



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CONSTITUTIONAL PETITION NO. 122 OF 2011

RONO JOEL CHERUIYOT

NANCY CHEPKOECH RONO

ATHMAN MOHAMMED MPONDA
PETITIONERS

VERSUS

KENYA URBAN ROADS AUTHORITY

KIBINICO ENTERPRISES LIMITED

THE HONORABLE ATTORNEY GENERAL
RESPONDENTS

JUDGMENT

Introduction

0. The Petitioners separately own two private subdivision plots on the original plot No. 196/12. The First and Second Petitioner are husband and wife respectively. They are joint owners of Plot Subdivision No. 9837 (Original No. 196/12) Section 1 Mainland North. The Third Petitioner, Athman Mohammed Mponda, claimed as the registered owner of Plot Subdivision No. 9836 (Original No. 196/11) Section I Mainland North.
0. The First Respondent sought to undertake construction of a feeder road from Bakarani Area so as to connect it with the Old Malindi Road in Bombolulu, Mombasa (“the road”) and therefore contracted the Second Respondent for the construction.
0. The Petitioners alleged that the road construction contractors were in the process of demolishing the structures on their private property when this suit was filed. For that reason conservatory orders were sought and obtained under certificate of urgency on 4th November 2011 restraining the Respondents from demolishing or otherwise interfering with the ownership and possession of the plots of the Petitioners pending the hearing and determination of the suit.

The reliefs sought

0. The Petitioners’ claim concerns their private property as defined by Article 64 of the Constitution. It is contended that the Respondents’ decision purporting to acquire the Petitioners’ property compulsorily is unconstitutional for failure to comply with the provisions of Article 40(3) of the Constitution. The Petitioners were also aggrieved by the lack of intervention or protection under Article 47 of the Constitution by the Respondents and Bamburi Police Station.

0. For these reasons, the Petitioners pray for the following remedies:
- a. ***A declaration that, under Article 23 (3) (a) of the Constitution, the Petitioners have a right to own their respective plots.***
 - b. ***A declaration that under Article 40(1) of the Constitution, the Respondents cannot construct a road or compulsorily take possession of the Petitioners' private property without their respective consents had and obtained and in accordance with Article 40(3) of the Constitution.***
 - c. ***An order of Judicial Review under Article 23 (3) (f) in the form of Prohibition barring the Respondents by themselves, their servants, agents and/or assignees from carrying on further developments, constructions, excavations and/or in any manner whatsoever interfering with the ownership and possession of Plot Subdivision No. 9837 (Original No.196/12) Section 1 Mainland North and Plot Subdivision No. 9836 (Original No.196/11) Section 1 Mainland North.***
 - d. ***An order of Judicial Review under Article 23 (3) (f) in the form of Mandamus compelling the Respondents by themselves, their servants, agents and/or assignees to reconstruct at their cost all the demolished structures, refill all the trenches and excavations and restore the conditions of Plot Subdivision No. 9837 (Original No.196/12) Section 1 Mainland North and Plot Subdivision No. 9836 (Original No.196/11) Section 1 Mainland North as they were before the complained interference:***
 - e. ***A declaration that where a citizen complains about infringement of a fundamental right threatening to breach the constitution by taking away the property of the citizen, the Kenya Police and/or the 3rd Respondent has a constitutional duty under Article 47 of the Constitution to accord the citizen with a quick and fair administrative action without necessarily referring the citizen to court.***
 - f. ***Costs of the Petition.***

The Petitioners' case

0. It is the Petitioners' case that the property in question rightfully belongs to the Petitioners and their respective titles have not been challenged. It has been alleged that the Second Respondent, while working on a contract for the 1st Respondent encroached on the private property of the Petitioners causing damage to property, which, however, was not quantified.
0. The Third Petitioner, Athman Mohammed Mponda, claimed as the registered owner of Plot Subdivision No. 9836 (Original No. 196/11) Section I Mainland North producing a copy of the Certificate of Title in his affidavit to the court. He alleged that the 2nd Respondent demolished the perimeter fence he had erected around the plot and had started digging trenches, filling in murrum without any authority. This has not been controverted by the Respondents.

The Respondents' case

0. The First Respondent Authority contracted the Second Respondent contractor to rehabilitate the said road. Engineer Anthony Muraguri Mwai, for the First Respondent admitted in the (undated) Affidavit filed on 5th December 2012 that: in the course of implementing the aforesaid rehabilitative contract, the Second Respondent contractor's excavator inadvertently knocked down a section of the Petitioner's iron sheeting perimeter wall. It was also deponed that the Second Respondent acknowledged and promptly made good for this, but details of this "compensation" has not been provided. It was alleged that, therefore, these proceedings are unnecessary.
0. At paragraphs 3-5 of his affidavit, the Regional Manager, Coast, of the 1st Respondent Authority deponed significantly as follows:
 3. ***That it is indeed correct that we at the 1st Respondent Contractor to rehabilitate the Bombolulu Bakarani Road within Mombasa District.***
 4. ***That however, it was in the course of implementing the aforesaid rehabilitative contract that the 2nd Respondent contractors excavator inadvertently knocked down a section of the***

Petitioner's iron sheeting perimeter wall, which incident the 2nd Respondent acknowledged and promptly made good.

5. *That it is my belief, and also on the advice of counsel, which advice I accept to be sound, that by dint of such acknowledgement and restoration the matter ended there, and that these proceedings are therefore unnecessary, ill advised and based on unfounded fear and unsound logic.*
0. The Second Respondent had earlier given their response through the Replying Affidavit of Betty Chepkemoi, a co-director of Kibinico Enterprises - the Second Respondent ("the company") sworn on 30th November 2011. The gist of the affidavit was that the company was properly awarded a tender by the First Respondent to construct the road. They were shown the site by the First Respondent with the help of the local area elders and were proceeding with the exercise of removing obstacles and preparing the ground for the construction when they were served with the court orders herein for temporary injunction. The Second Respondent has submitted that their inclusion in the suit was an error on the part of the Petitioners, and they pray to be struck out from the list of Respondents.
0. The Petitioners and the Second Respondent filed their written submissions, and with the First Respondent making clear indication through counsel that they did not intend to file submissions, the matter was reserved for judgment

Determination

0. The Petitioners' title to the property has not been challenged. Therefore, it must be accepted that the Petitioners are the owners of their respective property and have the right to own such property protected in the Constitution in terms of Article 40 thereof.
0. The First Respondent has admitted to an inadvertent encroachment to the Petitioners' property, which would constitute trespass. As it has been proved that the Respondents have in the course of construction of the road trespassed upon the property of the Petitioners, an order of prohibition and mandamus may be issued to, respectively, prevent further trespass and remedy the demolitions occasioned by the encroachment. .
0. It has been admitted that the Second Respondent encroached on the Petitioners' property and damaged property. It was alluded to in the affidavit of Engineer Anthony Muraguri Mwai for the First Respondent that certain reparations had been made. Subject to the reparations already made, if any, this order for mandamus must be granted.

The mandate of the Kenya Police Service is set out in Article 244 of the Constitution. Article 47 (1) provides that -

47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

The declaration sought as regards the duty of the Kenya Police Service, the 3rd respondent [or indeed any state organ] is the necessary implication of the provisions of Article 47 of the constitution.

0. It is clear that the petitioners are entitled to the reliefs sought in the petition flowing as they do from their undisputed ownership of the suit property and the acknowledged encroachment on it by the 2nd respondent, who was contracted by the 1st Respondent.

Orders

0. Accordingly, for the reasons set out above, I grant the petition herein as prayed. In default of the respondents reconstructing the petitioners' fence within 30 days hereof, the petitioners may undertake the reconstruction at the respondents expense' for which purpose there shall be liberty to apply.
0. However, in consideration of the public nature and benefit of the road construction exercise the

subject of this suit, I do not propose to make any order as to costs of the proceedings.

Dated signed and delivered on the 21st day of November 2014

EDWARD M. MURIITHI

JUDGE

In the presence of: -

.....for the Petitioners

..... for the Respondent

..... Court Assistant