



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT KABARNET
ELC PETITION NO.E001 OF 2023

FORMERLY ITEN ELC PETITION NO.E011 OF 2022

IN THE MATTER OF VIOLATION AND/OR INFRINGEMENT AND/OR INTENDED VIOLATION OF THE PETITIONER'S CONSTITUTIONAL RIGHTS UNDER ARTICLES 1(4), 3, 10(1), (2), 19, 20, 21, 22, 23(1), 2, 3; 24, 28, 31, 40, 42, 43, 47, 69 AND 165(3) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE PUBLIC ROADS AND ROADS OF ACCESS ACT CAP.399 LAWS OF KENYA

AND

IN THE MATTER OF THE PHYSICAL PLANNING AND LAND USE ACT NO.13 OF 2019

AND

IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT

AND

**IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS
ACT**

AND

IN THE MATTER OF THE EDUCATION ACT

BETWEEN

BOARD OF MANAGEMENT

**MOGOTIO GIRLS HIGH SCHOOL.....
PETITIONER**

VS

**BARINGO COUNTY GOVERNMENT.....1ST
RESPONDENT**

**BARINGO COUNTY PHYSICAL AND LAND
USE PLANNING CONSULTATIVE
FORUM.....2ND
RESPONDENT**

**NATIONAL LAND COMMISSION.....3RD
RESPONDENT**

**REGISTRAR OF TITLES.....4TH
RESPONDENT**

**CHIEF LAND REGISTRAR.....5TH
RESPONDENT**

DIRECTOR OF PHYSICAL AND

**LAND USE PLANNING6TH
RESPONDENT**

**MINISTRY OF ROADS, TRANSPORT AND
PUBLIC WORKS7TH
RESPONDENT**

**BARINGO COUNTY ROADS BOARD.....8TH
RESPONDENT**

JUDGMENT

Introduction

1. The petitioner herein, instituted this suit/petition seeking judgment against the respondents, jointly and severally for:-
 - i) A declaration that the decision by the respondents to open a road and/or construct a road passing through Mogotio Girls High School land to the extent that there was no consultation or public participation by the school and by the student community, was arbitrary, unreasonable, illegal, unconstitutional, had violated **Article 10** of the Constitution of Kenya and was for quashing and/or setting aside in its entirety by the orders of the honourable court;

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- ii) A declaration that the public participation ought to be real, not illusionary and ought not to be treated as a mere regularity, formality of constitutional dictates: that further the failure by the respondents to serve posters, newspaper or any form of notice to the petitioner requiring them to attend any scheduled consultative meeting for public participation and/or views gathering on the intended opening of the road constituted a violation of the national values and principles of governance and one such principle and value which binds all is the public participation value/principle. In consequence, the whole process was an illegality, irrational, arbitrary, unconstitutional, null and void *ab initio*;
- iii) An order of permanent injunction do issue restraining the respondents by themselves, their servants, agents, employees and/or whomsoever jointly and severally from beaconing, bringing in surveyors, initiating the opening and/or construction of a road passing through Mogotio Girls High School, (MGHS) from entering the

petitioner's land, planning, holding meetings, launching the road construction, passing the resolution, encroaching on the school land, effecting the intended road opening, carrying out any activity on the school land, having any dealings on the school land and from having dealings on L.R No.9109/101 approximately 27.31 Ha and in future carry out their actions publicly, fairly, openly and observe the public participation value/principle.

- iv) An order for compensation to the petitioner for the violations of the petitioner's constitutional rights.
 - v) Any other relief that the court may deem fit and necessary to grant to redress the violation of the petitioner's right to property, redress the lack of fair hearing and lack of fair administrative action.
2. As can be discerned from the averments/contentions on the face of the petition and the affidavit sworn in support thereof, the petition/suit is premised on alleged threat to construct a public road passing through the

petitioner's school. The petitioner complains that the decision to construct/open a public road through their land was done without consultation with the school community/ stakeholders hence arbitrary, unreasonable, procedurally unfair and illegal.

3. The impugned decision is said to have been communicated to the petitioner by way of Text message (SMS) by the area Member of County Assembly (MCA). The area MCA is said to have attended a meeting at MGSS and confirmed that the road was to be opened by January ,2023.
4. According to the Minutes of a joint Board of Management (BOM) meeting of Mogotio Vocational Training College (VTC) and MGSS held on 1st December, 2022 there was no official communication concerning the alleged threat of opening of a public road through the petitioner's land. Be that as it may, because the petitioner was apprehensive that a public road may be opened through their land thereby adversely affecting it and Mogotio VTC, they saw it well to have the joint meeting. It is in that joint meeting that a resolution was

passed to file a suit in court to stop the construction of the road between the two institutions. In that meeting, it was acknowledged, albeit implicitly, that the road in question exists in the map for the area drawn in 2013. In the meeting, it was also resolved that a suit be filed to have the road expunged from the map as it does not exist in the map of 1984.

5. The petition is undefended.

Petitioner's Submissions

6. Pursuant to directions given to the effect that the petition will be disposed of by way of written submissions, the petitioner filed submissions dated 8th October, 2025 in which it submits that the petition raises serious constitutional questions concerning the right to property, the right to fair administrative action, the right to education and the principle of public participation enshrined under **Article 10** of the Constitution of Kenya, 2010; that attempting to curve out a road through its school without public participation, transparency and accountability, the respondents violated its right to property and the right

to be afforded public participation concerning an action or activity which threatens the existence of the school and its operation.

7. The petitioners has made reference to the provisions of **Article 10(2)** of the Constitution of Kenya, 2010 and a number of decided cases where the principle of public participation is discussed/espoused, and submitted that it is not in dispute that the respondents proceeded to commence and took steps towards opening a road through the petitioner's school land without consulting the school administration, the students and the wider school community.
8. Complaining that there were no notices, barazas, newspaper advertisement or any other mechanisms employed to involve or inform the petitioner of the intention to open a road through the school prior to the impugned planned action/activity, the petitioner terms the failure to conduct public participation concerning the impugned activity not a mere procedural lapse but a fundamental breach of a constitutional safeguard

which renders the entire process unconstitutional, illegal, null and void.

9. Based on the cited cases, the petitioner submits that there is need for public participation in cases where the impending act will impact the welfare and conduct of the petitioner's business. According to the petitioner, the impugned activity, if implemented, will affect it as the school land will require a perimeter wall and a flyover for the students to cross over the other parcel of land; that it will also make the environment for learning unfriendly to the students due to the noise from the motor vehicles and the pedestrians among other hazards.
10. The petitioner further complains that it was not given notice and afforded opportunity to be listened to concerning any concerns that it may have and the concerns of the school fraternity and asserts that the omission is a violation of its right to fair administrative action.

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11. It is the petitioner's case that sanctioning such conduct would be a total miscarriage of the principles of justice and in all aspects unconstitutional.
 12. The petitioner further submits that the proposed construction of a road through the school land is a violation of its right to education under Article **43(1)(f)** and the right to inherent dignity guaranteed under **Article 28** of the Constitution.
 13. The impugned decision of the respondents (planning a public road through the petitioner's school land unilaterally), is said to be a blatant violation of the Physical and Land Use Planning Act as the constitutional safeguards outlined in the Act were not complied with (There was no public participation through county forums or otherwise and the school community was denied the opportunity to be heard on a matter that fundamentally affects their welfare).

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14. The respondents are also said to have ignored the procedural safeguards envisaged under the Public Roads and Road of Access Act, Cap 399 Laws of Kenya.
 15. Explaining/claiming that they lack an adequate audience before a forum created by statute to resolve the dispute they have brought before this court, the petitioner contends/submits that the instant petition is not vitiated by the doctrine of constitutional avoidance.
 16. Maintaining that it has demonstrated that the respondents acted unconstitutionally, illegally and arbitrary in planning to open a road through its school, MGSS without affording it public participation thereby violating its right to fair administrative action, the petitioner urges this court to grant the reliefs sought.

Analysis and determination

17. I have read the pleadings filed by the petitioner and taken into account the circumstances leading to the

filing of the petition which is the planned opening of a public access road through the petitioner's school land. I have also read and considered the grounds advanced for the petitioner's objection to the opening of a public access road through their school land as well as the submissions made in support of the petition.

18. From the petition, the affidavit evidence adduced in support thereof and submissions, I find the issues for the court's determination to be:-
- i) Whether the petition meets the threshold of a constitutional petition?
 - ii) Whether petitioner has made a case for being granted the orders sought?
 - iii) What order should the court make?
19. On whether the petitioner's suit meets the threshold of a constitutional petition, a review of the circumstances leading to filing of the petition shows that the petition was filed after the petitioner received a text message from the area MCA informing them of a planned road opening exercise that was to be carried in January, 2023. The area MCA is also said to have visited the

school and restated the information. To prove the alleged threat, the petitioner has produced the minutes of a joint BOM meeting of both Mogotio VTC and MGSS where the above source of information concerning the planned opening of the public access road through the school land is captured.

20. It is noteworthy that in minutes referred to in paragraph 20 above, the petitioner acknowledges that the information/communication it received from their area MCA was not official. In those minutes, it is also acknowledged, albeit implicitly, that in the map for the area drawn in 2013, there exists a public access road which passes through the school. The minutes suggest that the public access road did not exist in the map for the area drawn in 1984.
21. The joint BOM passed a resolution for filing a suit to stop the planned opening of the public access road through their school land and for removal of the public access road from the map.
22. Whilst the petitioner complains that it was neither consulted nor given a hearing before the planned

opening of the public access road, a keen appraisal of the issue(s) arising from the petition leaves one without a doubt that the bone of contention stems from creation of public access road through the petitioner's school land, something that happened in 2013 or thereabout.

23. Whereas the petitioner has addressed the court at length on the planned opening of the public access road, it has not addressed the court on the circumstances upon which the public access road was created in 2013 or thereabout. It has also not provided the court with the area map for 1984 to help the court determine the question of existence or none existence of the road before 2013. Further, it has not extracted the text message sent to it by the area MCA or recorded a statement of the MCA and produced it in evidence before this court to shed light to it on what informed the sending of the text message or circumstances upon which the text message was sent to help the court make an informed decision

concerning the impugned planned opening of the public access road.

24. The petitioner has also not given any evidence or information of who the maker of the impugned decision was.

25. Whereas the petition raises issues that are truly of concern to the petitioner, I find the issues of fact and law arising thereof to be in the nature of a civil dispute concerning creation of a public access road through the petitioner's land. To resolve the issues brought before this court, this court or any other forum or tribunal required to exercise the actions of the respondents complained of vis-à-vis the provisions of the statutes the respondents have failed to comply with in creating the impugned public access road.

26. **In Motiga v Lugalia & 4 others, (Petition E328 of 2023) (2025] KEHC 275 (KLR) (Constitutional and Human Rights) (22 January 2025) (Ruling)** the court stated/held:-

“66.The doctrine of constitutional avoidance precludes the Court from invoking the Constitution to settle controversies that can conveniently be dealt with on any other legal basis other than the Constitution. Disputes that may appropriately be resolved on the basis of a statute or regulatory regime or other established legal principles should thus not be disguised and tried as Constitutional litigations....”.

27. **In Ibrahim Wakhanyanga & 2 others v Chief Magistrate’s Court Kakamega & 2 others; Attorney General for Land Registrar Kakamega (Interested party) [2022] eKLR, it was stated/held:-**
- “One of the instances in which a constitutional court loses jurisdiction is through the doctrine of constitutional avoidance. Thus, where there exist ample statutory avenues for resolution of a dispute, the constitutional court will defer to the statutory options and decline to entertain**

such a dispute. A party seeking relief in a matter that can be addressed through interpretation of statutes and rules made thereunder must seek relief through an ordinary suit as opposed to a constitutional petition....

28. In **Sumayya Athmani Hassan v Paul Masinde Simidi & another [2019] eKLR** the Court of Appeal stated as follows:-

“Where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the Constitution without challenging the legislation in question. That principle has been reinforced by the Supreme Court in Communications Commission case Accordingly, the petition being incompetent, the court acted in excess of jurisdiction and erred in law in determining the petition.”

29. **In Gabriel Mutava & 2 others v Managing Director
—Kenya Ports Authority & another [2016] eKLR** the
Court of Appeal stated/held:-

“Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation....A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done.”

30. Having determined that the issues raised in this petition are in the nature of a civil suit for determination of the legality or otherwise of creating a public access road passing through the petitioner’s land, which dispute can be redressed through the

applicable law and procedures/processes, I decline the invitation to elevate the dispute to a constitutional issue.

31. The upshot of the foregoing is that the instant suit does not meet the threshold of a constitutional petition. The petitioners have also failed to establish a firm basis or foundation for their case against the respondents. Consequently, I dismiss the petition with no order as costs as it is undefended.

32. Orders accordingly.

Dated, signed and delivered this 4th day of December, 2025.

L. N. WAITHAKA

JUDGE

Judgment delivered virtually in the presence of:-

Mr. Kibelion holding brief for Mr. Arusei for the Petitioner.

N/A for the 1st, 2nd, 3rd and 8th Respondents

Mr. Kutei for the 4th, 5th, 6th and 7th Respondents.

Court Assistant: Christine

ORIGINAL