



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CONST. PETITION NO. 188 OF 2018

MARY WAENI WAMBUA.....1ST PETITIONER

HAPPY KOKI WAMBUA.....2ND PETITIONER

(Suing as joint administrators of the Estate of the late

Josiah Muli Wambua)

VERSUS

KENYA URBAN ROADS AUTHORITY.....1ST RESPONDENT

KENYA RURAL ROADS AUTHORITY.....2ND RESPONDENT

THE PRINCIPAL SECRETARY, MINISTRY

OF TRANSPORT, INFRASTRUCTURE,

HOUSING & URBAN DEVELOPMENT.....3RD RESPONDENT

THE PRINCIPAL SECRETARY,

MINISTRY OF LANDS &

PHYSICAL PLANNING.....4TH RESPONDENT

CHIEF LAND REGISTRAR.....5TH RESPONDENT

NATIONAL LAND COMMISSION.....6TH RESPONDENT

THE HON. ATTORNEY GENERAL.....7TH RESPONDENT

RULING

1. In the Notice of Motion dated 20th May, 2019, the Attorney General has prayed for the following orders:

a. That this Honourable Court be pleased to stay the determination of this matter as the Respondents have withdrawn from developing the area in contention leading to the abatement of the cause of action.

b. That this Honourable Court be pleased to mark this matter as having abated as no contravention or violation of law exists any longer.

c. That the costs of this Application be provided for.

2. The Application is supported by the Affidavit of Deputy Director of Survey Services working with the Kenya Urban Roads Authority, the

2nd Respondent, who has deponed that the government embarked on improving the existing low density roads country wide since the year 2017 and that one of the roads identified was traversing on various parcels of land including L.R. No. 12648/67; L.R. No. 12648/68; L.R. No. 6989; L.R. No. 8857/72 and L.R. No. 8857/1 (*Daystar University*).

3. According to the Attorney General, before sub-division of parcel of land L.R. No. 12648/67 and L.R. No. 12648/68, there was no road of access to the Petitioners' parcel L.R. No. 6989 to Mombasa Road and that after the sub-division of the land, the Petitioners started accessing Mombasa road using the road created by the proprietors of L.R. No. 12648/67 and 68.

4. The 2nd Respondent's Assistant Director of Surveys deponed that the Petitioners having reneged on the gentleman's agreement of allowing the upgrading of the existing earthen road to bitumen standards, the Respondents are now impelled to omit the works over the portion traversing the Petitioners' land.

5. In her Replying Affidavit, the 1st Petitioner deponed that she is a Co-Administrator of the Estate of the late Josiah Muli Wambua (*the deceased*); that the deceased is the registered owner of L.R. No. 6989 I.R 20000 situated off Mombasa Road and that the Respondents are seeking to escape responsibility for the contravention of the Petitioners' constitutionally guaranteed rights having caused damage to the suit property.

6. According to the Petitioners, the proposed upgrade of the Road has destroyed the borehole on the suit property whose estimated replacement cost will be over Kshs. 1,397,568 and that the Respondents blocked their road of access, destroyed vegetation and beacons and abrogated their property rights.

7. The 1st Petitioner finally deponed that the Respondents have attempted to create the impression that it is only the Petitioners who are opposed to the project and yet the Minutes of 21st November, 2018 shows that several land owners were opposed to the illegal acquisition of their land by the Respondents without compensation.

8. In his submissions, the Attorney General submitted that the suit herein has been overtaken by events, the Respondents having abandoned the improvement of the road linking Mombasa Road to Daystar University and that the improvement project was on the existing road.

9. On his part, the Petitioners' advocate submitted that the Respondents, from the date of service of the Petition on 9th May, 2018 to date, have failed to file any response to the Petition; that in the grounds of the Notice of Motion dated 20th May, 2019, the Respondents have admitted existence of the contravention and violations complained of by the Petitioners and that the trespass by the Respondents has resulted in damage, which damage has never been compensated to date and that the Application dated 20th May, 2019 should be disallowed.

10. In the Petition dated 4th May, 2018, the Petitioners averred that they are the legal representatives of the Estate of the late Josiah Muli Wambua (*the deceased*) who died on 27th March, 2012; that the deceased is the registered proprietor of L.R. No. 6989 situated off Mombasa Road and that rather than set out the motion of acquiring approximately 6.385 acres of L.R. No. 6989, the Respondents have illegally created a road of access on the suit property.

11. According to the Petitioners, sometimes in August, 2017, the 2nd Defendant entered on the suit property and begun works, purporting to upgrade a purported road on the suit property, which road does not exist and that the portion of the suit land that has been affected by the activities of the 1st and 2nd Respondents measures approximately 6.385 acres.

12. In the prayers, the Petitioners have prayed for a declaration that the 1st and 2nd Respondents have contravened their right to property; that the road works on L.R. No. 6989 are unconstitutional and illegal and that in the alternative, the Respondents to comply with the law by compulsorily acquiring a portion of the suit land and pay the Petitioners Kshs. 76,475,000 as compensation for the said acquisition.

13. Although the Respondents were granted an opportunity to file a response to the Petition, to date, they have not done so. Indeed, the court allowed the Petitioners to file their written submissions, which they did on 11th December, 2018. The matter was pending Judgment before the current Application was filed.

14. The Application by the Respondents is seeking for an order that the Petition be marked as having abated as no contravention or violation of the law exists any longer. That prayer, in my view, is not only known in law, but should have been a response by the Respondents to the Petition.

15. The Petitioners having filed a Petition pursuant to Article 22 complaining that their constitutional rights have been denied, violated or threatened, the Respondents were under an obligation to file their Replying Affidavits or Grounds of Opposition as per the Constitution of Kenya (*Protection of Rights and Fundamental Freedoms*) Practice and Procedure Rules, 2013 ("*the Mutunga Rules*").

16. Rule 15 of the Mutunga Rules provides as follows:

"15. (1) The Attorney-General or any other State organ shall within fourteen days of service of a petition respond by way of a replying affidavit and if any document is relied upon, it shall be annexed to the replying affidavit.

(2) (a) A respondent not in the category of sub rule (1) shall within seven days file a memorandum of appearance and either a-

(i) replying affidavit; or

(ii) statement setting out the grounds relied upon to oppose the petition.

(b) After filing either of the documents referred to in sub rule (2) (a), a respondent may respond by way of a replying affidavit or provide any other written document as a response to the petition within fourteen days.

(3) The respondent may file a cross-petition which shall disclose the matter set out in rule 10(2).”

17. The Respondents, through the Attorney General, had the opportunity to respond to the Petition as per the above Rule. Having not done so, they cannot purport to speak for the Petitioners by stating that the Petition has been overtaken by events, and that the same should be marked as having abated by way of an Application.

18. That, in my view, is a procedure and prayers not recognized by the Mutunga Rules. Indeed, as was held by the Supreme Court of Nigeria in the case of *Usikaro vs. Itsekiri Land Trustees (1992) 2 N.W.L.R.*, the concept of arresting a Judgment, especially where a party has been given an opportunity to be heard, is alien and misconceived. In the *Usikaro case (supra)*, Musdapher JCA had this to say:

“In my view, the Application to ‘arrest’ the Judgment after all the opportunities granted to the Appellant which it deliberately refused to take was merely calculated to hinder the due administration of justice....”

19. Having been afforded an opportunity to plead their case, the Application by the Respondents to have the Petition marked as having been overtaken by events or having abated is not only known in law, but is also a calculated move to hinder the due administration of justice. The Petitioners have a right to be heard by this court.

20. In the circumstances, I find the Application dated 20th May, 2019 to be unmeritorious. The Application is therefore dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 8TH DAY OF MAY, 2020.

O.A. ANGOTE

JUDGE