REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC CASE NO 272 OF 2016

JOHN KABINGA ONGWENYA …….…….……1ST PLAINTIFF

FRANCIS AMENYA NDUBI ……..…..……2ND PLAINTIFF

LILIAN MORAA MONGARE ……..…..…… 3RD PLAINTIFF

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITY…… DEFENDANT

JUDGMENT

1. The Plaintiffs vide their plaint dated 8th September, 2016 sued the Defendant, a statutory body over a notice it issued dated 27th July 2016. It is the plaintiff case that the impugned notice alleged the Plaintiffs' development encroaches the Kisii junction-Ngoima Road whose width should not exceed 120 feet. The Plaintiffs contended that while developing their plots, they considered the width of the Highway and asserted their properties donot in any way encroach on the road reserve.
2. This case was filed because the Defendant threatened to demolish the Plaintiffs' properties lying on the portions alleged to be encroaching on the highway. Hence the prayers made for;
    a. **An order of permanent injunction restraining the Defendant, their agents and or servants from demolishing or**

in any way interfering with the Plaintiffs' properties aforestated until the suit is heard and determined.

b. Costs of the suit.

c. Any other relief the honourable court deems just to grant.

3. The Defendant filed a statement of defence dated the 20th of April 2017 denying the claim. It pleads that the Kisii Junction (Daraja Moja)-Ngoima Road (B4), formerly C21, is classified as a public road with a minimum road reserve of 40m (131ft) wide, as indicated on available Land Acquisition drawings. It was for this reason that any development recently found to be within the reserve was marked as encroaching.
4. The defendant pleaded that before the land was acquired, the road reserve was 120 feet wide, but it increased to 131 feet after the acquisition. The defendant explained that the suit parcel L.R. No. N. Mugirango/Ikonge/1058 borders the said road and was created following the subdivision of N. Mugirango/Ikonge/850. Additionally, the land acquisition involved N. Mugirango/Ikonge/182, which was opposite no 850, to improve the road's geometry in the area.
5. It further stated that parcel N. Mugirango/Ikonge/2345 was created after a series of subdivisions from parcel 837. The Defendant states that when the suit parcel number 2345 was created, land acquisition had already occurred, and the road and reserve were already in place, with the reserve shown as 131 feet on the land acquisition drawing.

6. Regarding land reference North Mugirango/Ikonge/2577, the defendant claims it was created from parcel 125. They state that the amendments have been made on the preliminary index map (P.I.D.) and that this parcel is located in a zone where the 131-feett road reserve was acquired. The same applies to parcel number 2418, which was created from the subdivision of North Mugirango/Ikonge/124.
7. For North Mugirango/Ikonge/1236, the Defendant states that it was a subdivision from parcel number 1136. That parcel 1136 was created from a subdivision of parcel 616. The defendant affirms that part of 1236 was acquired to establish a new 40m wide road reserve. According to the defendant, the plaintiffs based their boundary determinations on the old, unamended Preliminary Index Map (PID).
8. The Defendant, in denying paragraph 6 of the plaint, asserts that the wrongdoing lies with the Plaintiffs for encroaching on the road reserve. Therefore, the planned demolition as per the impugned notice was for the public good and outweighs any private interests the Plaintiffs may have. The Defendant urged the court to dismiss the suit with costs.
9. The parties offered oral evidence in support of their case, with the Plaintiffs relying on the evidence of two witnesses. The 1st Plaintiff testified as PW1 by adopting his witness statement dated 8th September 2016 as his evidence-in-chief. Pw1 said he is the registered owner of land North Mugirango/Ikonge/1058 and 2345, while the 2nd Plaintiff owns

land North Mugirango/Ikonge/2418, and the 3rd Plaintiff is registered as the owner of North Mugirango/Ikonge/2577.

10. The witness stated that they sued the Defendant for encroaching on their land, which is situated by marking their buildings for demolition on allegations that they are on a road reserve along the Kisii Junction-Ngoima road. It is the Plaintiffs' evidence that they called the Physical Planning Officer, Nyamira County, who assured them that their plots were not on a road reserve. He concluded his testimony by urging the court to grant them the orders sought.

11. Elias Rioba Oteki, who introduced himself as the draftsman in the Physical Planning Department of Nyamira County, testified as PW2. He stated that, according to the Registry Index Map, the road's physical measurement is 120 ft. PW2 confirmed that the 1st Plaintiff applied for building approval with the County and was given the go-ahead by the Department of Physical Planning to build on the land North Mugirango/Ikonge/N. Mugirango/Ikonge/1058. It was after the 1st Plaintiff completed his construction that he visited their offices to complain that his building had been marked for demolition.

12. Pw2 continued that following the complaints, he visited the site and took measurements of the road. That he took the centre of the road and measured 18m plus 12m to the Plaintiff's building, and confirmed that the

Plaintiff's building is not on the road reserve. He produced his sketch as PEx. 10.

13. The record shows that the Defendant was absent when the Plaintiff testified, but on application to the court, the case was reopened, and they were allowed to call their two witnesses. The first witness, Myra Kigani Musavakwa testified on 1st February, 2023. She introduced herself as a survey assistant working with the Defendant. She adopted her witness statement dated 5th May 2017.

14. DW1 stated that the Defendant acquired parcel numbers North Mugirango/Ikonge/1058, 2345, 2577, 2418, and 1236 through compulsory acquisition. She explained that the acquisition took place in 1986 and was publicly announced via a gazette notice dated 31.1.1986 (DEx 1), intended to expand the Daraja Moja to Chemosit Road. She noted that this was initially a class C road, but it has since been upgraded to a class B road. Her evidence indicates that the road has been encroached upon by some buildings and fences.

15. She continued that after the acquisition, some plots that were acquired were subdivided. The witness referred the court to the acquisition drawings which indicate the road reserve of 120 ft before the acquisition, and the extent of the land/plots acquired. She gave an example: a portion of parcel number 616 was acquired, but when they went to put markings,

they found it had been subdivided into North Mugirango/Ikonge/1236, among others.

16. Dw1 admitted parcel number 850 which birthed parcel number 1058 was not acquired. The Defendant stated that the centre of the existing carriageway (the tarmac) is not the centre of the road reserve. She affirmed that parcel 837 which is the mother title for 2345 is among the plots that were acquired for the road reserve to make it 131 ft.

17. She added that a portion of parcel 125 was also acquired. It is parcel 125 that birthed parcel number 2577 following subsequent subdivision. She said parcel number 124, neighbours parcel 125. It is her evidence that the notice of encroachment and demolition was published in the Daily Nation of 17/6/2014 and the Standard Newspaper of 22/12/2005. She produced the documents in her list as DEx. 1-5.

18. The witness was stepped down before cross-examination as the Court, on its own motion, directed a site visit in the presence of the parties and their surveyors. Subsequent to the site visit, the survey report was filed in court on 13th March, 2024. The record shows that DW1 was never recalled to complete her testimony or for cross-examination.

19. On 15th October, 2025, Mr Michael Obop testified on behalf of the Defendant as Dw2. He introduced himself as a senior Surveyor working with KENHA and adopted his amended witness statement dated

20.8.2025 as his evidence in chief. He also produced the documents contained in the list dated 10.2.2025 as defence exhibits as per the list.

20. Dw2 continued to state that he was aware of the construction of the Kisii Junction-Ngoima B4 Road, which extends all the way to Chemosit. He explained that the road was built a long time ago by the Ministry of Roads and Public Works, but it later became necessary to realign and widen it. He testified that the land acquisition process was properly followed, with acquisition drawings prepared, gazetted, and awards paid in areas requiring realignment. He noted that a road may be realigned to eliminate a curve. The witness also mentioned that the centre line of the carriageway is not always aligned with the centre of the road. Additionally, he provided categories of permitted road reserves, including 40 metres, 60 metres, and in certain cases, 200 metres.

21. Regarding the parcels of land in dispute, he stated that parcel number 850 is directly opposite parcel number 182, which was acquired. The witness then described the portion of the parcel that was acquired, as shown in the acquisition drawing prepared by Otieno Odongo and Partners. He asserted that in this area, there is a section of the old road reserve that is wider than 40m and remains government land.

22. The witness asserted that the owner of plot 1058 was confused about its boundary in this section. He argued that this parcel encroaches upon the old road alignment and constitutes an encroachment, with the affected

portion marked in yellow in Dex8C. Based on this, the owner of 1058 was served with a notice to demolish the offending structures there, as the Defendant claims ownership.

23. Dw2 continued that parcel number 2345 was created from subdividing parcel number 837 and that a portion of parcel 837 was acquired. He states that parcel 2345 abuts the new road, but it is not encroaching.

24. It is the Defendant's case that the 3rd Plaintiff's title was issued in April 2013, long after the land was acquired for the extension of the road reserve. He asserted that some structures on this land encroach on a road reserve, and it is these structures that were marked for demolition. That the same scenario applies to parcel 2418, owned by the 2nd Plaintiff. Additionally, the witness stated that parcel 1236 falls within the area that was acquired from the original title number 616. He referred the court to exhibits 9C, 10A, and 1D (maps) as supporting his assertion.

25. He concluded his evidence by stating that the structures have not been demolished because the parties came to court as soon as they were served with the Notice.

26. Under cross-examination, Dw2 stated that Class B roads ideally should have a reserve of 60 metres, but there are areas where the reserve is as low as 40 metres. He admitted that not all of our roads meet the 40-metre reserve standard, and that the Ngoima-Kisii Junction road does not have a standard reserve from beginning to end. He stated that, when constructing

along the roads, the bodies to be consulted are the Director of Surveys and the Roads Authority. He also averred that the Physical Planner approves buildings but does not deal with boundaries.

27. The witness testified that in some areas where people cannot reach the district surveyor, the Defendant had placed road markers (white concrete markers). He affirmed that a road reserve is shown on the map, but the carriageway is not.

28. The witness asserted that it is not the role of the Physical Planner to determine the extent of the road reserve, insisting that the road reserve in Ikonge is 40 meters. After the acquisition, the reserve was expanded to 131 ft. He could not tell if the Government informed the Lands Registry about the acquisition, but states the RIM was amended to reflect the acquisition. He avers that any person buying land should also check on the map besides the certificate of official search.

29. DW2 stated that they have produced payment schedules confirming that the lands were acquired. He reiterated that parcel 1058 has absorbed both the old road reserve and the new reserve. He explained that the maps they produced, showing the old and new road reserves, were based on records from the Ministry of Lands. They are not disputing that the 1st Plaintiff owns parcel number 1058, but they clarify that he has extended his boundaries to enclose the road reserve

30. In re-examination, Dw2 stated that where there is an overlap of old and new reserve, the entire portion is combined to form the road reserve so that it is wider. Where developments are placed on the road reserve, they are to be removed. This marked the close of the Defendant's case.

Submissions

31. Both parties filed their respective submissions with the Plaintiffs' submissions dated 7th January 2026 and the Defendant's submissions is dated 28th November, 2025. The Plaintiffs submit that they acquired their parcels of land through purchase or as owners of land that were not subject to compensation. That the parcels of land acquired by the Defendant were not registered hence there was no way of knowing they exist.

32. The Plaintiffs argue that the exhibits used by the Defendant are not official as they are not registered at the lands office to notify the public which parcels of land are affected. According to them, they did due diligence before purchasing the suit parcels. Since their properties are not on recognized road reserves, the same cannot be said to have encroached. It is their submission that they have proved their case, as they are not among those who were compensated.

33. The Defendant raised two issues for determination;

    a. Whether the Honourable Court can grant Orders in vain?

b. Whether the Plaintiffs have encroached on the road reserve?

34. It submits that it is a general principle that parties are bound by their pleadings and courts determine a case on the issues that flow from the pleadings, and judgment would be pronounced on the issues arising from the pleadings or from issues framed for the court's determination by the parties. The main prayer by the Plaintiffs is for an injunction, which seeks to restrain the Defendant, their agents and/or servants from demolishing their properties aforestated until this suit is heard and determined.

35. They submit that a suit cannot be heard and determined on the basis of a temporary relief as held by the High Court in OBARA OENDO V KENYA POWER AND LIGHTING COMPANY LIMITED (Civil Appeal 157 of 2008120101 KEHC 412 KLR

36. On the second limb, the defendant cited the provisions of Section 49 of the Road Act CAP 408 Laws of Kenya provides for structures encroaching on the road reserve. The said section provides that:

(1) Except as provided in subsection (2), no person or body may do any of the following things without the responsible Authority's written permission or contrary to such permission —

a) erect, construct or lay, or establish any structure or other thing, on or over or below the surface of a road reserve or land in a building restricted area;

(4) Where a person, without the permission required by the subsection (1) or contrary to any permission given thereunder, erects, constructs, lays or establishes a structure or other thing, or makes a structural alteration or addition to a structure or other thing, an Authority may by notice in writing direct that person to remove the unauthorized structure, other thing, alteration or addition within a reasonable period which shall be stated in the notice but which may not be shorter than thirty days calculated from the date of the notice.

37. That the Defendant through the evidence of Dw2 had established that the Plaintiffs had encroached on the road reserve which had been legally acquired. The Plaintiffs had been issued with the appropriate notices for intention to demolish the said structures that existed in the road reserve by the Authority in 201 6 and the same offending structures were marked for demolition with the intention being that the owners would remove the structures voluntarily.

38. It cited inter alia, the case of **KABERIA KUMARI versus COUNTY GOVERNMENT OF MERU (2018) KEELC 622 (KLR)** where Cherono J. stated that:

"From the totality of the evidence by the parties, it is true that the Petitioner has a right to own property and is entitled to his property anc/ developments thereto only to the extent that such properties have not encroached upon land that is for a public purpose. When the Petitioner moved the Court for the orders now before me for determination, he must not only prove that he is entitled to the land but also demonstrate that the buildings constructed therein have not encroached on a public road. That can only be demonstrated by way of a survey map drawn by a qualified surveyor or a Land Registrar. In this case, the Petitioner has not produced any survey map or report by a qualified land surveyor or Land Registrar showing the Petitioner's building plan in paper and on the ground. It was incumbent upon the Petitioner to demonstrate that he is entitled to the orders by showing that he has not encroached on the road reserve."

39. The Defendant concluded its submissions by urging this court to dismiss the Plaintiffs' suit.

Analysis and Determination:

40. There is no dispute that the Defendant served a Notice dated 27th July 2016 upon the Plaintiffs for demolition of their structures, which the Defendant alleges is built on a road reserve. The affected plots, according to the Plaint, were; North Mugirango/Ikonge/1058, 2345, 2418, 2577, and

North Mugirango/Mokomoni/1236 and North Mugirango/Boisanga/497, 2299 and 895. However, during the hearing, evidence was led only in respect of parcel numbers North Mugirango/Ikonge/1058, 2345, 2418, and 2577.

41. There is also no dispute that the existing road reserve for Kisii Junction-Ngoima Road was initially 120 ft. Furthermore, the Plaintiffs have no objection to the Defendant's expansion of the said road reserve to 131 ft. The issue concerns whether the Plaintiffs' parcels of land and/or built structures encroach onto the old and new road reserve.

42. Therefore, my task is to determine whether or not there is an alleged encroachment as per the Notice dated 27th July, 2016. In determining the dispute, I adopt the two questions raised by the Defendant in its submissions, thus;

    a. **Whether the Plaintiffs have encroached on the road reserve**

    b. **Whether the Court can grant Orders in vain.**

43. It is only the 1st Plaintiff who gave evidence, and although he stated that he was also testifying on behalf of his co-plaintiffs, his written witness statement (dated 8th September, 2016) did not offer much to support the cases of the 2nd and 3rd Plaintiffs. The evidence of Pw2 also referred to measurements taken with respect to L.R North Mugirango/Ikonge/2345, owned by the 1st Plaintiff.

44. The law of evidence under sections 107 to 109 of the Evidence Act, Cap 80 imposes a duty on the party who alleges to prove the existence of those facts. It states that,

> **"107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**
>
> **109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."**

45. In this case, no evidence was presented to support the claims made by the 2nd and 3rd Plaintiffs, as well as the owners of land parcels numbered North Mugirango/Mokomoni/1236, North Mugirango/Boisanga/497, 2299, and 895. The standard of proof in civil cases is based on a balance of probabilities, and when no evidence is provided to establish the facts pleaded, the court cannot enter a positive finding.

46. In regard to the claim by the 1st Plaintiff, Dw2 stated thus with regard to encroachment by L.R. No. 2345, ***"it is abutting a new road that was created. KENHA did not give any eviction notice in this case. It is just abutting a new road reserve and so it is not encroaching."***

47. In the survey report prepared pursuant to the court order and filed on 13th March, 2024, the Surveyor stated thus;

"on parcel number 2345, the measurements from the map and mutation compared to the ground measurements showed that there is an encroachment of 0.0007ha."

48. The encroachment, if any, by land parcel number 2345 is so minor that it does not justify issuing orders for the demolition of any structures built on it. A copy of the Notice served on the 1st Plaintiff did not specify any parcel numbers, probably explaining why he filed the claim concerning both his two parcels of land, numbers 1058 and 2345.

49. In light of the evidence on record, I hold that the suit property North Mugirango/Ikonge/2345 has not encroached on the road reserve for the Kisii Junction-Ngoima road.

50. The remainder of this dispute centres on developments on parcel number 1058. To support his claim that he has not encroached, the 1st Plaintiff produced a certificate of official search showing he is the owner of the mentioned land. The Defendant does not contest his ownership and confirms that it was not part of the land they acquired. The dispute concerns the extent of the said land's boundary and the developments on this disputed portion.

51. The 1st Plaintiff also relied on the evidence of Pw2, who introduced himself as a draftsman in the Department of Physical Planning of Nyamira County. He stated that the road reserve measures 120 ft according to the Registry Index Map. This witness said he was authorised

by the Director of Physical Planning of Nyamira County to go and determine whether the 1st Plaintiff's buildings are on the road reserve. After carrying out the instructions, he concluded that the impugned buildings are not on a road reserve. He produced a sketch map showing his measurements to corroborate his evidence.

52. However, the Survey Report (carried out pursuant to the court order) stated that the suit parcel 1058 encroached onto the road reserve from Ikonge Boys Secondary School by 0.2798 hectares, as indicated by the mutation and the map (annex 1 & 4 to the report), along with its copy of the register (annex 6). The court notes that these measurements were taken in the presence of the 1st Plaintiff and his counsel. They did not apply to cross-examine the maker of this report, which leads me to infer that they were satisfied with its findings.

53. The 1st Plaintiff knows the size of his land as listed in the certificate of official search (5.425Ha) and nothing stopped him from determining the ground measurements and the precise location of the buildings marked for demolition by a qualified surveyor (whether government or private). This is because the encroachment matter concerns the boundary of his plot and the road reserve.

54. Section 18(2) and (3) of the Land Registration Act Cap 300 states thus;

"2. The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land

unless the boundaries have been determined in accordance with

this section.

3. Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary."

55. This position was expressed in the case of Kaberia Kumari Vs County Government of Meru supra that

"…When the Petitioner moved the Court for the orders now before me for determination, he must not only prove that he is entitled to the land but also demonstrate that the buildings constructed therein have not encroached on a public road. That can only be demonstrated by way of a survey map drawn by a qualified surveyor or a Land Registrar."

56. The Land Registration Act empowers the Land Registrar in collaboration with a government Surveyor to fix boundaries and or determine boundary disputes. Instead of engaging a Surveyor and/or Land Registrar, the 1st Plaintiff went to the Director of Physical Planning, Nyamira County. The duties of the Director of Physical Planning are granted under the Physical Planning Act (the applicable law as at the time this dispute arose).

57. The purpose of that Act set out in its preamble is, **"An Act of Parliament to provide for the preparation and implementation of physical development plans and for connected purposes."**

58. The functions of the Director were set out in section 5 of the Act (cap 286 repealed) as follows:

> "**The Director shall—**
>
> **(a) formulate national, regional and local physical development policies, guidelines and strategies;**
>
> **(b) be responsible for the preparation of all regional and local physical development plans;**
>
> **(c) from time to time initiate, undertake or direct studies and research into matters concerning physical planning;**
>
> **(d) advise the Commissioner of Lands on matters concerning alienation of land under the Government Lands Act (Cap. 280) and the Trust Land Act (Cap. 288) respectively;**
>
> **(e) ….**
>
> **(f) require local authorities to ensure the proper execution of physical development control and preservation orders."**

59. The Physical Planning Act Cap 286 was replaced by the Physical and Land Use Planning Act of 2019 (now Cap 303), which defines physical planning as;

“The active process of organising the physical infrastructure and its functions to ensure orderly and effective siting or location of land uses, and it encompasses deliberate determination of spatial plans with an aim of achieving the optimum level of land utilisation in a sustainable manner.”

60. Thus, the evidence of Pw2 does not add any value to the Plaintiffs’ case, as the statute creating their office allows them to plan and approve development on the land. They lack the authority to resolve boundary disputes.

61. In addition to discrediting Pw2's evidence that he plays no role in determining whether there is encroachment on a road reserve, the Defendant, through its witness, produced several maps to support its case. Among these, Dex. 8C, which he states proves that parcel 1058 has encroached upon both the old and new road reserves.

62. Dw2 stated that a portion measuring 0.24ha was acquired from parcel 182, which is directly opposite parcel 850, for purposes of improving the geometrics of the road; hence, the existing centreline of the carriageway that appears to be the centreline of the road is not the case. They produced documents in support of the acquisition as contained in Dex 1-7. It is the Defendant’s contention that the road reserve is wide in this section because it combines both the old and the new road reserve.

63. In their submissions, the Plaintiffs contested the maps produced by the defendant arguing they were not official records. I think this assertion is too late in the day as they did not object to the production of these documents when the witness was giving evidence. Furthermore, the Plaintiffs do not give particulars of the exhibits they argue ought to have emanated from the land's office.

64. They also faulted the Defendant for not registering the lands acquired with the Ministry of Lands. In addressing this matter, I observed that evidence has been produced showing that the acquired parcels of land were privately owned, and compensation was paid to the specific individuals. The persons whose lands were acquired have not raised any complaints against the Defendant. Since these parcels of land were separate, the failure to register the acquired portions does not permit neighbouring plots to alter the boundaries.

65. From the evidence presented, the court concludes that the entire parcel number 1058 is not encroaching on the road reserve of the Kisii Junction-Ngoima road. Instead, it is the built structures on the portion along the carriageway that are alleged to encroach on the road reserve. Therefore, the burden was on the 1st Plaintiff to prove that the structures were indeed built solely within parcel 1058.

66. The 1st Plaintiff relied heavily on the evidence of Pw2 whose evidence in my view was not conclusive as the sketch plan produced was on

buildings developed on parcel number 2345. The Defendant admitted that this plot does not encroach on the road reserve. Pw2 does not show any measurements taken for structures on Parcel number 1058 with comparison to its location on the map (R.I.M).

67. Therefore, the only evidence adduced regarding this parcel is the word of the 1st Plaintiff that his land does not encroach. The survey report supports the Defendant's claim that parcel 1058 has encroached. This leaves the court no option but to find that the 1st Plaintiff has not proved his case for an order of a permanent injunction restraining the demolition of his structures on 1058, which has encroached on the road reserve.

68. I am persuaded by the authority cited by the Defendant which in my view the facts presented here are similar, in the case of **Kenya National Highways Authority versus Shalien Masood Mughal & 5 Others (2017) Eklr** where the court of appeal held thus…

> **"With that finding, the answer to the first issue becomes clear that there was an 80-meter road reserve and a 30-meter buffer zone on the Nairobi/Mombasa Highway at the interchange with the Southern bypass, and the disputed plot was within it. It was scientifically proved by the survey report filed with the court. Needless to say, it was the disputed plot that encroached on the road reserve.....However, in the case before us, Kenha and the other respondents do not challenge the validity of Mugha/'s**

title to the disputed plot. Their assertion that, to the extent that he has, as confirmed in the report by the surveyors, encroached on the road reserve and buffer zone, his title is defeasible and is not entitled to the protection afforded by Article 40 of the Constitution. The Article protects proprietary rights but under the current Constitutional regime, those rights are not absolute. They can be limited and one of the limitations appears in Article 40 (6) under which the protection does not extend to any property that has been found to have been unlawfully acquired. One may ask whether the disputed plot in this matter was lawfully acquired but it is unnecessary to go there. One rnay even wonder whether, with the exercise of due diligence it was possible to establish the extent of the road reserve for the Nairobi/Mombasa Highway before the disputed plot was created."

69. On the competence of the suit, the defendant urged this court not to make any finding in favour of the Plaintiffs because the orders were prayed for pending the determination of the suit. In support of their argument, they cited the case of **Omuya & 4 Others vs Nawel Business Agencies & 6 Others; Nairobi City County and 2 Others (interested parties) (2023) KEELC 2022 (KLR)** where Justice Mboya held thus;

"For coherence, courts of law do not issue orders in vain and/or in futility; and in this regard, the issuance of a temporary injunction pending the determination of the application shall certainly be an exercise in futility.

In a nutshell, my answer to issue Number two (2) is that no appropriate reliefs have been impleaded and/or sought; and given that Parties are bound by their pleadings, this court cannot issue a relief that has neither nor sought for by the Applicants."

70. It is true that the Plaintiffs stated in the plaint that they were seeking permanent orders of injunction **pending the determination of the suit.** However, I do agree with the Plaintiff's submissions that this is an error that was not fatal to the case and did not prejudice the Defendant in any way. I hold that the error is curable under Article 159 of the Constitution, as the Defendant was aware of the case facing them. Thus, I am not persuaded to hold in the same manner as the cases cited by the Defendant in support of this argument.

71. In conclusion, I find that the case partially succeeds concerning the claim over land parcel **North Mugirango/Ikonge/2345**, which the court determines has not encroached on the road reserve of Kisii Junction-Ngoima road. I hold that the claims on the remaining parcels North Mugirango/Ikonge/1058, 2418, 2577 and North

Mugirango/Mokomoni/1236 as well as North Mugirango/Boisanga/497, 2299 and 895 have not been proven and are therefore dismissed.

72. The owners of these parcels are **granted Ninety (90) days from the dated of this judgment to remove the structures marked for demolition** due to encroachment on the road reserve. If they fail to do so, the Defendant shall proceed with the demolitions.

73. Although costs follow the events, in this case, I order each party to bear their costs of the suit.

Dated, Delivered and Signed at Kisii this 12th day of March, 2026.

A. OMOLLO

JUDGE