



Odongo v County Government of Vihiga (Executive Officer Department of Physical Planning) Executive Officer Department of Transport and Infrastructure) (Environment and Land Case Judicial Review Application 1 of 2024) [2024] KEELC 6172 (KLR) (19 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6172 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT AND LAND CASE JUDICIAL REVIEW APPLICATION 1 OF 2024**

E ASATI, J

SEPTEMBER 19, 2024

IN THE MATTER OF APPLICATION FOR JUDICIAL REVIEW ORDERS OF MANDAMUS

BETWEEN

KEPHER OJIL ODONGO APPLICANT

AND

COUNTY GOVERNMENT OF VIHIGA (EXECUTIVE OFFICER DEPARTMENT OF PHYSICAL PLANNING) EXECUTIVE OFFICER DEPARTMENT OF TRANSPORT AND INFRASTRUCTURE) .. RESPONDENT

JUDGMENT

1. The Ex parte Applicant, Kepher Ojil Odongo filed the Judicial Review application herein vide the Notice of Motion dated 30th January 2024 expressed to be brought pursuant to the provision of Order 51 Rule 4 *Civil Procedure Rules*, Article 57 of the *Constitution* and section 4 of the *Fair Administrative Action Act*, 2015 seeking for: -
 - a. An order of mandamus opening the access road with land parcels No. 1139 & 1140, 1140 & 1146, 1139 & 1138 West Bunyore/Ekwanda a per order of adopted by the Chief Magistrate court on 27/10/2022
 - b. An order of mandamus ordering the County Government of Vihiga through the Executive officer of Transport and Infrastructure and any other Executive officer of the County Government Department whose input and/or docket fall within the opening of the said access roads between land parcel Nos. 1139 & 1140, 1140 & 1146, 1139 & 1138 West Bunyore/Ekwanda as per the Ruling of the Chief Magistrate’s court on 27/10/2022.



- c. In the alternative an order of mandamus be issued to the engineer in charge of all the access roads within Vihiga County to open up to public use the access roads between LR No. West Bunyore/Ekwanda/1139 & 1140.
 - d. An order of mandamus to enforce the ruling of Hon, R.M Ndombi- issued on 27/10/2022 and have all rental, shops, erected on the road reserve between L.R No. 1139 & 1140, 1140 & 1146, and 1139 and 1138 West Bunyore/Ekwanda demolished.
 - e. Any other order of mandamus that is just and fair in enabling the opening of public use road between the land parcel aforementioned.
 - f. Court be pleased to order the County Government of Vihiga in opening the said access road to provide a conducive environment either through its enforcement agents or the National police service to ensure that the exercise of opening up the access road is successful and completed within the shortest time possible and without saddling the applicant.
 - g. An order of mandamus be issued for National police service to provide security during the opening of the access road aforesaid.
2. The Notice of Motion was based on the contents of the Statutory Statement dated 30th January 2024, the Supporting Affidavit sworn by the applicant on 30/1/2024 and the annexure thereto. The grounds of the Judicial Review are that the applicant is the owner of land Parcel known as 1139 West Bunyore/Ekwanda which borders land parcel No. 1140, 1139 and 1146. That there is a road of access in between the parcels of land which is duly surveyed and demarcated. That some people encroached onto the road of access and blocked it. That sometimes in the year 2015 the Land Registrar Vihiga County undertook a survey. That some of the applicant's neighbours sued him together with his brother by the name Nelson and the Land Registrar Vihiga County at the Land Disputes Tribunal at Kakamega.
 3. That the Land Registrar made a ruling on 15/6/2015:-

“the road of access should be maintained by all interested parties. Any unsatisfied party to appeal to the High Court within 30 days from the date of this ruling.”
 4. That in 2022 the applicant made an application to the Vihiga Principal Magistrate's court to have the Ruling and surveyor's findings as a ruling of the court. That the application was allowed and the Land Tribunal ruling of 15/6/2015 was adopted as the ruling of the Principal Magistrate's court on 27/10/2022. That it is the orders of 27/10/2022 that he is seeking this court to direct the County Government of Vihiga to enforce by opening the said road of access to him and the public in general. That he has made several visits to Vihiga County Government Department of Physical Planning, Roads and Infrastructure to have them open the said road with no success. Hence he sought the orders in the Notice of Motion.
 5. The application was opposed. The Respondent's case is that the applicant is being economical with the truth by failing to disclose that one of the suit lands was sub-divided and there are third parties holding valid title deeds and occupying the land. That opening the road would lead to demolition of structures such as shops and rental houses owned by the said third parties. That there is currently a case before the Magistrate's court being Vihiga SPM ELC No. 38 of 2018 over ownership of the said parcels where the third parties have been joined as interested parties. That Hon. S. Ongeri granted stay orders on 24th May 2022 for resurvey affecting any boundaries changes, sub-division or the issuance of



title deeds to parcel No. WEST BUNYORE/EKWANDA/1140 pending hearing and determination of the suit which suit is yet to be heard.

6. The substantive orders sought in the Judicial Review are orders of mandamus to compel County Government of Vihiga to open the road of access in execution of the order of the Principal Magistrate's court dated 27/10/2022. The court order adopted a ruling of Land Registrar dated 15/5/2015. I have read the findings in the said report dated 15/6/2015 it reads as follows; -

“In allowing the surveyor to take measurement so as to determine or open the said road of access I noted the following:

1. That the road of access is clearly marked or shown on the map while there were no marks on the ground though it was in use.
2. That the applicant and the defendants allowed us to mark and re-open the said road of access

Ruling

7. The said road of access should be maintained by all interested parties. Any unsatisfied party to appeal to the High court within thirty (30) days from the date of this ruling.
8. There was no order in the said ruling for re-opening of the road.
9. A copy of court ruling dated 24/5/2022 attached to the Replying Affidavit shows that there exists a court case No. 38 of 2018, in which an order of stay of resurvey affecting one of the suit lands namely; number West Bunyore/Ekwanda/1140 was issued pending hearing and determination of the suit. It appears the ruling was issued before the orders dated 27/10/2022 sought to be implemented herein.
10. The report was clear that the road, though not marked on the ground, was in use. Secondly that the applicants and the Defendants had allowed the Land Registrar and his team to re-open the road.
11. In *Republic v Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants* [2007] 2 EA 441, it was held that an order of mandamus compels a public officer to act in accordance with the law. The main principles that apply therefore for an order of mandamus to issue are firstly, that the Court will only issue a mandatory order if it concludes that it is the only decision lawfully open to the public body, and there is no other legal remedy that is available to remedy the infringement of a legal right.
12. Secondly, the Court will only compel the satisfaction of a public duty if it has become due, and if or where there is a condition precedent necessary for the duty to accrue, an order of mandamus will not be granted until that condition precedent comes to pass. Therefore, where there is a dispute as to whether a public duty has crystallized, the Court will not by an order of mandamus compel the Respondent to exercise that duty until the dispute is sorted out. Lastly, whereas the Court may compel the performance of the public duty where such duty is shown to exist, it will however not compel its performance or the exercise of its discretion in a particular manner.”
13. In the present case it has not been demonstrated that the County government of Vihiga had been ordered to re-open the subject road.
14. For the foregoing reasons and taking into account the existence of the court order dated 24/5/2022 aforementioned, I find no basis for issuance of orders of Mandamus as prayed. The Judicial Review application is therefore hereby dismissed. No orders as to costs.



15. Orders accordingly.

JUDGEMENT DATED, DELIVERED AND SIGNED IN OPEN COURT AT VIHIGA THIS 19TH DAY OF SEPTEMBER, 2024 AND VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Ajevi- Court Assistant.

No appearance for the Applicant.

Musiega for the Respondent.

