REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

PETITION NO. 974 OF 2016

ABDULMAJID RAMADHAN……1ST PETITIONER

AMINA BURHAN……2ND PETITIONER

SULEIMAN KASSIM……3RD PETITIONER

SHAFI ALI HUSSEIN……4TH PETITIONER

VERSUS

KENYA URBAN ROADS AUTHORITY……1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL……2ND RESPONDENT

NATIONAL LAND COMMISSION……3RDRESPONDENT

NATIONAL ENVIRONMENT AND MANAGEMENT AUTHORITY……4THRESPONDENT

H YOUNG COMPANY LIMITED……5TH RESPONDENT

RULING

The petitioners commenced these proceedings by way of a petition dated 5th August 2016. In their petition, the petitioners sought among others, the following reliefs;

i. A declaration that the intention of the respondents to build a road passing through the Nubian land of Lindi, KambiAluru and Mashimoni is a threat to the petitioners' constitutional rights to property under Article 40(2) of the Constitution of Kenya, 2010 and as such null and void.

ii. A declaration that the imminent demolition of the homes and dwellings of the petitioners is a violation of the petitioners' right to dignity under Article 28 of the Constitution.

iii. A declaration that the imminent demolition of the homes and dwellings of the petitioners is a violation of the petitioners' right to accessible and adequate housing guaranteed under Article 43(1)(b) of the Constitution.

iv. A declaration that the intended road having been diverted/deviated from the original map to be

constructed on a different path where the dwellings of the petitioners are situated is a violation of Article 27 of the Constitution which prohibits different treatment.

v. A declaration that the respondents have failed to protect the rights of the petitioners who are a marginalized community contrary to Article 23(1) of the Constitution.

vi. An order compelling the 3rd respondent to discharge its lawful statutory and constitutional obligations in Articles 63(3) and (4) of the Constitution and advice on the appropriate redress.

vii. An order prohibiting the respondents from altering the original survey map.

Together with the petition, the petitioners filed an application by way of Notice of Motion dated 5th August 2016 for among others the following orders:-

i. That pending the hearing and determination of the petition,there be a conservatory order restraining the respondents from the threatened illegal eviction of the members of the Nubian community residing at Lindifrom Plot numbers 40, 41 all thorough Mashimonito Plot number 106 at Kambi Aluru for purposes of building a road through Kibra, Nairobi.
ii. That pending the hearing and determination of the petition, conservatory orders of stay do issue to restrain the respondents from threatening, interfering with or impeding the life and livelihood of the members of the Nubian community residing at Lindi from Plot number 40, 41 all thorough Mashimonito Plot number 106 at KambiAluru for purposes of building a road through Kibra, Nairobi.
iii. That pending the hearing and determination of the petition, conservatory orders of stay do issue restraining the respondents from the threatened demolition, burning or in any other way destroying the Nubians' homes, properties and graveyards situatedatLindi from Plot number 40, 41 all thorough Mashimonito Plot number 106 at KambiAluru (hereinafter referred to as "the suit property" where the context so admits) for purposes of building a road through Kibra, Nairobi
iv. That pending the hearing and determination of the petition, the OCS and OCPD Kilimani to enforce the orders sought above.

The application was supported by the affidavit sworn on 5th August 2016 by the 1stpetitioner. In his affidavit, the 1stpetitioner presented the petitioners' complaint which gave rise to the petition and the present application as follows. The petitioners are members of the Nubian community residing at Kibra, Nairobi. The suit property is their ancestral land whose history is traced to the pre-colonial times. Kibra comprised of 4197 acres of land. Kibra was designated as a military settlement zone. It was reserved for Nubians who were ex-Sudanese soldiersin recognition of their distinguished service during the First World War. Out of the 4197 acres, what remains today is 300 acres. The 1st, 2nd , 3rd and 5th respondents have planned to build a dual carriage way through this 300 acres of land. The said carriage way will pass in the middle of three areas of Kibra namely, Kambi Aluru, Mashimoni and Lindi which are densely populated by Nubians. The petitioners' houses atLindi, Mashimoni and Kambi Aluru have been marked for demolition. The beacons for the said road were placed on the petitioners houses without prior notice. The petitioners inquired from the local administration as to what was going on and no useful information came forth from them. On the ground, they continued to receive threats that their houses would be demolished. As a result of these threats, most tenants who had rented the petitioners' houses developed fear for the safety of their properties and decided to vacate the said houses. The petitioners most of whom depended on income from the rent they received from the said tenants suffered great financial loss. Kibra is the petitioners' only ancestral home. On 28th July 2016, road contractors notified the petitioners that they would enter Kibra in August 2016. This is what prompted them to rush to court to seek protection of their constitutional rights.

The petitioners are apprehensive that unless the 5th respondent is restrained from demolishing their houses they will be left with nowhere to go. The intended demolition would violate their right to accessible and adequate housing under Article 43(1) (b) of the Constitution. There was no public participation before the commencement of the Kibra road project contrary to Article 10 of the Constitution. If any public participation was conducted, the same was done is a discriminatory manner contrary to Article 27 of the Constitution since the petitioners had no knowledge of any meeting concerning the said road construction project and furthermore, they were not invited to any forum which was arranged to discuss the road construction. There was also no inspection by the 4th respondent under the Environmental Management and Co-ordination Act(EMCA) prior to the commencement of the project. Kibra is the petitioners' communal land pursuant to Article 63 as read with Article 40 and 60(1)(b) and (f) of the Constitution and as such they are entitled to enjoy quiet and peaceful possession thereof.

The petitioners stand to suffer loss of their ancestral land and irreparable damage if the respondents are permitted to proceed with the construction of the said road. This is in addition to the violations and threatened violations of their constitutional rights.

The petitioner's application was opposed by the 1st to 4th respondents. The 1stand 2ndrespondents opposed the application through a replying affidavit and further affidavit sworn by Abdikadir Ibrahim Jatani, the 1st respondent's acting manager of survey on 8th September 2016 and 18th January 2017 respectively. Mr. Jatani admitted that the 1st defendant had embarked on a project which involved the construction to bitumen standards of Ngong Road-Kibera-Kungu Karumba-Lang'ata Road link and that the 5th defendant was awarded the contract to undertake the project. He stated that the said road was planned by the government in the year 1987. He stated that the proposed road link is located on a road reserve and that the entire property upon which the petitioners have laid a claim is public land. He stated that no title had been issued in respect of the suit property in favour of the petitioners and that no provision of law or Act of Parliament had declared the said property as community land under Article 63 of the Constitution. He stated that the issue of compensation of the petitioners does not arise.

Mr. Jatani stated that the 60 meter road corridor within the villages mentioned by the petitioners were clearly marked out and the area reserved exclusively for that purpose as evidenced by the Approved Advisory Plan from the Ministry of Lands, Physical Planning Department a copy of which was exhibited. He stated that despite the delineation of the road corridor reserve within Kibra, there was encroachment and that issue of resettlement of the Project Affected Persons (PAPs) were planned to be implemented through a comprehensive and all inclusive Resettlement Action Plan (RAP).

He stated that contrary to the petitioners' allegations, the 1st respondent had held several public consultative meetings inline withArticle 10 of the Constitution as read with Article 47 of the Constitution which meetings were attended by community leaders, local administration and representatives of affected persons. He stated further, that a Lang'ata-Kibra Roads Committee was formed in which the Nubian community was well represented and attended the meetings as evidenced by copies of minutes of meetings held on 11th January 2016 and 20th January 2016 which he exhibited.

Mr. Jatani stated further that an environmental and social impact assessment study was duly carried out in respect of the project and a report duly submitted to the 4th respondent herein. He stated that theroadin question linked Kibera Informal Settlement with Ngong Road and Lang'ata Road thus connecting various parts of Nairobi through the Southern, Eastern and Northern Bypasses thereby easing traffic in Nairobi City County. He stated that the overall public benefit outweighed the petitioners' private interests and that should the petitioners succeed in their claim, they could be compensated monetarily.

In his further affidavit sworn on 18th January 2017, Mr. Jatani stated that the 4threspondent had issued the 1strespondent with Environmental Impact Assessment License on 14th November 2016 in respect of the road project. He stated further that in compliance with the court's directive for the 1st respondent to include the petitioner's representatives in the Resettlement Action Plan (RAP) discussions, an invite was made to the petitioners' advocate but the same did not elicit any response. He urged the court to vacate the interim orders and compel the petitioners to participate in the RAP process to avoid further delays to the project which would subject tax payers to penalties.

The 3rdrespondentopposed the application through a replying affidavit sworn by its acting director of legal affairs and enforcement, Brian Ikol, on 9th November 2016. The 3rd defendant averred that the suit property is government land within the meaning of Article 62 of the Constitution. The 3rd respondent contended that no particular parcel of land had been mentioned or identified in the petition and that the court could therefore not issue blind orders. Further, the 3rdrespondent statedthat the Carter Commission Report or the Truth Justice and ReconciliationReports which were cited by the petitioners cannot override the provisions of the Constitution and the Land Registration Act.

The 3rdrespondent averred that there exists no mechanism to reverse land which has been acquired compulsorily and that the only available remedy is for a registered proprietor to claim compensation where applicable. The 3rdrespondent's contended that the areas affected by the road project namely Lindi, Mashimoni, and KambiAluruare not recognized as belonging to the Nubian community as ownership of the same is contested by other communities living in the area. The 3rd respondent averred that the Nubian community cannot assert exclusive ownership of the entire land in Kibra which is occupied by other communities with various claims to the land. The 3rd respondent contended that attempts by the government in the year 2013 to recognize part of the land in Kibra as belonging to the Nubian community by issuing a communal title for 288 acres were thwarted by the Nubians themselves and other communities living in Kibra. The 3rd respondent contended that an attempt to uphold the claim by one group over land which is the subject of claim by other communities would constitute an act of discrimination.

The 3rd respondent contended that the petition was prematurely before the court since the forum for the resolution of historical land injustices lies with the 3rd respondent under section 15 of the National Land Commission Act. The 3rd respondent contended further that under the Community Land Act, respective county governments hold in trust any monies payable as compensation for any unregistered community land acquired compulsorily and that such money become payable to the affected community upon registration of the acquired land. The 3rdrespondent contended that under Article 63(3) of the Constitution, unregistered community land is held in trust by the respective county governments.

The 3rd respondent averred that the road under construction was a public project and that the balance of convenience tilts in favour of upholding public interest projects. The 3rd respondent contended that no prejudice would be suffered by the petitioners since the only remedy available to them was to claim compensation for land compulsorily acquired after their claim over the land crystallizes. The 3rd respondent contended further that the petitioners had no proprietary interests in the suit property capable of protection by the court and further, that the application was speculative and an abuse of the court process.

The 4th respondent filed a replying affidavit sworn on 3rd November 2016 by its Director for Compliance and Enforcement Mr. David Ong'are. The 4th respondent averred that the 1st respondent through its licensed Environmental Impact Assessment (EIA) experts submitted to the 4th respondent an EIA project

report on 23rd April 2016 a copy of which was exhibitedby the 4th respondent. The 4threspondent stated that the aforesaid report was a project report and not a study report and that public participation was to be undertaken by the lead expert who was required to submit the public consultation questionnaires together with the EIA project report.

The 4th respondent averred that through a letter dated 23rd August 2016, the said project report was submitted to the lead agencies and that no comments were received from the lead agencies within the prescribed time. The 4th respondent stated that it was reviewing the project report to ensure compliance with the environmental laws and regulations and that it had not issued an EIA license to the 1st respondent.

Through a further affidavit sworn by the 4th petitioner on 4th November 2016 in response to the replying affidavits by the 1st, 2nd and 4th respondents, the petitioners averred that there was no evidence to suggest that the link road in dispute had been planned in 1987. The petitioners averred that the suit property was owned by the Nubians as evidenced by the annexed Carter Land Commission Report of 1933. The petitioners averred that the suit property was within the definition of communal land under Article 63 of the Constitution and as such the same could not be disposed of other than in terms of legislation specifying the nature and extent of the rights of members of each community in the area individually and collectively.

In respect to the 1st respondents averment that it had put in place plans for resettlement of Project Affected Persons(PAPs), the petitioners stated that it was not clear whether their homesteads would first be demolished and when the Resettlement Action Plan(RAP)would take place. The petitioners averred that there had been no notice or consultation with the affected persons as contemplated by Article 47 and 50 of the Constitution and that the purported consultative meetings whose minutes were furnished by the 1strespondent did not in law constitute public participation.

Submissions by the parties:

The application was argued by way of written submissions. The petitioners filedtheir submissionson 27thJanuary 2017in which they argued that in applications for conservatory orders, the principles applicable are the same as those for grant of temporary injunctions which were set out in the case Giella vs. Cassman Brown & Co. Ltd (1973) EA 358.In support of this submission, the petitioners cited the case of Cascade Company Ltd vs. Kenya Association of Music Production (Kamp) & 3 others (2015) eKLR. The petitioners argued that there was a very thin line between conservatory orders and other orders of interlocutory nature. The petitioners submitted that interlocutory injunction orders have more to do with an individual as against the other while conservatory orders were more inclined to protecting public interest and maintaining public order.

The petitioner submitted that from the facts of the case and the documents relied on, a prima facie case had been established. The petitioners contended that the 4threspondent had in its affidavit indicated that it was not aware of the road construction being undertaken by the 1st respondent and that the construction ought not to have been commenced before an EIA license had been issued. The petitioners submitted that since the license was issued retrospectively, the 1st, 2nd and 5th respondents did not follow the procedure that could guarantee the petitioners' safety.

The petitioners argued that Article 62(4) of the Constitution provides clear guidelines on how public land should be disposed of. The petitioners submitted that there was no legislation providing that Kibra's

Nubian land was public land and further that, there was no Act of parliament designating the suit property for use as a road reserve. The petitioners submitted that the construction of the road in Kibra was a blatant contravention of Article 62 of the Constitution.

The petitioners made reference to the case of Coalition for Reform and Democracy (CORD) & another vs. Republic of Kenya & others (2015) eKLRand submitted that they were in imminent and serious danger and that their rights in the bill of rights such as a right to adequate housing, dignity, property and not to be subjected to degrading treatment were threatened after the 1st and 5th respondents marked their dwellings for demolition. The petitioners averred that the balance of convenience was in their favour. The petitioners contended that having claimed that the road in contention was planned in 1987, the respondents had three decades to plan the construction of the said road. The petitioners submitted that there was no demonstrable prejudice that was likely to be suffered if the project was suspended for a few months pending the hearing and determination of the petition.

1st and 2ndrespondentsfiled their submissionson 31stJanuary 2017.The 1st and 2nd respondents submitted that the petitioners had without any evidence claimed that; the suit land is their ancestral land; that they had not been consulted through public participation prior to the commencement of the road project; that the respondents had failed to take out Environmental Impact Assessment License and that they had not been offered compensation. The 1st and 2nd respondents submitted that the ancestral land claim did not fall within the purview of this court as there were other mechanisms provided by law within which the claim could be pursued.

The 1st and 2ndrespondents argued that the Community Land Act made provisions for a party to move the Minister in charge for crystallization of ancestral and community land rights. The 1st and 2nd respondents submitted that the petitioners had not asked the court to declare their claim as falling within the community land but had asserted on their own that they were the owners of the land without producing any ownership document. The 1st and 2ndrespondentssubmitted that he who alleges must prove and the court was urged to set aside the interim orders and dismiss the present application since the claimdid not meet the threshold for grant of a conservatory order. The 1st and 2ndrespondents submitted that that issue of compensation would only arise when the petitioners' claims are brought to the appropriate forum.

On the issue of the Environmental Impact Assessment, the 1st and 2ndrespondents contended that the 4threspondents had stated in its replying affidavit sworn on 18th January 2017 that the 1st respondent had complied with the 4th respondent's requirements. The 1st and 2nd respondents argued that the environmental concerns had been taken care of and that there was no complaint from the petitioners. In this regard, the 1st and 2nd respondents referred to the license attached to the affidavit of Abdulkadir Ibrahim Jatani sworn on 18th January, 2017. The court was referred to the decision in the case of Patrick Kamotho Githinji vs. Resjos Enterprises & 4 others Nrb ELC Pet. No. 228 of 2016 where injunctive orders which had been issued were set aside upon production of the Environmental Impact Assessment License.

The 1st and 2ndrespondents submitted further that prior to undertaking the road construction in question, they complied with Article 10 of the Constitution by involving all the stakeholders including the petitioners herein. The 1st and 2nd respondents contended that the 1st petitioner had in his further affidavit stated that he was present in the meetings organized by the 1st and 2nd respondents thereby confirming that there was public participation. The 1st and 2nd respondents submitted further that the petitioners had in bad faith declined to engage the respondents despite the court's directive on 2nd November 2016 requiring the petitioners to nominate their representative and forward the name to the respondents. The 1st and 2ndrespondents relied on the case of Robert Gakuru vs. Kiambu County Government JR. Misc

No. 61 of 2014and submitted that they had satisfied the threshold of what constitutes a proper public participation.

The 1st and 2nd respondents referred to Article 40 of the Constitution and submitted that that the issue of compensation of the petitioners could not arise since the petitioners were not the registered owners of the suit land and as such nothing was acquired from them. The 1st and 2ndrespondents submitted that the requirement of Article 40(3)(4) for compensation of occupants of land in good faith had been met through the Project Affected Persons(PAPs) program outlined in their replying affidavit which the petitioners had refused to follow.

The 1st and 2nd respondents argued that the petitioners were not occupiers of the structures on the suit property which they had admitted to be renting out at between Kshs. 2000 and Kshs. 3000. They submitted that tenants had already vacated and that the structures were empty. The 1st and 2nd respondents cited the cases of Kenya Airports Authority vs. Mitubell Welfare Society & others CA No. 218 of 2015 and Veronica Njeri Waweru & 4 others vs. The City Council of Nairobi & others Nrb Pet. No. 58 of 2011 and submitted that trespassers and those in occupation of public land are not entitled to compensation. The 1st and 2nd respondents submitted that the petitioners were not entitled to the injunction soughtsince the alleged ancestral communal land rights must crystallize for such a right to accrue.

The 1st and 2nd respondents submitted that the interim orders issued herein had halted the road project and that the petitioners had not demonstrated that they were willing to pay the costs that will arise from the delay of the project should the suit not succeed. The 1st and 2nd respondents submitted that the petition herein which was premised on ancestral and communal land claim was likely to fail having been instituted in the wrong forum. The 1st and 2ndrespondents argued that the balance of convenience was in their favour since the link road in question was for the benefit of the public in general and public interest overrides private interest. The 1st and 2ndrespondents submitted that the petitioners had not met the conditions for grant of injunction which were enunciated in the case of Giella vs. Cassman Brown & Co. Ltd.(supra)since a prima facie case had not been established.

The 3rdrespondent did not file submissions.The 4th respondent filed its submissions on 1st February 2017. The 4th respondent argued that there was a distinctionbetween a project report and a study report under section 58(1) and (2) of Environmental Management and Coordination Act (EMCA) and the EIA Regulations as amended through LegalNotice No. 149 of 19th August 2016. The 4th respondent contended that the 1st respondent submitted an EIA project report on 23rd August 2016 and that the application for a license was made through a project report and not a study report.

The 4threspondent argued that there is no requirement for publication of an EIA project report for public participation. It was submitted that it was not in dispute that the license issued by the 4th respondent was for a project report and that the same had several conditions. The 4th respondent contended that even after issuing a license, the 4th respondent had vast powers to ensure that there was compliance with the conditions of the license and that the petitioners had not explored that option.

The 4th respondent submitted that the petitioners had confused the requirements for a project report and a study report and as such a prima facie case for the grant of an injunction based on the EIA process had not been established. The 4th respondent argued further, that in the event that the 1st respondent had breached the conditions of the license, there were available remedies under the Environmental Management and Coordination Act (EMCA) which the petitioners had failed to explore. The 4th respondent cited the case of Republic vs. National Environment Tribunal & 2 others ex parte Abdulhafidh Sheikh Ahmed Zubeidi(2013)eKLR and submitted that if the petitioners were aggrieved by its decision to

issue a license, they had a right of appeal to the National Environment Tribunal in the first instance and thereafter before this court under section 129(2) and 130 of EMCA.

Determination of the issues raised:

I have considered the petitioners' application and the opposition put forward thereto by the respondents. What is before the court for consideration is an application for conservatory orders pending the hearing of the petition. As this court had stated in the case of George Odero vs. Lake Victoria Environment Programme & 3 others[2015]eKLR, an applicant for a conservatory order under rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013must demonstrate that:-

(i) He has a prima facie case.

(ii) Unless the conservatory order is granted he is likely to suffer prejudice or injury as a result of violation or threatened violation of his constitutional rights or the constitution.

(iii) It would be in the public interest to grant the order.

In the Supreme Court case of Gatirau Peter Munya –vs- Dickson MwendaKithinji and 2 others, Supreme Court of Kenya, Application No. 5 of 2014,[2014]eKLRthe 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."

The petitioners'case is that they belong to the Nubian ethnic community and that most of them reside at Lindi, Mashimoni and Kambi Aluru villages of Kibra within Nairobi County. The petitioners have contended that as a community, they have lived in Kibra for several years. The petitioners have put the Nubians initial occupation of Kibra to between 1918 and 1919 when Kibra was first surveyed and gazetted as a military reserve. The petitioners have contended that Kibra is their ancestral land. The petitioners have contended that Kibra and its Nubian residents have suffered historical injustices which include violation and abuse of rights which has its roots in the colonial era and continued after independence. The petitioners have contended that the worst of such injustices has been land dispossession to which the Nubians have been subjected by successive governments. The petitioners' complaint in these proceedings concerns a road which the 1st, 2nd and 5th respondents intend to construct in the middle of their villages mentioned above. The petitioners have contended that the said road would have adverse effect on their livelihood and general wellbeing as it will involve dispossession of Nubians of their land and demolition of their homes. The petitioners have seen this road project as a perpetuation of the historical injustices against the Nubians. They have contended that the project is being undertaken in a manner which violates their constitutional rights. They have contended that they were not consulted before their houses were marked for demolition and that the respondents have not come up with alternative homes for them in violation of their right to accessible and adequate housing. They have contended that Kibra being their ancestral land, they will have nowhere to go after their homes have been demolished to give way for the said road. The petitioners have contended that the

initial plan for the said road was changed so as to target their villages and that they were left out of public consultations regarding the said road. They have accused the respondents of discrimination contrary to Article 27 of the Constitution. The petitioners have contended 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.

I have highlighted earlier in this ruling the respondents' response to the petitioners' petition and application under consideration. The respondents have admitted that the 1st and 5th respondents intend to construct a road through Kibra and that some residents would be affected. The respondents have contended that the said road would be constructed on a road reserve and that the residents of Kibra who are likely to be affected have been engaged in consultations on how best they can be assisted. The respondents have contended that Nubians are represented in the committees which were formed as vehicles for public consultations. The respondents have contended that the areas which have been earmarked for road construction form part of public land. The respondents have contended that the petitioners who have no titles over the said land have no right to compensation.

The first question which I need to answer is whether the petitioners have established a prima facie case of violation or threatened violation of their constitutional rights. From the historical records placed before me, I am satisfied that the Nubians have lived at Kibra for several decades. It is however not clear as to the nature of rights which they have over the land which they occupy. I wish to point out at the outset that on the material before the court, Nubians are not the only residents of Kibra. Kibra is now a home to several other Kenyan communities. I have not been called upon in these proceedings to determine the right of Nubians to live at Kibra and I will not make such an attempt. What is before me is a dispute over a road passing through some villages at Kibra. It is common ground that the road is going to affect Kibra residents some of whom are Nubians. The onus was upon the petitioners to show the court in what manner their constitutional rights have been threatened or violated. The petitioners have placed before the court photographs showing that some houses at Lindi, Mashimoni and Kambi Aluru villages in Kibra have been marked for demolition to pave way for road construction. The petitioners have also provided a list of the people whom they claim would be affected by the said road construction.

As I have stated earlier, the fact that there are houses earmarked for demolition is not denied. The same applies to the fact that a number of people would be affected by the construction of the road in contention. What is in dispute is the rights of those who would be affected and whether the same are threatened or are being violated. A part from their historical claim to Kibra, the petitioners have not placed any form of title before the court in support of their claim to the land in question or structures which are threatened with demolition. Article 40 of the Constitution which the petitioners cited as the foundation of their case guarantees every person a right to acquire and own property of any description in any part of Kenya. That Article also prohibits arbitrary deprivation of a person of such property or any interest or right over the property save where the property is required for public purposes or in the public interest and payment in full of just compensation has been made to the proprietor of the property.

There is no dispute from the foregoing that the government has a right to compulsorily acquire private property for public purpose or in the public interest provided it pays just compensation to the owner. It is not in dispute that the road in contention is a public project and that the government would be entitled to acquire land for the same compulsorily. The respondents have contended that the petitioners who will be affected by the road construction have no right to compensation because they have no title to the land being acquired by the government. As I have pointed out, the petitioners have not exhibited any title in support of their claim to the land in Kibra. They have contended that Kibra is ancestral land and as such communal land for Nubians. The respondents have contended that there is a process through which land becomes communal land and that such right has not accrued to the petitioners. I must say that

despite the persuasive submissions by both parties, I cannot determine at this stage the nature of the rights which the Nubians have over Kibra. This will have to await the hearing of the petition. It follows therefore that I cannot say at this stage that the petitioners were entitled to be compensated for portions of land which they occupy and which they will have to vacate to give way for the road in question.

It was not disputed that the petitioners are in occupation of the villages through which the road in contention is going to pass and that some of them are going to be affected by the said road in the manner stated above. I am in agreement with the petitioners that as residents of Kibra who were to be affected by the said road project, they had a right to be consulted before the road construction commenced. On the material before me, I am satisfied that the 1st and 2nd respondents engaged the residents of Kibra in discussions regarding the road project in question. Contrary to the allegations made by the petitioners, there is no evidence before the court that public participation in the project was carried out in a discriminatory manner. The petitioners have not persuaded me that they were prevented from participating in the forums which were put in place to discuss the said project.

On the issue of the failure by the 4th respondent to discharge its statutory duties, it is apparent that the 1st and 5th respondents commenced the road construction project before obtaining Environmental Impact Assessment License. The license was not issued for the project until 14th November 2016 after the filing of this suit. The petitioners were in the circumstances entitled to complain that the project was being undertaken contrary to the provisions of EMCA. Nothing however now turns on the issue of that license. Whether or not it should have been issued is for another forum.Due to the foregoing, I am doubtful of the merit of the petitioners' case against the respondents.

As to whether the petitioners would suffer 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.

On the issue as to whether it would be in the public interest to grant the orders sought, my answer is in the negative. It is common ground that the road construction sought to be stopped by the petitioners is a public project intended for the benefit of the public the petitioners included. As I have already observed, 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 petitioners are entitled to compensation. I am of the view that if the court at the hearing of the petition comes to the conclusion that the petitioners have a right to the land acquired by the 1st and 2nd respondents for the construction of the road in question, appropriate orders shall be made for the compensation of the petitioners.

In the final analysis and for the foregoing reasons, I find no merit in the Notice of Motion dated 5th August 2015 which I hereby dismiss. In the interest of justice and in order to avoid human suffering, I order that the petitioners herein be included in the Langata/Kibera Roads Committee and be actively involved in the Resettlement Action Plan(RAP) for the Project Affected Persons(PAP). I order further that the 1st, 2nd and 5th respondents shall not evict or demolish the houses belonging to the petitioners until the agreed resettlement plan for the persons affected by the road project in question is put in place. Each party shall bear its own costs of the application.

Delivered and Signed at Nairobi this 28th day of April, 2017

S. OKONG'O

JUDGE

In the presence of

N/A for the Petitioner

Mr. Motari for the 1st and 2nd Respondents

Mr. Mbuthia for the 3rd Respondent

N/A for the 4th Respondent

N/A for the 5th Respondent