



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

PETITION CASE NO. 11 OF 2016

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 27, 28, 29, 35, 40, 43, 47 & 50 OF THE
CONSTITUTION**

AND

IN THE MATTER OF THE LAND ACT, 2012

AND

IN THE MATTER OF THE ROAD ACT, 2007

BETWEEN

ANTHONY NGILI MUNGUTI1ST PETITIONER/APPLICANT

NICHOLAS MUTHINI MUTISO2ND PETITIONER/APPLICANT

JOSHUA KASINIU INGOOTI.....3RD PETITIONER/APPLICANT

MUNANIE MWAZIA4TH PETITIONER/APPLICANT

DOMINICK MUTIE KATOO.....5TH PETITIONER/APPLICANT

ALICE KYEE KILUNGU.....6TH PETITIONER/APPLICANT

ALI-HAJI MAWEU MWANZA.....7TH PETITIONER/APPLICANT

JOHN MUSAU KILONZO.....8TH PETITIONER/APPLICANT

SYLVESTER MWINZI MWANZA.....9TH PETITIONER/APPLICANT

MWENDE NDUVA10TH PETITIONER/APPLICANT

ZAINAB SAID11TH PETITIONER/APPLICANT

MONICA NTAMBI MUSAU.....12TH PETITIONER/APPLICANT

JACKSON MAKAU MUTUNE13TH PETITIONER/APPLICANT

VERSUS

KENYA NATITON HIGHWAYS AUTHORITY.....1ST RESPONDENT

THE HON ATTORNEY GENERAL2ND RESPONDENT

RULING

1. The Substantive Application before this court is the Notice of Motion dated 9th September, 2016 filed in the Petition and is pursuant to Articles 27, 28, 29, 35, 40, 43, 47 and 50 of the Constitution and seeks the following reliefs namely:-

(a) That pending the hearing and determination of the Motion a conservatory order to issue to restrain the Respondents from demolishing or removing the Petitioners property as marked with a red "X" mark which properties lie in the following shopping/Town centres – Kaewa Kwa Mundu wa Miti, Mbondeni, Kyaani and Kivaa along Kangonde Embu road in Machakos County.

(b) That pending the hearing and determination of the petition herein a conservatory order to issue to restrain the Respondent from demolishing or removing the Petitioners property as marked with a red "X" mark which properties lie in the following shopping/Town centres – Kaewa Kwa Mundu wa Miti, Mbondeni, Kyaani and Kivaa along Kangonde Embu road in Machakos County.

(c) That costs of this application be provided for.

2. The Application is supported by affidavits of Nicholas Muthini Mutiso the second Petitioner/Applicant sworn on 9/9/2016 and 2/10/2017 and further on the following grounds:-

(a) Unless conservatory orders are issued the Respondent shall remove and/or demolish the Petitioner properties anytime from now since the thirty (30) days notice period has already lapsed.

(b) The Petitioners having occupied some of the properties since 1969 cannot be said to have constructed on a road reserve.

(c) The Petitioner's rights have been violated and continue to be violated by the actions of the Respondents.

(d) A thirty (30) days notice is unreasonable (as demanded) for the Petitioners to remove or demolish their businesses where they derive their livelihood from and no compensation having come from the Respondents.

(e) The Petitioners hold to the documents to their properties having lawfully acquired the same long before the construction of the tarmac and that the said properties should not be taken away and/or demolished without any compensation.

(f) The Respondents actions are draconian, unjust, unfair and does not amount to fair administrative action.

(g) The Petitioners livelihood entirely rest on the various businesses conducted on the premises intended to be demolished which will render them destitute.

3. The Application was opposed by both Respondents. The 1st Respondent filed a replying affidavit sworn by Engineer Michael A. Ngala who is the 1st Respondent's Regional Manager Lower Eastern. He raised the following grounds of opposition:-

(i) The Applicants cannot lay claim to a road reserve measuring 60 metres comprising a road corridor yet the Applicants have not placed any ownership documents of the alleged plots and further the alleged handwritten exercise book extracts cannot suffice as evidence of ownership of property in Kenya.

(ii) The Applicants have illegally encroached onto a road reserve and the structures marked were those within the road reserve which is not available for allotment.

(iii) Applicants cannot seek protection under Article 40 of the Constitution to any property unlawfully acquired.

(iv) The Applicants encroachment on the road reserve amounts to a criminal offence under Section 91 of the Traffic Act and such is not protected.

(v) The 1st Respondent is not undertaking any compulsory acquisition as claimed by the Applicants;

(vi) Applicants cannot claim to suffer irreparable damage as the encroachment on a road reserve cannot give rise to any enforceable legal interest.

(vii) It is the public which has been inconvenienced as a result of the encroachment by Applicants on the road reserve.

(viii) The Application does not disclose any prima facie case with probability of success.

4. The 2nd Respondent also opposed the application and filed grounds of opposition dated 18/1/2018 inter alia that the Application is an abuse of the court process; that the Applicants lack recognizable legal interest; that the Applicants cannot claim violation of rights under Article 27, 28, 29, 35, 40, 47 and 50 of the Constitution as they have failed to demonstrate their basis of ownership of the properties in question; that the letters of allotment cannot give rise to any proprietary interest in land and the 1st Respondent is legally entitled to remove

anything which has been placed on a road reserve. The cases of **WRECK MOTORS ENTERPRISES =VS= THE COMMISSIONER OF LANDS AND 3 OTHERS – NBI C.A NO. 71 OF 1997** (un reported) and **JOSEPH ARAP NG’OK= VS= JUSTICE MOIJO OLE KEIWUA – NBI CIVIL APPLICATION NO. 60 of 1997** were relied upon.

Submissions

5. Parties agreed to canvass the Application by way of written submissions.

Applicants submissions

6. It was submitted for the Applicants that their constitutional rights to property, right to accessible and adequate housing as well as right to dignity is likely to be violated unless this court issues conservatory orders pending the hearing and determination of the petition. It was further submitted that the Petitioners case meets the threshold regarding the principles enunciated in the case of **GIELLA =VS= CASMAN BROWN [1973] EA 358** in that they are in occupation of the subject properties since 1969 and hence have a prima facie case as there is need to grant conservatory orders pending the determination of the competing interests in the petition.

It was also submitted for the Applicants that there is a likelihood of the Applicants suffering irreparable harm if the conservatory order is not granted since all their families live on the said properties and that the demolition will render them homeless and destitute. It was also contended for the Applicants that the balance of convenience tilts in favour of the Applicants who have lived on the lands for over 50 years without any interference with Kangonde – Embu road. It was finally submitted for the Applicants that this court should consider the lower risk than the higher risk of injustice while determining this matter. Applicants Counsel sought reliance in the cases of **AMIR SULEIMAN =VS= AMBOSELI RESORT LTD [2004] eKLR** and **BOLDEN NELSEN =VS= HERMAN PHILLIPUS STEYA [2012] eKLR**. Also the case of **MICRO AND SMALL ENTERPRISES ASSOCIATION OF KENYA MOMBASA BRANCH=VS= MOMBASA COUNTRY GOVERNMENT & 2 OTHERS – CONST. PETITION NO. 3 OF 2014**.

1st Respondent’s Submissions

7. It was submitted for the 1st Respondent that the Applicants had encroached onto the 60 metre road corridor which serves the Kangonde – Embu road and they were duly notified to remove the illegal structures erected on the road reserve. Counsel for the 1st Respondent contended that the Applicants claims do not pass the test of a prima facie case as established in the case of **GIELLA =VS= CASMAN BROWN [1973] EA 358** as they have failed to submit an urgent case at this stage to show that they really have an arguable case warranting protection in the form of an interim injunction. It was also submitted that the Applicants have not produced any evidence pertaining to the ownership of the properties such as a certificate of title and reliance was placed in the case of **HELLEN WANGARI SAMUEL =VS= SIMON KAMAU MUNGA & ANOTHER [2013] eKLR** where the court held that in the absence of a certificate of title no prima facie case with a probability of success had been established.

It was also submitted that the Applicants who have encroached on a road reserve cannot seek refuge under Article 40 of the Constitution as they have committed a criminal offence punishable under Section 91 of the Traffic Act.

On the issue of irreparable damage, it was submitted for the 1st Respondent that the Applicants do not possess ownership documents on the land they have encroached upon and in the event that they prove valid ownership, then they can be compensated by way of damages as the properties can be valued and quantified. It is the larger public that is likely to suffer great harm compared to the Applicants as the public’s access and right to good infrastructure shall be curtailed.

On the issue of balance of convenience, it was submitted for the 1st Respondent that the same tilts in favour of public interest since the road reserve serves the greater public unlike the Applicants who are merely trespassers without any ownership documents. The case of **JOHN PETER MURITHI & 2 OTHERS =VS= A.G. & 4 OTHERS [2006] eKLR**.

Finally it was submitted for the 1st Respondent that the Applicant’s claim being a land dispute should be raised before the Environment and land court and that in considering all the issues the Application is for dismissal with costs.

Determination

8. I have considered the Applicant’s application dated 9/9/2016 together with the rival affidavits and the submissions. I have also considered the cited authorities. The issue for determination is whether the Applicants have established a case for the grant of conservatory orders sought. Indeed at this juncture the court does not have to make findings on the disputed facts as the same shall await the determination of the petition.

The conservatory orders sought by the Applicants are basically injunctive in nature and as such the guiding principles are those enunciated in the **GIELLA =VS= CASMAN BROWN [1973] EA 358** namely:-

(a) An Applicant must show a prima facie case with a probability of success;

(b) An injunction will not be granted unless the Applicants might otherwise suffer irreparable injury which cannot be compensated by an award of damages;

(c) When the court is in doubt, it will decide the Application on the balance of convenience.

9. On the issue of whether a prima facie case has been made, it is noted that indeed the Applicants have not presented certificates of titles as proof of ownership of the respective plots they currently occupy. There is evidence that the area had been an adjudication Section and titles are yet to be issued. The Applicants have demonstrated that they have been residing on the plots with their families and conducting business thereon for the last fifty (50) years. The Applicants in their affidavits have annexed allotment letters as well as letters from the Machakos Land Adjudication and Settlement Department Machakos County indicating that the plots occupied by the Applicants are valid and that issuance of titles are at an advanced stage. As the issue of the titles to the subject area is yet to be resolved by the Machakos County Land Adjudication and Settlement Department, it would be fair and just to grant conservatory orders as sought herein pending the hearing of the petition. During the hearing of the petition the issue of the 1st Respondent's road reserve as against the Petitioners ownership of the parcels allotted to them by the Machakos County Lands and Settlement Department will then be resolved beyond doubts. Again one cannot tell whether during the hearing of the petition, the Applicants might wish to call the Lands Officials from the said Machakos County to shed light on the issue of the allocations. It is noted that the Applicants herein filed this petition on the grounds that their rights under the Constitution have been infringed and or threatened and as such the test for the grant of a conservatory orders under the Constitutional Application requires that the enjoyment of fundamental rights should be looked at wholesomely and the court has a duty to protect Applicants from the threatened harm and to protect the enjoyment of those rights until the petition is determined. The preliminary Index Diagrams (maps) presented by the 1st Respondent does not appear clear save that it shows that there have been about 15 amendments of the map as from 28/03/2007 to about 12/2/2015 and which therefore calls for a determination during the hearing of the petition as to whether or not the Applicants have actually encroached onto the 60 metre corridor road reserve. I am satisfied that the Applicants have established a prima facie case to warrant the grant of conservatory orders pending the hearing of the petition.

10. On the issue of irreparable harm, the Applicants have indicated that they have been on the properties for over 50 years and it is the only place they call home. It is their place of shelter and livelihood and their removal thereof could irreparably cause great loss and damage which cannot be compensated by an award of damages. This is so because land has an intrinsic value and the Applicants attachment to it cannot be gainsaid. Their rights to shelter at this stage before the determination of the Petition has to be protected.

11. On the issue of balance of convenience it is noted that the Applicants have been in occupation of the plots as far back as 1969 to date. They have lived there with their families. The 1st Respondent through its Regional Manager has indicated that a normal routine inspection of the roads in the area revealed the alleged encroachment onto the road reserve. Indeed the 1st Respondent's Lower Eastern Regional Manager has confirmed in his replying affidavit that the 1st Respondent does not intend to have the road expanded as there are no road projects currently. It then follows that it is appropriate to let the Applicants remain on the plots as the petition is being determined since the lesser evil would be to stop the envisaged demolitions and thus avert the higher risk of injustice to the Applicants as they wait for the determination of the petition. Hence the balance of convenience tilts in favour of granting the conservatory order pending the hearing of the petition which would preserve the enjoyment of the rights by the Applicants. The 1st Respondent has claimed that the Applicants have committed a criminal offence under Section 91 of the Traffic Act Chapter 403 Laws of Kenya as they have encroached onto a road reserve. However there is no evidence offered by the 1st Respondent that the Applicants have ever been charged with such an offence before a court of law and convicted. In the absence of such evidence, I find the Applicants are deemed innocent until the contrary is proved and it would be just and fair to grant the conservatory orders pending the hearing of the petition. Finally the 1st Respondent's Counsel raised an issue to the effect that this court lacks jurisdiction to entertain this matter as the dispute relates to a land matter. It is noted that the Petitioner/Applicants moved to this court pursuant to Article 20, 21, 22 and 23 of the Constitution on the enforcement of Fundamental Rights and Freedoms. That being the position, this court has jurisdiction vide Article 165(3) (b) of the Constitution to hear and determine this matter.

12. In view of the foregoing observations the Applicants Application dated 9/9/2016 is allowed in terms of prayer 2 thereof. Each party to bear their own costs.

Orders accordingly.

Dated and delivered at Machakos this 5th day of June, 2018.

D. K. KEMEI

JUDGE

In the presence of:-

Kavita for the Ogeto for the Respondents

Malelu for Osoro for the Applicants

Josephine - Court Assistant