



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 71 of 2012

KIERAN HOLDINGS LIMITED PETITIONER

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

MINISTRY OF ROADS AND PUBLIC WORKS 2ND RESPONDENT

KENYAN URBAN ROADS AUTHORITY 3RD RESPONDENT

JUDGMENT

1. The petitioner in this matter has brought the petition dated 7th March 2012 to protect its right to property under **Article 40** of the Constitution.

2. I have heard the parties and considered the depositions in support of and in opposition to the petition and the submissions and there is no dispute that the suit property LR No. 209/8300 (Grant No. IR 27006) belongs to the petitioner. What is in issue is whether the Notice dated 28th November 2011 titled “*Encroachment of Road Reserve along Jogoo Road*” issued by the 3rd respondent is a breach of the petitioner’s rights.

3. The Notice is addressed to licensed and unlicensed Traders, Hawkers and Vendors and it states as follows;

RE: ENCROACHMENT OF ROAD RESERVE ALONG JOGOO ROAD

(TRAFFIC Act Cap 403 (u/s 911 and Kenya Roads Act, 2007 Section 49)

Pursuant to section 10(1) of the Kenya Roads Act, 2007 (the Act), the Kenya Urban Roads Authority (The Authority) is responsible for the Management, Development, Rehabilitation and Maintenance of all Public Roads in the Cities and Municipalities of the Republic of Kenya.

Pursuant further to section 49(a) of the Act, no person is permitted to erect, construct or lay or establish any structure or thing on or over or below the surface of a Road Reserve or Buffer Zone.

The Authority is aware that you have gone against the law by (as the case may be) erecting billboards, constructing deceleration lanes and structures without approval, using the road reserve as garages and or holding areas for vehicles awaiting repair, setting up makeshift/permanent wooden, steel and or polythene paper kiosks through which you hawk foodstuffs and groceries, including vegetables, fruits, chicken and furniture, fencing off portions thereof by use of wood, wire mesh and metal grills and by creating and using illegal access thereon; all of which clearly offend Article 62 of the Constitution of Kenya, 2010 and the Kenya Roads Act 2007.

You are therefore reminded as a matter of law that any/all dealings incursions or meddling that are inconsistent with, or breaches Roads Corridors are **EXPRESSLY PROHIBITED**.

You are required to **STOP, DESIST, ABSTAIN** and or **REMOVE** (as the case may be) the makeshift wooden, wire mesh and or polythene paper kiosks by which you hawk foodstuffs and groceries, including vegetables, fruits, chicken and furniture and the fences erected on portions thereof by use of wood, wire mesh and metal grills and to seal off and or desist from any further creation or use of illegal accesses; garages, **FROM/ON/AT/ALONG** Jogoo Road Reserve as at the close of business on or before the thirtieth (30) day from the date of this Notice.

PLEASE TAKE NOTICE that failure to act as directed above will result in forcible removal of yourselves and the matter disclosed above at your own cost by Authority upon expiry of the stipulated notice period. Further, any such act in defiance of this notice shall additionally attract penal sanctions culminating in the institution of a criminal prosecution against yourselves, your agents and or anyone acting on your behalf in that regard to Section 19(6) of the Act. Be advised accordingly!

Bosire O Peter

Chief Legal Officer – Litigation

FOR – DIRECTOR GENERAL

4. At first blush, the notice refers to hawkers, unlicensed traders and vendors. The petitioner is not covered by the said notice as an owner of the building along Jogoo Road. But action of the 3rd respondent marking the petitioner's property with "X" clearly created an apprehension that the property would be demolished or at any rate interfered with.

5. **Article 22(1)** entitles a person to move the court if there is a threat of violation of a fundamental right and freedom and in this case the petitioner apprehended the demolition of the property and I do not think it is an answer to the petitioner's complaint that the petitioner ought to have carried out further inquiries. The petitioner was entitled to take *quia timet* action.

6. The petitioner's apprehension, in view of the country's history of forced evictions and demolitions, is not without justification and I find a threat to the petitioner's property real and entitling the petitioner to move the court.

7. Before I proceed to grant relief, I would hold that where an encroachment notice is issued, it is proper that the particular properties that encroach on the road reserve be specifically identified as it is the Road Authority that has the full information on the properties encroaching on the road reserve. This would accord with the requirements of **Article 47** that require fair administrative action.

8. The proper remedy in this case is that I hereby restrain the respondents, jointly and severally, from interfering in any manner whatsoever with **LR No. 209/8300 (IR 27006)** for the purposes of the Jogoo Road Rehabilitation Project. The petitioner shall have the costs of the petition.

DATED and **DELIVERED** at **NAIROBI** this 26th day of October 2012.

D.S. MAJANJA
JUDGE

Mr Rimui instructed by Mohamed Madhani and Company Advocates for the petitioner.

Mr S. Wamotsa, Litigation Counsel, instructed by the State Law Office for the respondent.