



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

JUDICIAL REVIEW NO. 5 OF 2013

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF
MANDAMUS AND PROHIBITION**

AND

**IN THE MATTER OF ARTICLE 4 SECTION 21, 22, 23 AND 43 OF THE CONSTITUTION OF
KENYA**

AND

**IN THE MATTER OF THE CIVIL PROCEDURE ACT CAP 21 AND IN THE MATTER OF
LAW REFORM ACT SECTION 8 AND SECTION 9 OF CAP 26 OF LAWS OF KENYA**

AND

**IN THE MATTER OF SECTION 10 (2) AND 16 (1) AND (2) OF THE PHYSICAL PLANNING
ACT CAP 286 OF LAWS OF KENYA**

REPUBLIC.....APPLICANT

VS

THE UASIN GISHU COUNTY PHYSICAL PLANNER & 3 OTHERS.....RESPONDENTS

EX-PARTE

HERMAN SHIBITI & 2 OTHERS.....EXPARTE-APPLICANTS

***(Application seeking orders of mandamus and prohibition to have the respondents to survey a road
and to prohibit the demolition of houses said to be on a road reserve; application unopposed;
application for mandamus to affix the boundaries of the road allowed; application seeking to prohibit
the demolition of houses stayed pending the affixing of the boundaries)***

RULING

This is an application for judicial review seeking the following orders :-

***(1) An order of mandamus compelling the 1st and 2nd respondents to establish the exact position of the
reserve road passing through King'ong'o Estate from Maranatha Church along Uganda Road as***

indicated by the mutation map of the area.

(2) An order of prohibition prohibiting the 4th respondent from demolishing the *ex-parte* applicant's properties earmarked for demolition.

(3) That there be stay of any demolitions or intended subsequent actions towards enforcing the notice issued by the 4th respondent for demolition pending the hearing and final determination of this proceedings or until such orders are made by this Honorable Court.

(4) Costs incidental to the proceedings to be provided.

The grounds upon which the application is based are *inter alia* that the intended demolition of the properties of the *ex-parte* applicants is illegal as their parcels do not fall on a road reserve as alleged by the 4th respondent. It is also stated that the efforts of the applicants to have the 1st and 2nd respondents demarcate the boundary along the road reserve has been fruitless.

The application is supported by the affidavit of the applicants. *Inter alia* it is averred in the affidavit that the applicants are representatives of King'ong'o residents and they have filed this suit on behalf of the legal owners of certain parcels of land which are claimed to be on a road reserve by the 4th respondent. They have denied that their parcels are constructed in the road reserve and have contended that they have given the stipulated 9 meters reserve as per the mutation map of the area. They have averred that they were shocked when the 4th respondent placed "X" marks on their properties and earmarked them for demolition on the allegation that the properties are on a road reserve. They have stated that they followed due process in obtaining their titles. It is for these reasons that they have asked for prohibitory orders and have asked that the respondents be compelled to interpret the correct measurements of the mutation maps.

Despite being served with the application, neither of the respondents filed any appearance and neither did they file a response to this application. It is unfortunate that the Government and/or the Office of the Attorney General would not find it prudent to file any response, or at least find it important to assist the court, in making a determination on a matter so important as the presence of a road reserve. It therefore follows that the only material before me is that provided by the applicants.

The applicants have annexed a map of the area, although it is not clear to me, whether that is the registry index map, or merely a map, proposing mutation of the various parcels along the road.

In my view, the main prayers sought are prayers 1 and 2, and for the purposes of this application, I must construe the 4th defendant to mean the County Government of Uasin Gishu.

It will be discerned that in the first prayer, the applicants want the 1st and 2nd respondents, who are the Uasin Gishu County Physical Planner and the Uasin Gishu District Surveyor, compelled to establish the exact position of the road. I see no problem in granting this prayer, as indeed, it is the duty of the two offices, to point out the exact positions of any road or road reserve.

I however have a bit of a difficulty in granting the 2nd prayer because in my view, that prayer is dependent on the positions that will be set by the 1st and 2nd respondents after executing the first prayer of this application. I think for the circumstances of this case, I cannot issue an order of prohibition, unless and until, it is established by the 1st and 2nd respondents, that the properties of the applicants do not fall within the road reserve. I have little option but to hold this prayer in abeyance for the moment.

For now, I allow prayer 1 of the application and make the following orders :-

(1) I hereby issue an order of mandamus compelling the Uasin Gishu County Physical Planner and the Uasin Gishu District Surveyor to determine and establish the exact position of the road reserve passing through King'ong'o Estate from Maranatha Church along Uganda Road.

(2) I hereby direct that this exercise be done and be completed within the next 60 days and a report

confirming completion of the exercise be filed in this court within the said period.

(3) I hereby direct that in the report, the 1st and 2nd respondents do state clearly whether or not the properties of the ex-parte applicants fall within or outside the road reserve.

(4) I hold in abeyance prayer 2 of this application pending the report hereinabove and further reserve the issue of costs.

I had issued a stay of demolitions pending the determination of this application and the stay order remains in force pending the report of the 1st and 2nd respondents.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 23RD DAY OF APRIL 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in open court in the presence of:

N/A for M/s R.Odede for ex-parte applicants.

N/A for Respondents who never entered appearance.