



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

PETITION NO. 10 OF 2020

MWAWASI MARTIN MJOMBA.....PETITIONER

VERSUS

COUNTY GOVERNMENT OF TAITA TAVETA.....1ST RESPONDENT

TAITA/TAVETA COUNTY LAND

ADJUDICATION AND SETTLEMENT OFFICER.....2ND RESPONDENT

DEMARCATION OFFICER OF NDARA “A”

ADJUDICATION SECTION.....3RD RESPONDENT

CABINET SECRETARY

MINISTRY OF LANDS HOUSING & PHYSICAL PLANNING.....4TH RESPONDENT

ATTORNEY GENERAL.....5TH RESPONDENT

RULING

(Petition claiming infringement of various constitutional provisions including the right to own property; petitioner claiming that while the land in issue was being adjudicated, it was wrongly declared that a road passes through the suit land; petitioner filing an appeal to the Minister; while appeal is pending, grading of a road undertaken in the land; petitioner now seeking injunction pending hearing of the petition; declaration of the road done in the year 2018; assumption would be that there is a road until the appeal determines otherwise; applicant not seeking conservatory orders upon filing the appeal; the road that applicant is seeking injunction already graded so nothing to injunct; applicant ought to have come earlier to court for relief; application dismissed)

1. What is before me is an application for injunction which was filed alongside this petition.
2. The applicant commenced this suit on 12 May 2020 claiming a violation of various of his constitutional rights. In the petition, he avers that he is the registered owner of the land parcel identified as Plot No. 3117 situated in Ndara “A” Adjudication Scheme in Voi, within Taita Taveta County (the suit land). He avers to have purchased the suit land from one Godson Ndarai Chabalo sometime in the year 2013 and that he and the vendor visited the offices of the 2nd and 3rd respondent several times to effect transfer without any success and without any explanation from the two offices. It is averred that in 2017, the 2nd respondent published a notice inviting members of the public who had any objection to the contents of the Adjudication Register and that the applicant raised two objections, the first being an objection objecting to the vendor’s name appearing as the owner of the Plot No. 3117, and the second an objection to the presence of a road in the suit land. It is said that the objection on the registration was allowed and transfer was effected into his name, but his objection on the road was dismissed. It is said that this was determined in the absence of the applicant and the applicant thus claims that due process was not followed. The applicant avers that he appealed the decision to the Cabinet Secretary for Lands Housing and Physical Planning, the 4th respondent. It is said that the appeal is pending. The applicant further states that the declaration of a public road on his land has led to persons destroying the boundaries. The applicant claims that he has asked to be supplied with a ground map for the area where his land falls but this has not elicited any response. The applicant avers that in the ruling on the contentious road, the 2nd and 3rd respondents purported that the road was 6 meters from the boundary of a neighbouring plot No. 3319.

3. The petitioner has stated that on 25 April 2020, the 1st respondent proceeded to grade the road despite his pending appeal. It is said that this road is in the middle of the applicant's land thus rendering the whole land useless and is not 6 meters from the boundary of the Plot No. 3319. He claims that when he purchased the land, there was no public road on it. It is his position that there is already a reserved public road acting as a boundary separating the Plots No. 3117 and 3115.

4. The applicant thus contends that this is an affront to his constitutional rights to own property. He has also contended that he was never given a hearing contrary to Article 47 and 50 (1) of the Constitution and the Fair Administrative Actions Act. He has contended that the withholding of the map is also an affront to his right to information under Article 35 of the Constitution.

5. In his petition, the applicant has asked for 20 orders inter alia for a declaration that the declaration of a road was made without giving him a hearing or compensating him; an order of certiorari to quash the said decision; a declaration that failure to have the appeal heard more than 2 years after lodging it infringes on his right to fair administrative action; an order of mandamus to compel the hearing of the appeal; and an order that the construction of the road infringes on his constitutional right to own property.

6. Together with the petition, the petitioner filed this application seeking orders of an injunction to stop the 1st respondent from continuing to grade the road.

7. The supporting affidavit to the motion is sworn by the applicant. In the affidavit, he asserts that the declaration of the road was done in the year 2015 without following due process. He has stated that it was in the year 2017 that the public were informed that the Adjudication Register is complete and objections could be raised. He then raised the objection on omission of his name and the creation of the road. He avers that he was never summoned to argue the objection but the same was decided in his absence. His objection on the omission of his name was allowed but his objection on the road was dismissed. He avers that in the year 2018 he lodged an appeal to the Cabinet Secretary, Ministry of Lands Housing and Physical Planning, and that the appeal is yet to be heard. Despite this, a road was graded on his land. He has annexed some photographs of what he claims to be the graded road.

8. Despite being served, the respondents have not entered appearance and have not responded to this application.

9. I invited the applicant to file written submissions which he did together with some authorities. I have taken these into consideration before arriving at my decision.

10. I will treat this as an ordinary application for injunction and/or conservatory orders. The injunction being sought is to stop the construction of a road which is disputed. The applicant's contention seems to be that firstly, the road ought not to exist, but even if does, it should not be where the grading has taken place.

11. I have to begin with the presumption that the road does exist until it is held otherwise on appeal. On whether the grading has been done on the spot where the road was declared, or elsewhere, I cannot tell by merely looking at photographs. This would need a survey report. It is not therefore possible for me to tell, from the material supplied by the applicant, whether the grading has been done where the road was declared or in the middle of the land of the applicant. Either way, grading of the road has already been done, and thus there is nothing to injunct. In my view, the applicant ought to have sought conservatory orders much earlier, the best time being at the time that he filed his appeal, so that there would be conservatory orders, or a stay, pending the hearing of the appeal.

12. Given the above, I am not therefore persuaded to issue an order of injunction and for that reason this application fails and is dismissed. I will however not make any orders as to costs since it was not opposed.

13. I sympathise with the applicant who appears to be suffering from the delay in hearing his appeal. He may have a point in stating that it is not fair to wait for 2 years to have his appeal argued. But these are matters that will be addressed after a full hearing of the petition.

DATED AND DELIVERED THIS 30 DAY OF JUNE 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA