Chebugel & 3 others (Suing on their own behalf and on behalf of all the Members of the public using the Muserech-Orinie-Kapsatek road) v Kenya Rural Roads Authority & 7 others; Rono (Suing as the Legal Representative of the Estate of Cherono Chebowo- Deceased) & 3 others (Interested Parties) (Environment & Land Petition E004 of 2022) [2023] KEELC 16421 (KLR) (23 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16421 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT & LAND PETITION E004 OF 2022

LA OMOLLO, J

MARCH 23, 2023

BETWEEN

SUNGUYO OLE CHEBUGEL ..... 1ST PETITIONER

CHIRCHIR KIPKOECH JOEL ..... 2ND PETITIONER

VALENTINE JEPKOECH KOSGEI ..... 3RD PETITIONER

ENOCK KIPYEPKWAI CHEPSOM ..... 4TH PETITIONER

SUING ON THEIR OWN BEHALF AND ON BEHALF OF ALL THE MEMBERS OF THE PUBLIC USING THE MUSERECH-ORINIE-KAPSATEK ROAD

AND

KENYA RURAL ROADS AUTHORITY ..... 1ST RESPONDENT

THE CHIEF LAND REGISTRAR ..... 2ND RESPONDENT

THE DIRECTOR OF SURVEY ..... 3RD RESPONDENT

THE HON. ATTORNEY GENERAL ..... 4TH RESPONDENT

JACKSON LAGAT ..... 5TH RESPONDENT

THE COUNTY GOVERNMENT OF NAKURU ..... 6TH RESPONDENT

THE COUNTY GOVERNMENT OF BARINGO ..... 7TH RESPONDENT

THE NATIONAL LAND COMMISSION ..... 8TH RESPONDENT

AND

WILFRED CHEBON RONO (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF CHERONO CHEBOWO- DECEASED) .. INTERESTED PARTY

SAMSON KIPCHUMBA KIPNGOK ..... INTERESTED PARTY

KIBICHII MOGOTIO ..... INTERESTED PARTY

JENIFFER LAGAT ..... INTERESTED PARTY

RULING

Introduction

1. This ruling is in respect of a Notice of Motion application dated May 20, 2022 and July 1, 2022.

2. The application dated May 20, 2022 was filed by the Petitioners/Applicants. The said application is expressed to be brought under Sections 1A, 1B, 3A of the *Civil Procedure Act* and Order 51 of the *Civil Procedure Rules* and seeks the following orders:

    a. Spent

    b. Spent

    c. Spent

    d. That a temporary mandatory injunction be hereby granted restraining the 5th Respondent by himself, servants, agents, employees, proxies or any other person from blocking, erecting barbed wires and fencing posts on a portion of the Muserech — Orinie - Kapsatek road passing next to his parcel of land pending hearing and determination of the Petition.

    e. That the officer in charge Eldama Ravine Police Station to ensure compliance and enforcement of the orders hereinabove.

    f. That pending hearing and determination of the Petition, the 1st Respondent be and is hereby directed to ensure continued and uninterrupted use of Muserech - Orinie - Kapsatek road for the benefit of members of the public.

    g. That pending hearing and determination of the Petition, the 2nd and 3rd Respondents be and are hereby directed to prepare and file a report in Court evidencing ownership and boundaries of all properties adjacent to the Muserech - Orinie - Kapsatek road.

    h. Costs of the application be provided for.

3. The application is based on the grounds on its face. There is no supporting affidavit attached to the said application.

4. The application dated July 1, 2022 is filed by the 5th Respondent/Applicant. The said application is expressed to be brought under Order 26 Rule 1, 4 and 5 of the *Civil Procedure Rules, 2010* and Section 3A of the *Civil Procedure Act* and seeks the following orders:

    a. Spent

b. That this Honourable Court be pleased to grant orders compelling the Petitioners/ Respondents to deposit in the Court an amount of Kshs 10, 000, 000 as security for costs of this suit.

c. That this honourable Court be pleased to dismiss this Petition upon failure of the Petitioners/ Respondents to deposit such security with the Court.

d. That this Honourable Court be pleased to make any other or further order as it deems fit and in the interest of justice in this suit.

5. The application is based on the grounds on its face and the supporting affidavit of Jackson Lagat sworn on July 1, 2022.

Factual Background

6. The suit was commenced by way of a Petition dated May 20, 2022 and filed on May 23, 2022. An Amended Petition dated was subsequently filed on August 4, 2022.

7. The prayers sought in the Amended Petition are as follows:

i. A declaration be and is hereby made that the Muserech, Orinie, Kapsatek road is a public road meant to be enjoyed by members of the public and public institutions.

ii. A declaration be and is hereby made that the 5th Respondent's action of blocking the Muserech, Orinie, Kapsatek road is illegal, arbitral and unconstitutional.

iii. A mandatory Injunction compelling the 5th Respondent and any other member of the public to remove all barricaded and blocked portions of the Muserech -Orinie- Kapsatek road.

iv. A permanent injunction be and is hereby issued restraining the 5th Respondent and any ether persons from barricading, obstructing. fencing or in any way denying the petitioners and other members of the public from accessing and using the Muserech – Orinie -Kapsatek road.

v. An order of mandamus be and is hereby issued directing the 6th ,7th and 8th Respondents, in collaboration with the 1st Respondent to manage and maintain the public road that is Muserech -Orinie- Kapsatek road by ensuring that the road is used freely by members of the public at all times as is intended.

vi. A declaration be and is hereby made that a public road cannot be arbitrarily privatized without following laid down procedure.

vii. The 2nd and 3rd Respondents report establishing the boundaries and ownership of both sides of the Muserech, Orinie, Kapsatek road be adopted as part of the judgement herein.

viii. Costs of this Petition be borne by Respondents in any event.

ix. Any other relief that this Honourable Court may deem just and fit to grant.

8. The 5th Respondent, 1st, 2nd, 3rd and 4th Interested Parties filed their Amended Responses to the Amended Petition dated 29th September, 2022 and pray that the Amended Petition dated 2nd August, 2022 be dismissed with costs to them.

9. The 1st Respondent filed a replying affidavit sworn on September 26, 2022 by Jadiel Macharia Gichohi who also seeks that the Amended Petition be dismissed with costs.

10. The application dated May 20, 2022 first came up for hearing on May 24, 2022 when the Petitioners/ Applicants were directed to serve the application on the other parties while the application dated July 1, 2022 first came up for hearing on July 6, 2022.

11. After several mentions to confirm filing of responses by parties, and the court issued directions on October 6, 2022. The directions were that the applications dated May 20, 2022 and July 1, 2022 would be heard simultaneously by way of written submissions.

12. On 15th November, 2022 parties confirmed that they had filed submissions and the applications were reserved for ruling.

13. Its important to note that the 6th Respondent supports the petition.

Petitioners/Applicants Contention In The Application Dated May 20, 2022.

14. As pointed out before, there is no supporting affidavit annexed to the Petitioners/Applicants application dated May 20, 2022.

15. I will therefore set forth the grounds on the face of the application which are as follows:

    a. That the Muserech - Orinie - Kapsatek road is a public road separating Nakuru and Baringo Counties and serving an average of 20,000 members of the public, schools, churches, hospitals and markets.

    b. That the road has been used by members of the public since time immemorial.

    c. That the road being a public road is maintained and repaired by the 1st Respondent.

    d. That a portion of the road passes next to a parcel of land owned by the 5th Respondent who has since illegally blocked it by erecting barbed wires and fencing the same in the process denying members of the public access through it.

    e. That as a result of the said blocking, members of the public have been forced to use an alternative road being Muserech Kapsebeltin Orinie Road which forces them to spend an additional 45-60 minutes thereby causing a lot of inconvenience.

    f. That the said alternative road in not maintained by the 1st Respondent, is too narrow thereby impassable when it rains and/or large vehicles breakdown.

    g. That all attempts by members of the public to have the road reopened have proven futile and the law enforcement agencies have not come to their aid.

1st Respondent's Response To The Petitioners/applicants Application Dated 20th May 2022.

16. In response to the application dated 20th May, 2022, the 1st Respondent filed a Replying Affidavit sworn on 4th July, 2022 by Jadiel Macharia Gichohi.

17. He deposes that he is a Senior Assistant Roads Officer, Nakuru Region in the employment of the 1st Respondent.

18. He also deposes that Muserech - Orinie - Kapsatek -Lengenet Road is not a road under the management of the 1st Respondent but belongs to the County Government.

19. He further deposes that on or around 4th January, 2019 the 1st Respondent entered into a Memorandum of Understanding with the County Government of Nakuru for the Maintenance of UF7174 Junction C55 Molo River —Kapsatek Muricho Road/Muserech — Orinie — Kapsatek - Lengenet Road.

20. He deposes that on the basis of the Memorandum of Understanding, the only road works done by the 1st Respondent was site clearance, culvert and drainage works and grading and gravelling of the road.

21. He also deposes that the 1st Respondent is a National Government Entity established under the *Kenya Roads Act, 2007* and as per Legal Notice No 2 of January 22, 2016, roads falling under the National Government are class A, B and C only.

22. He further deposes that the Muserech — Orinie — Kapsatek — Lengenet Road is a Class F road belonging to the County Government and thus, it is not within the mandate of the 1st Respondent to ensure continued and uninterrupted use of the said road.

23. He further deposes that he has been advised by his Advocates on record that the order sought in the Application against the 1st Respondent for it to be directed to ensure continued and uninterrupted use of the suit road, is in the nature of a Mandatory Injunction which cannot be granted at an interlocutory stage unless special circumstances warrant the same to be granted.

24. He ends his deposition by stating that the Petitioners/Applicants have not satisfied the conditions for the grant of orders of a Mandatory Injunction.

The 5Th Respondent's Response To The Petitioners/applicants Application Dated May 20, 2022.

25. The 5th Respondent filed his replying affidavit sworn on July 1, 2022 on July 5, 2022.

26. He deposes that he is one of the personal representatives of the Estate of the deceased Kiprop Arap Lagat, which estate comprises of the land known as Muserech- Orinie – Kapsatek road traverses i.e land parcel number Lembus/Kilombe/147.

27. He further deposes that he is not aware of any road known as Muserech -Orinie -Kapsatek road that traverses their parcel of land.

28. He deposes that during allocation of the said land, there was no mention of the road.

29. He also deposes that the previous maps indicate that there was no such road existing on their family's parcel of land.

30. It is his deposition that the Petitioners/Applicants have not established a prima facie case.

31. He deposes that the evidence of the non-existence of the road can be perceived from the proceedings in the Parliament Hansard on the September 3, 2009.

32. He also deposes that the proceedings demonstrated that the Ministry of Roads had no plans to compensate the farmers and that the said road was a private road used by the farmers as a short cut.

33. He further deposes that the proceedings also confirmed that there exists an alternative road which can be used by the members of the public that does not traverse through their parcel of land which formed the reason for lack of immediate or future plans to compensate the farmers for the creation of the road.

34. He deposes that the Court in Eldama Ravine Criminal Case No 371 of 2010; Republic vs Samson Kipchumba Kipngok and Jackson Lagat arrived at a finding that there was no road on land parcel No's Lembus/Kilombe/147 and Lembus/Kilombe/149 belonging to the 1st and 2nd accused persons.

35. He also deposes that if the application is allowed, he stands to suffer irreparable harm.

36. He further deposes that the balance of convenience tilts in their favour as there is no legally known road in their parcel of land.

37. He ends his deposition by stating that the grant of the prayers sought will highly prejudice them as they will be unable to enjoy their private property as provided for under Article 40 of the *Constitutio of Kenya*.

The 8Th Respondent's Response To The Petitioners/applicants Application Dated May 20, 2022.

38. The 8th Respondent filed a Replying Affidavit sworn by Frank Kibelekenya sworn on November 7, 2022.

39. He deposes that he is employed by the 8th Respondent as the County Coordinator Nakuru County.

40. He also deposes that since the 8th Respondent's inception in February, 2013 or in its capacity as the successor of the defunct office of the Commissioner of Lands, it has never received any complaint from any of the parties in the present petition and cannot therefore be faulted as failing to execute its mandate as manager of public land.

41. He further deposes that on October 19, 2022, the 8th Respondent conducted a ground status investigation that established that a road exists on the ground and has since the colonial period been used by members of the public.

42. He deposes that the members of the public used the road until the registered owner of the property the late Wilson Chebon died and the legal representatives of the estate being the 5th Respondent and the 1st to 4th Interested Parties blocked the road sometime in the year 2007.

43. He also deposes that there has been a cat and mouse chase over the access and use of the road between the members of the public, the 5th Respondent and the Interested Parties, leading to demonstrations by the public.

44. He further deposes that it is true that currently the members of the public have been denied access and use of the road forcing them to use a poorly maintained alternative road.

45. He deposes that in reference to the Regional Surveyor's report dated 2nd November, 2022, the road has existed for a long time and whenever a road exists on the ground it is mandatory that the contracted surveyor notes in the submitted survey work to the Director of Survey for approval and mapping.

46. He also deposes that in the event that a note of an existing road is not made on the map by the Director of Survey, an amendment is made to rectify the map and reinstate the road.

47. He ends his deposition by stating that that the 5th Respondent and Interested Parties shall suffer no irreparable damage if the temporary mandatory injunction orders are granted.

The 5Th Respondent/applicant's Contention In His Application Dated July 1, 2022.

48. The 5th Respondent/Applicant contends that he is the personal representative of the Estate of Kiprop Arap Lagat which estate the alleged Muserech – Orinie -Kapsatek road traverses.

49. He further contends that the Petitioners/Respondents have no legal basis for the Constitutional Violations that they allege.

50. He also contends that the then Minister for Roads, Mr Frankline Bett confirmed that the suit road runs on private property.

51. It is his contention that the Minister indicated that it had no intention of compensating the farmers affected by the existing road.

52. He contends that the court in Eldama Ravine Criminal Case No 371 of 2010, Republic Vs Samson Kipchumba Kipngok and Jackson Langat held that legally there was no road on land parcel No's Lembus/Kilombe/147 and 149 belonging to the 1st and 2nd accused persons.

53. He further contends that it is safe to assume that the present suit has been instituted with the sole design of denying him the enjoyment of his right to property as provided for under Article 40 of the *Constitution*.

54. He also contends that he prays that that the Petitioners/Respondents be compelled to deposit Kshs 10,000,000/= as security for costs.

55. It is his contention that the Petition and the Petitioners application is unmerited as the Petitioners have not demonstrated the interest they have on the land, they are unknown to him and that they have not exhausted other avenues of dispute resolution in regards to the matter.

56. He ends his deposition by seeking that his application be allowed as prayed as he stands to suffer prejudice if the application is not allowed.

Petitioners/respondents Response To The 5Th Respondent/applicant's Application Dated July 1, 2022.

57. In response to the 5th Respondent/Applicant's application dated July 1, 2022, the Petitioners/ Respondents filed Grounds of Opposition dated July 18, 2022 on July 19, 2022.

58. The Grounds are as follows:

    a. The Application is an affront to the Petitioners right to access to justice under Article 48 of the *Constitution*.

    b. The Petition is filed as a public interest litigation by the Petitioners on their own behalf and on behalf of the other members of the public, public institutions like markets, schools, churches, hospitals, recreational centres who rely on Muserech — Orinie - Kapsatek road (the road subject of this Petition) for their day today use in the course of their business and movements.

    c. Security for Costs ought not to lie on a constitutional Petition filed for the benefit of member of the public.

d. The Application herein presupposes that the Petition will be dismissed even before the same is heard and determined and all parties to the suit have had an opportunity to put in their evidence in support or opposition to the Petition.

e. At worst, costs ought to follow the outcome of the Petition.

f. The Application is bad in law, an abuse of the Court Process and ought to be dismissed with costs.

The 5Th Respondent/applicant, The 1St To 4Th Interested Parties Response To The Petitioners/ respondents Grounds Of Opposition.

59. The 5th Respondent/Applicant and the 1st to 4th Interested Parties filed an affidavit sworn on 25th October, 2022 by Jackson Lagat the 5th Respondent/Applicant herein in response to the Petitioners/ Respondents Grounds of Opposition.

60. He deposed that the Grounds of Opposition filed by the Petitioners/Respondents are mere denials and have not shed light in respect of their identities.

61. He also deposed that the Petitioners/Respondents have not confirmed further particulars in respect to their places of abode and means to confirm their capability and ability to pay if directed by the court.

62. He further deposed that their application has not elicited any response from the Attorney General which demonstrates that the Petition as presented is a private interest petition clothed as a public interest petition.

63. It is his deposition that none of the institutions being complained to have made an application for joinder or made an attempt to support the petition.

64. He also deposed that the court is empowered to issue directions on security for costs.

65. He further deposed that the application for security for costs is not made in an effort to stifle the Petitioners/Respondents right to access justice but the same is made conscious that the petition is made in bad faith by the Petitioners/Respondents as well as their unknown nature in terms of their places of residence and means.

66. He ends his deposition by stating that the Petitioners/Respondents have failed to plead with great specificity on the important question of security for costs.

Issues For Determination.

67. The Petitioners/Applicants filed their submissions to the application dated May 20, 2022 and they identify the following issues for determination:

a. Whether the Petitioners have met the conditions for grant of temporary injunction.

b. Whether the 5th Respondent will suffer any prejudice were the application to be allowed.

c. Whether the 2nd and 3rd Respondents should be directed to prepare and file a report in court evidencing ownership and boundaries of all properties adjacent to the road.

d. Who should bear the costs of this application.

68. On the first issue the Petitioners/Applicants rely on the cases of *Giella Vs Cassman Brown and Company Limited* [1973] E.A 358, *Mrao Limited Vs First American Bank Limited & 2 Others* [2003] KLR 125, *Fairview Estate Limited Vs Ann Wangari Kirima & 2 Others* [2016] eKLR among other cases and submit that they have met all the conditions for grant of temporary injunction.

69. The Petitioners/Applicants submit that the suit road has been in existence since the 1960's and that members of the public have been using it. That the 6th and 7th Respondents have maintained the said road with public funds.

70. The Petitioners/Applicants also submit that the said road has been demarcated as a public road as indicated in the map and they therefore have a prima facie case.

71. On the second issue, the Petitioners/Applicants submit that the 5th Respondent and the Interested Parties shall not suffer any prejudice if the orders sought are granted.

72. They also submit that it is the members of the public who are suffering as they have been forced to use an alternative road which is longer, narrow and not maintained.

73. On the third issue, the Petitioners/Applicants submit that they seek to have the official record of boundaries and ownership of properties next to the road so as to assist the court to make a just determination of the dispute as to ownership of the portions of the road being claimed by the 5th Respondent.

74. On the fourth issue, the Petitioners/Applicants submit that costs of the application be in the cause.

1 St Respondent's Submissions.

75. The 1st Respondent filed its submissions to the application dated May 20, 2022 and identified the following issues for determination;

    a. That (sic)the suit road, Muserech-Orinie-Kapsatek-Lengenet road does not belong to the 1st Respondent.

    b. That (sic) the Petitioner has not satisfied the conditions for the grant of the order sought against the 1st Respondent.

76. On the first issue, the 1st Respondent submits that as per its Replying Affidavit, the suit road is not under its management. The 1st Respondent also submits that this is supported by Legal Notice No 2 of 22nd January, 2016 and the Memorandum of Understanding attached to its Replying Affidavit.

77. It relies on the case of *Republic Vs Director General, Kenya Rural Roads Authority: Ex parte: Paul Sane Nanapu* [2022] eKLR in support of its argument.

78. On the second issue, the 1st Respondent submits that the order of mandatory injunction sought by the Petitioners/Applicants cannot be granted in an interlocutory stage in the absence of special circumstances.

79. The 1st Respondent relies on the case of *Kenya Breweries Limited & Another Vs Washington O. Okeyo* [2002] eKLR in support of its arguments and seeks that the Petitioners/Applicants application be dismissed.

5Th Respondent's And 1St To 4Th Interested Parties' Submissions.

80. The 5th Respondent and the 1st to 4th Interested Parties filed their submissions to both applications on November 4, 2022.

81. In respect to the application dated 1st July, 2022, the 5th Respondent and the 1st to 4th Interested Parties reiterate the contents of their Affidavit in response to the Petitioners/Applicants Grounds of Opposition to their application.

82. They submit that the purpose of the said application is to protect the Respondents from the frivolous nature of the petition and rely on the case of *Shah & 2 Others Vs Shah & 2 Others* [1982] eKLR in support of their arguments.

83. In conclusion they seek that the application dated July 1, 2022 be allowed as prayed.

84. With regard to the application dated May 20, 2022, the 5th Respondent and the 1st to 4th Interested Parties submit that the land in question is private land and that the government did not compulsorily acquire the same.

85. They submit therefore that the Petitioners do not have any prima facie case against the Respondents as was held in the case of *Giella Vs Cassman Brow*n [1973] EA 358.

86. In conclusion, the 5th Respondent and the 1st to 4th Interested Parties seek that the application dated May 20, 2022 be dismissed and an order for security of costs be issued.

8Th Respondent's Submissions.

87. The 8th Respondent filed its submissions to the application dated May 20, 2022 on November 15, 2022.

88. It identifies the following issues for determination:

    a. Is the current application Constitutional and of public interest and importance?

    b. What is the role of the state agencies legislatively mandated to maintain and ensure access and use of public roads in this petition?

    c. In the event that the said temporary mandatory orders pending the hearing and determination of the Petition are not granted will the Respondent suffer irreparable damage?

89. On the first issue, the 8th Respondent relies on the case of *Dindi Oscar Okumu Vs Robert Pavel Oimeke & 5 Others* [2021] eKLR and submits that the petition meets the threshold of what Public Interest Litigation constitutes.

90. On the second issue, the 8th Respondent submits that the 1st, 2nd, 3rd, 4th, 6th and 7th Respondents cannot distance themselves from their roles and responsibilities as state organs or offices as they are meant to serve the people.

91. On the third issue, the 8th Respondent submits that one of its functions is compulsory acquisition of land and if the court determines that the 5th Respondent is the rightful owner of the property, then it shall ensure adequate compensation is made.

92. In conclusion, the 8th Respondent submits that it supports the application dated 20th May, 2022.

Petitioners' Submission On The Application By 5Th Respondent.

93. The Petitioners/Respondents filed their submissions to the application dated 1st July, 2022.

94. They identify one issue for determination which is whether the 5th Respondent/Applicants application warrants issuance of orders sought.

95. They rely on Order 26 Rule 1 of the *Civil Procedure Rules* and the case of *Aggrey Shivona Vs Standard Group Plc* [2020]eKLR and submit that the application of this nature is only allowable where the Respondent is a foreigner with no fixed aboard in the Country and it is not disputed that the Petitioners/Respondents herein are Kenyans.

96. They also submit that the road traverses through several sub-counties in both Nakuru and Baringo Counties and that it is possible that the 5th Respondent might not personally know all persons staying within those sub-counties and/or use the road as they undertake their day to day activities.

97. They further submit that the demand by the 5th Respondent that the Petitioners deposit Kshs 10,000,000/= as security for costs is not only unreasonable but can only be construed to mean that were the Petition to be unsuccessful, the costs awardable to the 5th Respondent would rise to that amount.

98. In conclusion, they seek that the application dated 1st July, 2022 be dismissed.

Analysis And Determination.

99. I will first make a determination on the application dated May 20, 2022. After perusing the said application, replying affidavits and submissions, the issues that arise for determination are as follows:

    a. Whether the court should grant a mandatory injunction restraining the 5th Respondent from blocking and fencing Muserech – Orinie – Kapsatek road pending the hearing and determination of the Petition.

    b. Whether the 1st Respondent should be ordered to ensure continued use of Muserech – Orinie – Kapsatek road.

    c. Whether the 2nd and 3rd Respondents should be directed to prepare and file a report in court evidencing ownership and boundaries of all properties adjacent to the Muserech – Orinie – Kapsatek road.

Whether the court should grant a mandatory injunction restraining the 5th Respondent from blocking and fencing Muserech – Orinie – Kapsatek road pending the hearing and determination of the Petition.

100. The Petitioners/Applicants are seeking orders of mandatory injunction restraining the 5th Respondent from blocking and fencing the Muserech – Orinie -Kapsatek road.

101. The 1st Respondent in response to the application states that the Muserech – Orinie -Kapsatek road is not under its management as it belongs to the County Government.

102. The 1st Respondent further states that a mandatory injunction cannot issue at the interlocutory stage.

103. The 5th Respondent denies the existence of the said road.

104. The 8th Respondent is in support of the application.

105. It is important to note that the Petitioners/Applicants are seeking orders of mandatory injunction in their application dated 20th May, 2022. However, in their submissions, they address this court on requirements for grant of orders of temporary injunction.

106. In Nairobi Civil Appeal No 240 of 2011 *Daniel Toroitich Arap Moi Vs Mwangi Stephen Muriithi & another* [2014]Eklr and it was held as follows:

> " Submissions are generally parties' "marketing language", each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented..."

107. The court in the case of *Erastus Wade Opande Vs. Kenya Revenue Authority & Another* Kisumu HCCA No 46 of 2007 held as follows:

> " Submissions simply concretise and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided.
>
> ...regarding the meaning and import of submissions in matters, I find that submissions are like decorations in a wedding fete where parties therein decorate the props and environment generally to direct the guests' attention to the fact that there is a wedding cake placed somewhere in readiness for enjoyment by way of eating. They are to attract guests to focus on the real issue partaking of the cake. Where there is no wedding cake, the decorations are meaningless for guests do not eat decorations. And, a wedding cake can be eaten without decorations necessarily being there. In like manner, courts will decide on issues before them even where submissions have not been made thereon. (Emphasis is mine)

108. The Petitioners/Applicants are bound by their pleadings. I will therefore make a determination based on their pleadings and delve into issues for consideration in granting or refusing orders of temporary mandatory injunctions.

109. The law on interlocutory mandatory injunctions is now settled. The Court of Appeal in the case of *Nation Media Group & 2 others Vs John Harun Mwau* [2014] eKLR held as follows:

> It is trite law that for an interlocutory mandatory injunction to issue an Applicant must demonstrate existence of and special circumstances. See Kenya Breweries Limited Vs. Washington Okeyo, Civil Application No 332 of 2000.
>
> Likewise, in volume 24 Halsbury's Laws of England, 4th Edition paragraph 948, the learned authors state as follows:
>
> > "A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the Plaintiff.... a mandatory injunction will be granted on an interlocutory application."

110. From the application filed, it is not clear when the road was closed and/ or blocked. The 8th Respondent who supports the petition alleges that it was in the year 2007. The Petitioners/Applicants have stated that there exists an alternative road known as Muserechi-Kapsebeltin-Orinie road that is in use though not properly maintained.

111. I find that the Petitioners/Applicants have not demonstrated any special circumstances that would warrant the grant of an order of mandatory injunction at this stage of the proceedings.

Whether the 1st Respondent should be ordered to ensure continued use of Muserech – Orinie – Kapsatek road.

112. The Petitioners/Applicants are seeking that the 1st Respondent be ordered to ensure the use of Muserech – Orinie – Kapsatek road.

113. The 1st Respondent states that the said road does not fall within the class of roads maintained by it and goes on to specifically state that the said road is managed by the County Government.

114. The 1st Respondent further states that on 4th January,2019, it entered into a Memorandum of Understanding with the County Government of Nakuru for the maintenance of the U-F7174-Junction C55 Molo River – Kapsetek Muricho Road/Muserech- Orinie -Kapsatek – Lengenet Road.

115. The 1st Respondent has attached the said Memorandum of Understanding to its Replying Affidavit. Its terms are that the County Government of Nakuru engaged the 1st Respondent to upgrade various roads for it and the road subject matter of this suit is included in the said memorandum.

116. The Petitioners/Applicants did not respond to the Respondent's deposition that the road in is not under its management. The question of management of the road by the 1st Respondent goes to the substance of this petition and allowing it is akin to determining the petition at the interlocutory stage. I decline to issue the said order.

whether the 2nd and 3rd respondents should be directed to prepare and file a report in court evidencing ownership and boundaries of all properties adjacent to the Muserech – Orinie – Kapsatek road.

117. The Petitioners/Applicants are seeking that the 2nd and 3rd Respondents be directed to prepare and file a report in court evidencing ownership and boundaries of all the properties adjacent to the suit road.

118. Neither of the Respondents and Interested Parties opposed the grant of the said orders. I believe that the grant of this order will assist the court in determination of this dispute and does not in any way prejudice the parties herein.

119. On the application dated 1st July, 2022 by the 5th respondent, I have taken into consideration the Petitioners/Respondents Grounds of Opposition and the 5th Respondent/Applicant's, the 1st to 4th Interested Parties response to the Petitioners/Respondents Grounds of Opposition. The following issues arise for determination:

    a. whether the Petitioners/Respondents should be compelled to deposit in court Kshs 10,000,000 as security for costs of the petition.

    b. Who should bear costs of the application.

120. The Petitioners/Respondents oppose the said application and state that their petition is Public Interest Litigation as it was filed on behalf of members of the public.

121. The Petitioners/Respondents also state that security of costs does not lie in Constitutional petitions filed for the benefit of members of the public.

122. The decision in *Keystone Bank Limited & 4 others Vs I&M Holdings Limited & another* [2017] eKLR sheds light on the question of security for costs. It was held as follows:

> " In an application for security of costs, the applicant ought to establish that the Respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. It is not enough to allege that a respondent will be unable to pay costs in the event that he is unsuccessful. The same must be proven".

123. The 5th Respondent/Applicant has not laid any basis for seeking Kshs 10,000,000/= to be deposited by the Petitioners/Respondents as security for costs.

124. The onus is on the 5th Respondent/Applicant to prove that the Petitioners/Respondents will not be able to pay costs in the event that they are unsuccessful and 5th Respondent/Applicant has failed to discharge the said burden.

125. I find that the 5th Respondent/Applicant's application dated 1st July, 2022 lacks merit.

Disposition

126. In conclusion, therefore, I issue orders as follows:

> The Petitioners/Applicants application dated May 20, 2022 succeeds only in terms of prayer "g" and I order as follows;
>
> a. Pending hearing and determination of this Petition, the 2nd and 3rd Respondents are hereby ordered to prepare and file a report before this Court, which report shall contain information on ownership and boundaries of parcels of land adjacent to the Muserech - Orinie - Kapsatek road.
>
> b. The 5th Respondents application dated July 7, 2022 is hereby dismissed with costs.
>
> c. The costs of the two applications shall abide the outcome of the petition.

127. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 23RD DAY OF MARCH, 2023.

L. A. OMOLLO

JUDGE