



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

PETITION CASE NO. 11 OF 2016

ANTHONY NGILI MUNGUTI1ST PETITIONER/APPLICANT
NICHOLAS MUTHINI MUTISO.....2ND PETITIONER/APPLICANT
JOSHUA KASINGIU INGOOTI.....3RD PETITIONER/APPLICANT
MUNANIE MWANZIA.....4TH PETITIONER/APPLICANT
DOMINICK MUTIE KATOO.....5TH PETITIONER/APPLICANT
ALICE KYEE KILINGU.....6TH PETITIONER/APPLICANT
ALI-HAJI ISA MAWEU MWANZA.....7TH PETITIONER/APPLICANT
JOHN MUSAU KILONZO.....8TH PETITIONER/APPLICANT
SYLVESTER MWINZI MWANZA.....9TH PETITIONER/APPLICANT
MWENDE NDUVA.....10TH PETITIONER/APPLICANT
ZAINAB SAID.....11TH PETITIONER/APPLICANT
MONICA NTHAMBI MUSAU.....12TH PETITIONER/APPLICANT
JACKSON MAKAU MUTUNE.....13TH PETITIONER/APPLICANT

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITY1ST RESPONDENT
THE HON. ATTORNEY GENERAL2ND RESPONDENT

RULING OF THE COURT

Introduction

1. The Substantive application before the court is a Notice of Motion dated **9th September, 2016** filed in the Petition herein. The Notice of Motion is filed pursuant to **Articles 27, 28, 29, 35, 40, 43, 47 & 50** of

the **Constitution**, and prays for the following orders;

a. That pending the hearing and determination of this 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.

d. Unless conservatory orders are issued the respondent shall remove and/or demolish the Petitioner's properties anytime from now since the thirty (30) days' notice period they had been given has already lapsed.

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

f. The Petitioners' rights have been violated and continue to be violated by the actions of the respondents.

g. 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.

2. Before the application could be heard, the 1st respondent filed a Notice of Preliminary Objection dated 19th October, 2016 taking an objection on a Preliminary point of law against the Petition and the Notice of Motion that the Petitioners/Applicants have not complied with **Section 67(a)** of the **Kenya Roads Act 2007**. That Section demands that the Director General of the 1st respondent be given one month notice before any suit can commence. The Objector submitted that the Petitioners never issued the said notice. If that notice was issued the 1st respondent would have considered it especially in light of **Article 159** of the **Constitution** which requires that matters be adjudicated through other means rather than through court.

3. However, the applicants in paragraph 17 of the replying affidavit to the Preliminary Objection annexed copies of letters marked "NMM3" and "NMM4" alleging that the same were adequate notice. However, the Objector states that the said letters do not disclose intention to institute a suit and cannot be deemed to be in compliance with the said **Section 67(a)** of the said Act.

4. I have considered the said Preliminary Objection. To begin with **Mr. Kairu** counsel for the 1st respondent did not make any attempt to show the court what **Section 67(a)** of **Kenya Roads Act** states. The provisions of the Section were not drawn to the attention of the court. However, going by what the Preliminary Objection stated the court believes the section requires a person intending to file a suit against the 1st respondent to give notice of such intention. If that is correct, and I have no reason to doubt it, then it follows that the 1st respondent was always aware that the Petitioners were to go to court if the negotiations between the parties failed to succeed. This came out clearly in the Replying Affidavit of the applicants to the Preliminary Objection. It also came out clearly in the texts of annexures "NMM3" and "NMM4" which were in the nature of demand letters to the 1st respondent.

5. That notwithstanding, it is the opinion of this court that the applicants/petitioner's rights which are

threatened are right to shelter which is protected under the Constitution. Indeed, the applicants allege to have lived in the premises since 1965. That is over 50 years. When such a right is threatened, the person causing the threat cannot hide under any legal technicality. A fundamental right guaranteed by the Constitution cannot be taken away on the basis that demand notice stating intention to sue was not issued. It is the finding of this court that such a right is so supremely protected, that even a verbal notice such as for example, “*Hey, this is our home, do not demolish it*” is valid enough to stop the respondent on its track. Such a right cannot be defeated by statutory provision. It is the finding of the court that a constitutional provision on access to justice supercedes any statutory powers limiting enforcement of constitutional rights. This court accepts the submission of **Mr. Osoro** counsel for the applicants that the Preliminary Objection lacks merits. The same is dismissed with costs.

Orders accordingly.

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E.K.O. OGOLA

JUDGE

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 14TH DAY OF FEBRUARY, 2017

.....

DAVID KEMEI

JUDGE

In the presence of:

Ngolya – for Osoro for Applicant

Miss Ngugi for Maenga for Respondent