Miheso v County Director Survey, Kakamega County & 3 others (Environment and Land Petition E004 of 2025) [2026] KEELC 1151 (KLR) (26 February 2026) (Ruling)

Neutral citation: [2026] KEELC 1151 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ENVIRONMENT AND LAND PETITION E004 OF 2025

A NYUKURI, J

FEBRUARY 26, 2026

BETWEEN

PETRO MULAMA MIHESO ..... PETITIONER

AND

COUNTY DIRECTOR SURVEY, KAKAMEGA COUNTY ..... 1ST RESPONDENT

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

COUNTY GOVERNMENT OF KAKAMEGA ..... 3RD RESPONDENT

NATIONAL LAND COMISSION ..... 4TH RESPONDENT

RULING

1. Before court is a Notice of Motion application dated 13th March 2025 filed by the petitioner seeking the following orders:

    a. Spent.

    b. Spent.

    c. That this Honourable court be pleased to issue a temporary injunction directed to the 1st, 2nd and 3rd respondents, their agents or servants from compulsorily acquiring, demarcating, surveying, interfering, commencing, carrying out and or supervising any construction work and demolition of premises erected on Isukha/Shitoto/688 belonging to the petitioner pending the hearing and determination of this suit;

    d. That this Honourable court be pleased to issue a temporary injunction directed to the 2nd and 3rd respondents, their agents or any other person from compulsorily acquiring, demarcating surveying, selling by public auction, transferring or otherwise disposing of the property pending the hearing and final determination of the suit;

e. That the officer Commanding Station (OCS) Khayega Police Station do oversee and enforce the implementation of these orders.

f. That any other further order this Honourable court deems fit, proper and just to grant.

g. That the costs of this application be borne by the respondents in any event.

2. The application is premised on the supporting affidavit of the petitioner sworn on 13th March 2025. The applicant's case is that he is the registered proprietor of the parcel of land known as Isukha/ Shitoto/688 measuring 0.45 hectares, which he lawfully acquired through purchase.

3. That he received a letter dated 9th October 2025 through the Assistant chief of his area being notice to open the access road by agents of the 1st and 2nd respondents. That on 17/12/2024, the 1st respondents' agents entered the suit property and began surveying and or demarcating it with intention to have an access road constructed thereon.

4. He further stated that the 2nd respondent entered the suit property, demolished the fence and destroyed crops thereon so as to clear the land for purposes of constructing a road. That on consultation and inquiry, he learnt that the suit property had been earmarked for compulsory acquisition by the 1st and 2nd respondents for purposes of constructing an access road. That despite his protest, the respondents proceeded with an illegal process of compulsory acquisition and that he has never been compensated. That provisions of the *Land Act* on compulsory acquisition were not complied with.

5. It was his position that he stands to suffer irreparable damage if orders sought are not granted. That he lost his fence and crops and continues to suffer economic loss. He attached search certificate, letters from the Director of survey dated 9th October 2024 and 2nd December 2024 for opening access road for parcel Nos. Isukha/Shototo/ 206, 268, 207, 189, 176, 182 & 183, a map and photographs.

6. The application was opposed. The 2nd respondent filed a replying affidavit dated 28th March 2025 sworn by one Charles Obura Onyiero, the 2nd respondent's Senior Assistant Roads Officer. He stated that the 2nd respondent's mandate is the management, development, rehabilitation and maintenance of national roads as provided for under section 7 of the *Kenya Roads Act* No. 2 of 2007.

7. Further that the access road described in this matter is unnamed and unclassified and does not fall within the mandate of the 2nd respondent. That by dint of Gazette Notice Supplement No. 4 of 22nd January 2016, unclassified roads fall under the mandate of the County Government. That the 2nd respondent has not entered on the suit property, nor destroyed crops or a fence for purposes of constructing a road. That the 2nd respondent has not earmarked the suit property for compulsory acquisition and that no compulsory acquisition process has been commenced by the 2nd respondent for purposes of creating an access road, as that process is not within its mandate. That the petitioner has failed to establish a prima facie case and that the application does not meet the threshold for grant of the orders sought. He attached a Gazette Notice supplement No 4 of 22nd January 2016.

8. The 1st and 3rd respondents filed their replying affidavit sworn on 31st March 2025 by one Caleb Shiundu, the 1st respondent. He stated that his office has a legal responsibility that include maintaining public access roads and ensuring compliance with land use regulations in accordance with the County Roads Bill No. 18 of 2018. That he received a letter dated 7th October 2024 from the Land Registrar in regard to complaints that an access road touching on parcels Nos. Isukha/ Shitoto/183, 176, 188, 207, 189, 190, 688 and 206 were closed and or narrow in some parts due to encroachment by some land owners on the access road.

9. That he obtained the map in regard to the same which showed a clear access road touching on the said parcels of land showing that the access road was a recognized public way. That his office conducted searches regarding the said parcels of land and issued requisite notices through the area Chief to the land owners, notifying them of his intention to visit the area and open the access road. That they interviewed members of the public and established that there is an access road measuring 6 meters wide but the complainant who is the owner of parcel No. 183 was unable to access his parcel due to encroachment and human activities on the access road by owners of parcel Nos. 206, 189, 207, 188 and 176.

10. That during the visit, which was in the presence of all land owners, they established that the petitioner who is owner of parcel No. 688 was conducting farming activities on the access road where he had planted sweet potatoes and maize, denying the public access to the road. Further that the owner of parcel No. 188 had a grave on the road, while the owner of parcel No. 289 had maize crop on the road. That in addition, the owner of parcel No. 176 had put up a permanent structure on the road denying access to the public.

11. He maintained that the petitioner is deliberately misleading the court in making reference to compulsory acquisition as he is the one who has encroached on a public road by planting sweet potatoes and maize thereon. He denied violating the petitioner's right under Article 40 of *the Constitution* and maintained that he acted under the public necessity doctrine which allows for removal of obstructions when the public rights to access roads is at stake. That no survey report has been presented by the petitioner to demonstrate non-encroachment.

12. It was his position that the access road exists on the map and no compulsory acquisition has been made by the 1st and 3rd respondents. That the mandate to establish boundaries vests in the Land Registrar and Surveyor. That the petitioner has not approached court with clean hands as his encroachment is illegal. He attached a letter dated 7/10/2024, map, official searches, letters dated 9/10/2024 and 2/12/2024, and a surveyor's report.

13. A further replying affidavit was filed by one Alfred Kubili Anguswa. The same was dated 31st March 2025. He stated that he was the registered proprietor of parcel No. Isukha/Shitoto/183. That he reported to the Area Assistant Chief that the access road to his property was blocked by owners of parcel Nos. 688, 206, 207, 189, 188 and 176. That he made a formal report to the Lands office which led to the visit by the 1st respondent's team. That during the visit, it was established that the access road which was provided in the map and which had been on the ground had been encroached upon. He denied allegations of compulsory acquisition. He attached his title deed and identity card.

14. The 4th respondent filed a replying affidavit dated 5th May 2025, sworn by one Brian Ikol, its Director, Legal Affairs and Dispute Resolution. He deponed that the 4th respondent has never recived any request from the National or county Government in regard to the acquisition of the suit property and has never been involved or played any constitutional or statutory mandate in the alleged acquisition. That the petitioner has failed to establish any nexus between the 4th respondent and the alleged acquisition, hence the reliefs sought are ill advised.

15. In a rejoinder, on behalf of the petitioner, Alex Asuza Akivambo filed further affidavit dated 26th May 2025. He stated that he was an Approved Assistant Surveyor. That on 14th March 2025, he received instructions from the petitioner to resurvey the suit property in relation to the access road. That the existing road on the map measures approximately 5 meters. That according to him, access roads as per the old legal provisions were supposed to be 4 meters, and that if there is no existing access road and a party wishes to open one, the current law provides for 6 meters to be acquired in a fair and procedural manner. That upon resurvey, he established that there were discrepancies because the 1st

respondent marked 6.5 meters on the upper part, 6.2 meters on middle part and 9 meters on the lower part therefore acquiring 0.03 hectares of the petitioner's property. That therefore the access road is "grossly irregular, malicious, and does not reflect the exact measurements shown in the map." He attached his report.

16. Parties were directed to canvass the application by way of written submissions. On record are the petitioner's submissions dated 30th October 2025, the 2nd respondent's submissions dated 13th February 2026 and the 1st and 3rd respondents' submissions dated 11th February 2026; all of which this court has duly considered.

Analysis and determination

17. The court has carefully considered the application, the responses thereto as well as submissions and authorities cited. In my considered view, the single issue that arises for this court's determination is whether the petitioner has met the conditions for grant of temporary injunction.

18. Principles for grant of temporary injunctions are well settled. In the case of American Cyanamid Co v Ethicon Limited 1975 AAER 504, the court enumerated elements to be satisfied before grant of a temporary injunction as follows;

    a. There must be a serious/fair issue to be tried;

    b. Damages shall not be an adequate remedy

    c. The balance of convenience lies in favour of granting or refusing the application.

19. A prima facie case was described in the case of Mrao Ltd v First American Bank of Kenya and 2 Others (2003) KLR as follows;

> " A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

20. The concept of irreparable injury seeks to protect the prima facie case established by the applicant from being rendered nugatory, hence there must be a prima facie case, before the existence of an irreparable injury. To show that the applicant shall suffer irreparable injury, they ought to demonstrate that the injury likely to be suffered cannot be adequately compensated by costs. In the case of Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] e KLR, the court sated as follows;

> " Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury."

21. In the case of Pius Kipchirchir Kogo v Frank Kimeli Tenai (supra), the court held that for the balance of convenience to tilt in favour of the applicant, they must show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction, will be greater than that which is likely to arise from granting it.

22. In the instant case, the applicant's case is that he is owner of parcel No. Isukha/Shitoto/688, which the respondents entered upon, compulsorily acquired by creating a road inside the said land and failed

to compensate him. On the other hand, the respondents are categorical that the dispute herein has nothing to do with compulsory acquisition because it was a question of the petitioners' encroachment onto an access road which is a public way and denying other land owners of access to their parcels. The 1st and 3rd respondents' counsel in their submissions maintained that the petitioner did not establish a prima facie case with chances of success as the evidence of the 1st respondent demonstrated that the petitioner had encroached on a public access road and equity does not aid a wrong doer.

23. It is trite that an application for injunction is an equitable remedy and anyone approaching equity ought to have clean hands and is expected to disclose all material facts.

24. The petitioner herein is aware that the dispute herein is in regard to whether he has blocked an access road, yet he framed the same as a compulsory acquisition dispute and infact excluded the land owners who complained that he had blocked an access road. It is upon being confronted with the evidence of the respondents that he had to turn around, confirm that there is indeed an existing access road on the site of the dispute. He went on to avail the affidavit and survey report of one Alex Akivambo and allege that the access road as opened was "irregular and malicious" on the basis that the road was supposed to be 4 meters. It is clear to me that the petitioner is guilty of nondisclosure of material facts and therefore undeserving of the equitable remedy of temporary injunction.

25. I agree with the 1st and 3rd respondents' submissions that restoration of a public access road which had been encroached upon, cannot amount to compulsory acquisition. Besides, the petitioner having failed to demonstrate prima facie that his land was compulsorily acquired by the respondents, has failed to demonstrate a prima facie case, as the dispute herein has nothing to do with compulsory acquisition, but everything to do with opening of a public way, which the petitioner concedes that the same exists on the map. There being no prima facie case, questions of irreparable loss and the balance of convenience are without foundation and hence moot.

26. In the premises, I find and hold that the application dated 13th March 2025 lacks merit and the same is hereby dismissed with costs to the respondents.

27. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 26TH DAY OF FEBRUARY 2026

A. NYUKURI

JUDGE

In the presence of;

Mr. Kuloba for Petitioner

Ms Odeck for the 1st and 3rd respondents

Ms Bosire holding brief for Ms Naneu for the 2nd respondent

No appearance for the 4th respondent

Court Assistant: Delphine