



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CIVIL CASE NO. 289 OF 2018**

**SAMUEL MWATHA KANG'ETHE..... 1<sup>ST</sup> PLAINTIFF/APPLICANT**

**MARY KANG'ETHE.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**=VERSUS=**

**KENYA URBAN ROADS AUTHORITY.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**NATIONAL LANDS COMMISSION.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**SINOHYDRO TIANJIN ENGINEERING CO. LTD.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

1. Coming up for determination are the notice of motions dated 21<sup>st</sup> June 2018 and 6<sup>th</sup> November 2018. The two applications were canvassed by oral submissions.

2. The notice of motion dated 21<sup>st</sup> June 2018 is brought under order 40 rules 1, 2 and 4, order 51 of the Civil Procedure Rules section 63(c) and (e), 1A, 1B and 3A of the Civil Procedure Act and all enabling provisions of the law.

3. It seeks orders

**1. Spent.**

**2. Spent.**

**3. Abandoned.**

**4. That pending the hearing and determination of this suit the respondents be ordered and directed to restore the applicants property to the condition, status and character that obtained prior to 16<sup>th</sup> June 2018 at the respondents costs.**

**5. That the costs of this application be borne by the respondents.**

4. The grounds are on the face of the application and are set out in paragraphs 1 to 8.

5. The application is supported by the affidavit of Mary Kangethe, the 2<sup>nd</sup> plaintiff/applicant herein sworn on the 21<sup>st</sup> June 2018.

6. The notice of motion dated 6<sup>th</sup> November 2018 is brought under article 35 of the Constitution of Kenya, section 1A, 1B, 3A and 22 (a) of the Civil Procedure Act, order 11 rule 3(2) (e) and order 51 of the Civil Procedure Rules, section 19(2) of the Environment and Land Act no 19 of 2011 sections 4 and 6(4) of the Access to Information Act and all enabling provisions of the law.

7. It seeks orders:-

**1. Spent**

## 2. Spent

**3. That the honourable court be pleased to issue an order compelling the 1<sup>st</sup> and 2<sup>nd</sup> defendant/respondent to produce and furnish the applicant with the road design, maps of the outerring road especially the road section and interchanges forming part of the road from the Eastern bypass and Donholm area.**

**4. That the costs of this application be borne by the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents**

8. The grounds are on the face of the application and are set out in paragraphs 1 to 11.

9. The application is supported by the affidavit of Mary Kang'ethe, the 2<sup>nd</sup> plaintiff/applicant herein sworn on the 6<sup>th</sup> November 2018.

10. The notice of motion dated 21<sup>st</sup> June 2018 is opposed. There is a replying affidavit sworn by Abdulkadir Ibrahim Jatani, Deputy Director in Charge of Surveys at the Kenya Urban Roads Authority filed on the 3<sup>rd</sup> July 2018. There are also grounds of opposition by the 2<sup>nd</sup> defendant/respondent dated 9<sup>th</sup> July 2018. The 3<sup>rd</sup> defendant/respondent instructed the firm of M/S MNM Advocates LLP to appear but did not file any responses. With respect to the notice of motion dated 6<sup>th</sup> November 2018, there is a replying affidavit sworn by Abdulkadir Ibrahim Jatani, deputy director of surveys with the 1<sup>st</sup> defendant/respondent sworn on the 19<sup>th</sup> November 2018.

11. I have considered the two applications, the affidavits in support, the grounds of opposition, the replying affidavits, the oral submissions of counsel and the authorities cited. The issues for determination are:-

**i. Whether the notice of motion dated 21<sup>st</sup> June 2018 is merited.**

**ii. Whether the notice of motion dated 6<sup>th</sup> November 2018 is merited.**

**iii. Who should bear costs?**

12. With respect to the notice of motion dated 21<sup>st</sup> June 2018 the plaintiff/applicants seek that their property be restored to the status obtained as at 16<sup>th</sup> June 2018. It is not in doubt that the suit property is a subject of compulsory acquisition. Article 40 (3) (b) of the Constitution of Kenya, 2010 provides that:-

**“The state shall not deprive a person of property of any description or of any interest in, or right over, property of any description, unless the deprivation is for public purpose or in the public interest and is carried out in accordance with this constitution, and any Act of Parliament that:-**

**i. requires prompt payment in full, or just compensation to the person and**

**ii. allows any person who has or interest in, or right over, that property or right of access to a court of law”**

The plaintiffs/applicants have not told the court that they will not be compensated.

13. I have gone through paragraph 6 of the affidavit of Abdulkadir Ibrahim Jatani, in which he deposes:-

**“That in response to the foregoing, the 1<sup>st</sup> respondent promptly sought the requisite funding and remitted the same to the 2<sup>nd</sup> respondent vide a letter of 30<sup>th</sup> May 2018 annexed and marked AIJ-2 is a copy thereof”.**

The same is a cover letter forwarding monies to the chairman of the 2<sup>nd</sup> respondent being compensation to the affected persons. The list of the affected persons is attached as annexure “AIJ1”. I note that the plaintiffs/applicants are in the list of the affected persons.

14. It is clear from the replying affidavit of Abdulkadir Ibrahim Jatani that the monies are available for the plaintiffs/applicants to collect. In my view if the plaintiffs/applicants are dissatisfied with the award then they ought to challenge the same as per the procedure provided for under the Land Act.

15. I find that this application is premature and an abuse of the court process as there is already an avenue for challenging the awards provided for in the Land Act. It is also the 1<sup>st</sup> defendant's/respondent's case that the works are complete and the road has been put to public use. I have gone through the plaint, I agree with the 1<sup>st</sup> defendant's/respondent's counsel that prayer (4) in the notice of motion has been sought in the plaint dated 21<sup>st</sup> June 2018 as prayer no. (b).

16. I agree that granting prayer (4) of the notice of motion dated 21<sup>st</sup> June 2018 amounts to granting final orders at interlocutory stage. I find no merit in the notice of motion dated 21<sup>st</sup> June 2018 and the same is dismissed. The costs do abide the outcome of the main suit.

17. With respect to the notice of motion dated 6<sup>th</sup> November 2018 the plaintiff/applicant seeks that they be furnished with the road design maps of the area. It is again the 1<sup>st</sup> defendant/respondent's case that the works are complete and the road has been put to public use. The question is, of what use will the designs be to the plaintiffs/applicants at this stage? The authorities which the plaintiffs/applicants rely on are

both petitions. The plaintiffs/applicants herein are not alleging any violation of rights. The plaintiffs/applicants herein brought this application within a suit. I have considered paragraphs 6 and 7 of the replying affidavit of Abdulkadir Ibrahim Jatani and I am convinced that compelling the 1<sup>st</sup> respondent to furnish the road design map at this stage is untenable. The court will have to hear the case before granting such prayers.

18. In Paragraphs 7 of her supporting affidavit, the 2<sup>nd</sup> plaintiff/applicant deposes thus:-

**“That production of the aforementioned documents will affect the overall finding and result of the suit herein”.**

This confirms that the documents sought ought to be produced at the right time during the hearing so that the court can make a determination on the issue once and for all.

19. In conclusion, I also find no merit in the notice of motion dated 6<sup>th</sup> November 2018 and the same is dismissed. The costs do abide the outcome of the main suit.

It is so ordered.

**Dated, signed and delivered in Nairobi on this 15<sup>TH</sup> day of MAY 2019.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

.....Advocate for the Plaintiffs

.....Advocate for the 1<sup>st</sup> Defendant

.....Advocate for the 2<sup>nd</sup> Defendant

.....Advocate for the 3<sup>rd</sup> defendant

.....Court Assistant