



REPUBLIC OF KENYA



KENYA LAW
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Nakitare & 18 others v Kenya National Highway Authority & 3 others (Constitutional Petition E003 of 2024) [2025] KEELC 286 (KLR) (30 January 2025) (Ruling)

Neutral citation: [2025] KEELC 286 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
CONSTITUTIONAL PETITION E003 OF 2024**

EC CHERONO, J

JANUARY 30, 2025

**IN THE MATTER OF ARTICLES 1(10), 2(1), 10,19(2)
19(3),21(1),22(2), 23(3), 40(1), 40(3), 47(1),64,67 AND
162(2)B OF THE CONSTITUTION OF KENYA, 2010.**

AND

**IN THE MATTER OF SECTIONS 113,115,125 &128 OF THE
LAND ACT, 2012.**

AND

**IN THE MATTER OF SECTION 4 OF THE FAIR
ADMINISTRATIVE ACT, 2015.**

AND

**IN THE MATTER OF COMPULSORY ACQUISITION OF LAND
ALONG KISUMU-KITALE ROAD AT MISIKHU DESCRIBED AS
WEBUYE-KITALE (AI) ROAD PROJECT**

BETWEEN

**ROBERT NAKITARE 1ST PETITIONER
WINFRED OKINDA 2ND PETITIONER
PETER S. MURUNGA 3RD PETITIONER
CHRISTOPHER K. MUTORO 4TH PETITIONER
RONALD MOSES MUUCHI 5TH PETITIONER
JOSEPH K. WAMALWA 6TH PETITIONER
BEVERLYNE N. JUMA 7TH PETITIONER**



JOHN WAFULA SIMIYU	8 TH PETITIONER
JOHN KHAMALA	9 TH PETITIONER
MERCY KARANI WANYAMA	10 TH PETITIONER
ERICK ANAKUTWA SITANDA	11 TH PETITIONER
HERBERT NAKITARE	12 TH PETITIONER
JAPHETHER SASAKA	13 TH PETITIONER
ALEX W. SIMIYU	14 TH PETITIONER
JORAM SITANDA	15 TH PETITIONER
HUMPHERY CHELOTI MUKHALUSIA	16 TH PETITIONER
EMMANUEL S. SIMIYU	17 TH PETITIONER
EVANS MURUMBA	18 TH PETITIONER
ANDREW SITATI WEPHUKHULU	19 TH PETITIONER

AND

KENYA NATIONAL HIGHWAY AUTHORITY	1 ST RESPONDENT
NATIONAL LAND COMMISSION	2 ND RESPONDENT
LAND REGISTRY BUNGOMA COUNTY	3 RD RESPONDENT
ATTORNEY GENERAL	4 TH RESPONDENT

RULING

1. By their petition filed herein on 13/11/2024 amended on 15/08/2024 the petitioners herein sought various orders against the respondents alleging a violation or threatened violation of their Constitutional rights with respect to various properties.
2. Simultaneously with the petition, the petitioner filed a Notice of Motion premised under the provisions of Order 40 Rules 1,2 &3 of the Civil Procedure Rules, 2010 seeking the following remedies:
 - a. Spent
 - b. Spent
 - c. That a temporary injunction be and is issued restraining the 1st respondent (KENHA), its agents and/or servants however called from demolishing the petitioner's properties of Misikhu Market along road name/code- Webuye-Misikhu (A1) in Bungoma County pending the hearing and determination of this application inter-partes.
 - d. That the said conservatory orders do subsist pending the hearing and determination of this petition.
 - e. That the costs of this application do abide the outcome of this petition.



3. The application is predicated on the grounds set out therein supported by the affidavit of Andrew Sitati Wepukhulu.
4. The gist of the application is that the petitioners claim to be registered owners of properties along the road designated as Webuye-Kitale (A1) at Misikhu Market having allegedly acquired the same from the original owners as bonafide purchasers for value without notice. That at the time of acquisition, there was no encumbrance registered on the land and that they did due diligence by obtaining the map of the area which showed the respective titles and acreage on the ground.
5. It was deposed that the properties have been developed with the approval of various government institutions and that it was only until recently that they received demolition notices from the 1st Respondent. It was their case that the Respondents have not accorded them fair administrative justice. That their petition has a prima facie chance of success and their properties being of high sentimental value, they are likely to suffer damages.
6. The 1st Respondent filed a replying affidavit in opposition thereto sworn by Joash K.Ruto on 16/07/2024. The deponent in his replying affidavit stated that sections 3,4,22,23 and 24 of the Roads [Act No. 2 of 2007](#) stipulate the mandate of the 1st Respondent. That in the years 1973 and 1975, the Government through compulsory acquisition acquired specific portions of the adjacent parcels of land, which share a common boundary with the Kisumu-Kakamega-Webuye-Kitale Highway. He deposed that the respective owners were promptly compensated in that exercise and the acquired portions of land ultimately excised from the various parcels of land making the parcels part of the road reserve resulting to the increase of the road from the existing 30metres to 60metres in width with the exception of the section of the road along old Misikhu market centre, Wabukhoye market centre and Lugulu Market centre which expanded to 40metres.
7. The 1st Respondent enumerated and attached documentation of the said acquisition of the Kitale-Kiminini-Webuye (Broderick falls) Road. That the parcels of land claimed by the petitioners which are a sub-division of the original land parcel No. Ndivisi/Makusela/886 which had been registered in the name of Jacktone Obaye Mutoro and share a common boundary with the Kisumu-Kakamega-Webuye-Kitale Highway. That Land parcel no. Ndivisi/Makusela/886 was an earlier sub-division of Ndivisi/Makusel/762 which was registered in the name of Ismael Mutoro.
8. He deposed that from the reading of the mutation forms of land parcel no. Ndivisi/Makusela/762 to Ndivisi/Makusela/886 and 87 and the resultant 20 portions i.e Ndivisi/Makusela/1855 to 1874, it is apparent that despite the letter from the Commissioner of lands dated 16/2/1976 forwarding the acquisition of the relevant portions of land seem not to have been amended to reflect in the record. That the petitioners ought to have gone beyond the certificate of search and looked into the history of the parcels of land and they would have discovered the earlier compulsory acquisition. It was stated that the initial owners did not surrender the compulsorily acquired portions of land on the ground and continued to occupy and sell the portions. That the issue before court the court is a boundary dispute issue which is the mandate of the Land Registrar according to Section 18(1) & (3) and 19(1),(2) and (3) of the [Land Registration Act](#).
9. It was deposed that the petition arose after a public sensitization campaign program that took place in December 2023 which brought to light the petitioner's encroachment into the road reserve which resulted to a report presented to their headquarters in Nairobi and subsequently they marked the encroachment areas and issued notices of intended demolition of the illegal structures. That the road maintenance exercise has now reached the affected area and it requires vacant possession to complete the project. It was sated that this is a national exercise of benefit to the entire country and the neighboring counties using the road and thus, they should not be stopped as the petitioners have



no legitimate claim of right over the affected portions. It was argued that the petitioners have not demonstrated a prima facie with chances of success and that the balance of convenience does not tilt in their favour.

10. The Petitioners have sought conservatory orders and an interim injunction following notices of demolition of their properties situated at Misikhu Market along road name/code-Webuye-Misikhu (A1) in Bungoma County. They allege that they hold certificates of title for the various parcels of land which have been developed. They alleged violation of their right to a hearing, to fair administrative action and to hold property.
11. The Respondent argued that the various portions of the parcels of land in issue were compulsorily acquired for purposes of expanding the road and that they are in the process of maintaining and re-establishing the Kisumu-Kakamega-Webuye-Kitale Highway which shares a common boundary with the said parcel of land.
12. In addressing my mind to this matter, I remind myself that I am dealing with it at an interlocutory stage. I will therefore not deal with the various averments made by the parties with regard to whether or not approvals for the developments in question were sought or not, and whether or not there was a road reserve with respect to which the notices were served. The issue that I am concerned with at this stage is whether there was a violation or threatened violation of the petitioners' constitutional rights, and whether I should grant the temporary injunction orders sought by the petitioners.
13. The petitioners have sought a temporary injunction to stop the Respondents from demolishing their properties at Misikhu Market along road name/code- Webuye-Misikhu (A1) in Bungoma County, and which they allege encroach on a road reserve. The principles guiding the grant of temporary injunctions orders was enunciated in the case of *Giella –vs- Cassman Brown Co. Ltd* (1973) EA 358. In that case, the Applicant must establish a prima facie case with a probability of success; that damages will not be an adequate remedy should the injunction not be granted and the Applicant later succeeds in its claim; and where there is doubt, the balance of convenience lies in its favour.
14. In the case of *Symon Gatutu Kimamo & 587 Others –vs- East African Portland Cement Co. Ltd.* [2011]eKLR Machakos High Court Petition No. 333 of 2011, Ngugi J observed at paragraph 9 thereof as follows:

In similar strain, Justice Musinga has explained that while the three-prong test in *Giella* Case is the fulcrum in our jurisprudence on interlocutory injunctions, the *Giella* Principles acquire a different hue when fundamental rights are involved. Justice Musinga put it this way in the *Satrose Ayuma & 11 Others v The Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 2 Others* [2011] eKLR:

In an application for an interlocutory injunction to restrain breach of a fundamental right, the court may have to go beyond the ordinary tests as stated in *Giella v Cassman Brown Co. Ltd*. While the applicants must demonstrate that there has been breach or threatened breach of their constitutional rights and thereby show that they have a prima facie case with a likelihood of success, the court has a duty to consider whether grant or denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of Rights.



15. Further, in the Supreme Court case of *Gatirau Peter Munya –vs- Dickson Mwenda Kithinji and 2 others*, Supreme Court of Kenya, Application No. 5 of 2014, [2014]eKLR the court stated that:-

“Conservatory orders” bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during pendency of a case; or “high probability of success” in the applicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes and priority levels attributable to the relevant causes.”

16. The first condition is to consider whether the petitioners have established a prima facie case with overwhelming chances of success. what amounts to a prima facie case has variously been defined and in this regard, it is sufficient to refer to and invoke the definition used in the case of *Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 fashioned a definition for “prima facie case” in civil cases in the following words:

“In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

17. The petitioner’s case is that they are the registered owners of various parcels of land at Misikhu Market along Webuye-Misikhu road in Bungoma County and that there are impending demolitions of their structures erected along those roads a result of notices of intended demolitions to pave way for maintenance of the road. The petitioners contend that the said road would have adverse effect on their livelihood and general wellbeing as it will involve dispossession of their land and demolition of their homes and businesses. They further contend that the project is being undertaken in a manner which violates their constitutional rights. The petitioners further contend that their constitutional right to property is threatened and that they have been deprived of a right to a lawful and procedurally fair administrative action.

18. The 1st Respondent has admitted that they are in the process of maintaining and re-establishing the Kisumu-Kakamega-Webuye-Kitale Highway which shares a common boundary with the said parcel of land. That the authority acquired various portions of the parcels of land in issue compulsorily for purposes of expanding the road. That the parcels of land claimed by the petitioners which are a sub-division of the original parcel i.e. Ndivisi/Makusela/886 which had been registered in the name of Jacktone Obaye Mutoro and which the said Land parcel no. Ndivisi/Makusela/886 was an earlier sub-division of Ndivisi/Makusela/762 which was registered in the name of Ismael Mutoro and was compulsorily acquired and the then registered owners duly compensated.

19. Both the Petitioners and the 1st Respondent agree that the survey maps of the area do not however reflect this position, a fact the 1st Respondent terms as an inadvertent error on the part of the Lands Registry Bungoma since the said compulsory acquisition was communicated. However, on examination of the two rival positions as presented by the petitioners and the 1st Respondent, it is my considered view that both scenarios are plausible since at this stage I cannot conclusively determine the



extent of the petitioner's rights and this will have to await the hearing of the full petition. As such, the petitioners have not demonstrated a prima facie case with overwhelming chances of success.

20. As to whether the petitioners would suffer irreparable injury if the conservatory orders sought are not granted, there is no doubt that that would be the case. A conservatory order cannot however be granted solely on the basis of the possibility of an injury occurring. The injury to be prevented by the court must be occasioned by or threatened by unlawful act. Moreover, the respondents being government entities, are well capable of compensating the petitioners if at all they are successful in their petition.
21. On which side the balance of convenience lies, it is common ground that the re-establishing and maintenance of the road sought to be stopped by the petitioners is a public project intended for the benefit of the general public, the petitioners included. It is key to note that the Government has a right to acquire land compulsorily for public purposes or in the public interest provided it complies with the law regarding just compensation. As things stand at the moment, it is not yet clear whether the section as claimed was indeed compulsorily acquired or the petitioners are entitled to compensation. I am of the view that this can only be determined at the hearing of the petition and the appropriate orders shall be made at that time.
22. In my humble view, the grant of the orders sought in the application would be against the public good and otherwise forestall the realization of good and proper infrastructure, premised on the intended upgrade of the highway.
23. Consequently, I am constrained to disallow the application. In the upshot, I find the application dated 13/11/2024 devoid in merit and the same is hereby Dismissed. Costs shall be in the petition.
24. Orders accordingly.

DATED SIGNED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF JANUARY, 2025.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Ragot for the 1st Respondent
2. 2nd, 3rd & 4th Respondent/Advocates-absent.
3. Petitioners/Applicants/Advocate-absent
4. Bett C/A

