violation was being perpetuated by the area Chief who owns the adjacent land and who has not been joined to these proceedings.

13. In my opinion, one of the grounds demonstrating the Petitioners have a prima facie case is a denial of the right to fair administrative action. As a result, I will grant an injunction for a limited period of twenty (21) days to allow a repeat of the survey exercise on September 13, 2021, to be conducted by the County Land Registrar, County Land Surveyor (Kakamega County), and the Head of GIS Section, Lands, Housing, and Physical Planning, and on which date the Petitioners shall attend with surveyors of their choice at their cost. The report must be completed and filed within three days of the exercise date.

14. The second issue, whether or not a dangerous blind is being created, is one for the trial court to decide after extensive hearings with the parties. For the time being, I will not delve into it. In view of the foregoing, the I make the following interim orders;

a) An order of temporary injunction be and is hereby be issued restraining the 1st, 2nd, 3rd and 4th Respondents, their servants, agents and/or any other person deriving authority from them from proceeding with the construction of the section of Mumias-Musanda Road from point 0+323M to 0+605M for a period of 21 days pending repeat exercise of the survey and further directions to be made by the ELC Judge Kakamega;

b) The matter be placed before the Judge in Kakamega on 16th Sept, 2021 to confirm if the Survey report is ready and filed and for giving directions on the determination of the application.

Dated, signed & delivered at BUSIA this 31st day of August, 2021.

A. OMOLLO

JUDGE