



Easthaven Development Company Ltd v Water Resources Management Authority & 3 others; County Government of Nairobi & 2 others (Interested Parties) (Environment & Land Petition 77 of 2018) [2022] KEELC 12810 (KLR) (30 September 2022) (Judgment)

Neutral citation: [2022] KEELC 12810 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION 77 OF 2018
OA ANGOTE, J
SEPTEMBER 30, 2022
IN THE MATTER OF ARTICLES 2,3,10,19,20, 21, 22, 23,
40, 47, 60,61, 64, 67 AND 253 OF THE CONSTITUTION OF
KENYA, 2010
AND
IN THE MATTER OF SECTION 23 OF THE REGISTRATION
OF TITLES ACT CAP 281 LAWS OF KENYA (NOW
REPEALED) AND SECTIONS 26 & 107 OF THE LAND
REGISTRATION ACT, 2012
AND
IN THE MATTER OF A REMOVAL OF ILLEGAL
STRUCTURES NOTICE IN RESPECT OF BUILDINGS AND
STRUCTURES ERECTED ON PARCEL L. R. NO. 4857/121
ALONG RING ROAD RIVERSIDE IN KILELESHWA ESTATE
IN NAIROBI

BETWEEN
EASTHAVEN DEVELOPMENT COMPANY LTD PETITIONER

AND
WATER RESOURCES MANAGEMENT AUTHORITY 1ST RESPONDENT
NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY 2ND
RESPONDENT



NAIROBI WATER AND SEWERAGE COMPANY LIMITED 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT

AND

COUNTY GOVERNMENT OF NAIROBI INTERESTED PARTY
DIRECTOR FOR SURVEY OF KENYA INTERESTED PARTY
COMMISSION ON ADMINISTRATIVE JUSTICE INTERESTED PARTY

JUDGMENT

1. In the petition dated November 13, 2018, the petitioner averred that it is the legal owner of land known as Brooklyn Springs Apartment under parcel of land L R No 4857/121 along Ring Road, Kileleshwa (the suit property).
2. According to the petitioner, in the year 2006, it decided to develop the suit property; that prior to the developments, it submitted its architectural drawings and building plans to the relevant government departments and that it was granted approval by the 2nd respondent and the 1st interested party to build apartments on the suit property.
3. The petitioner averred that in the year 2008, the agents of the Nairobi Water and Sewerage Company Limited started building sewers on the riparian way leave which diverted the water from the river bank into its perimeter wall.
4. It is the petitioner's case that on June 10, 2010, NEMA, the 2nd respondent, issued to the petitioner an order of demolition of the perimeter wall and the apartments on the allegation that it had encroached on the riparian way leave; that on September 27, 2017, the Water Resources Management Authority, the 1st respondent, also issued an order of demolition of the perimeter wall and the apartments standing on the suit property and that the 1st and 2nd respondents seem to have based their allegations on the man-made river created by the 3rd respondent.
5. In the petition, the petitioner has prayed for an order of permanent injunction restraining the respondents from interfering with, demolishing or destroying Block C of Brooklyn Springs Apartment and the perimeter wall standing on LR No 4857/121.
6. The petitioner has also prayed for a declaration that the approvals granted to the 3rd respondent with respect to the construction of a sewer line along Kirichwa Kubwa river was illegal and tantamount to an infringement on its right to use its property.
7. Finally, the petitioner has prayed for an order by way of judicial review to quash the orders dated June 10, 2010 and September 27, 2017 issued by the 1st and 2nd respondents respectively.
8. In response to the petition, the 2nd respondent's County Director of Environment, Nairobi County, deponed that under the Environment Management and Coordination Act (EMCA), the 2nd respondent's principal object is to exercise general supervision and co-ordination over all matters relating to the environment.
9. It is the deposition of the 2nd respondent's director that on June 10, 2010, the 2nd respondent issued a restoration order to the petitioner who had constructed on riparian reserve and that whereas the



- petitioner was issued with an Environmental Impact Assessment License for the project, the same required that the project proponent observes a six (6) meters riparian reserve which he failed to do.
10. It is the 2nd respondent's case that the Water Resources Management Authority conducted an official site visit and established that indeed the petitioner had encroached on a riparian reserve and issued it with a restoration order as evidenced by the petitioner's pleadings.
 11. The 2nd respondent's County Director finally deponed that the site inspections by NEMA and WARMA were undertaken at different times and it cannot be a coincidence that both authorities came to the same conclusion on the encroachment of the riparian reserve by the petitioner.
 12. The 3rd respondent filed both the grounds of opposition and a replying affidavit. In the grounds of opposition, the 3rd respondent averred that it obtained all the requisite approvals from the relevant authorities and followed due process before constructing the sewer line in 2008.
 13. The 3rd respondent further averred that the petitioner ought to have lodged an appeal before the Water Appeal Bond in accordance with sections 85 and 86 of the [Water Act, 2002](#) (repealed), if it was dissatisfied with the decision of the 3rd respondent.
 14. The 3rd respondent averred that pursuant to condition 8 on the certificate of title for LR No 4857/121, the petitioner had an obligation to allow laying of water mains, service pipes and drains on the property, and not to erect any buildings in such a way as to cover or interfere with such water mains and service pipes, which condition the petitioner has materially breached.
 15. In the replying affidavit, the 3rd respondent's surveyor deponed that there exists a privately developed sewer line constructed within the registered six (6) meter riparian reserve that serves LR No 4857/65 and that the said sewer line has neither diverted any river water into the suit property nor created a manhole that has encroached on the petitioner's land.
 16. The 1st and 4th respondents and the 2nd interested party filed joint grounds of opposition in which they averred that the petition offends the principles of constitutional avoidance and that the petition does not meet the threshold for granting the order of certiorari as provided for under section 7 of the [Fair Administration Act](#).
 17. It was averred that the petitioner is making reference to approvals and building plans which have not been attached to the petition and as such has not demonstrated the extent to which it complied with the said approvals.
 18. The petition proceeded by way of written submissions. The petitioner submitted that it is the registered proprietor of land known as LR No 4857/121 (the suit property) and that the survey in respect of the suit property clearly indicates the beacons of its property.
 19. According to the petitioner, the riparian reserve claimed to exist by the 1st and 2nd respondents was only made to exist by the agents of the 3rd respondent; that the petitioner has been in occupation of the suit property for 44 years and that the Petitioner has developed apartments on the land valued at Kshs 7,168,265,000.
 20. It was submitted by the petitioner that under article 40 of the [Constitution](#), the property rights of every person are guaranteed and that under article 40(3) of the [Constitution](#), no person should be deprived of property without prompt and just compensation being made.
 21. In its submissions, the 2nd respondent submitted that parties are bound by their pleadings; that the petitioner has admitted that he constructed 27 units on the suit property instead of 22 units that had



- been approved by the 2nd respondent and that the construction of 27 units by the petitioner was in disregard of the EIA license issued by the 2nd respondent.
22. Counsel for the 2nd respondent submitted that section 108 of the *Environmental Management and Coordination Act* (EMCA) provides for issuance of Environmental Restoration Orders and that the 2nd respondent's attention was drawn to regulation 6(c) of EMCA (Water Quality) regulations that provides that no person shall cultivate or undertake any development activity within the full width of a river or stream to a minimum of six meters and a maximum of 30 meters on either side based on the highest recorded flood level.
 23. It was submitted that the petition was filed after an inordinate and unexplained amount of time, being eight (8) years after issuance of the restoration order and that the Petitioner has failed to prove that the 2nd respondent has violated or breached his fundamental rights as pleaded in the petition. counsel relied on several authorities which I have considered.
 24. The 3rd respondent's advocate submitted that there only exists a privately developed sewer line constructed within the registered six-meter riparian reserve that serves LR No 4857/65 and that the said sewer line has neither diverted any river bank water into the petitioner's property nor created a manhole. It was submitted that the case against the 3rd respondent does not raise constitutional issues and does not disclose a reasonable cause of action as against the 3rd respondent or at all.

Analysis and findings

25. It is not in dispute that the petitioner is the legal owner of land known as Brooklyn Springs Apartment under parcel of land LR No 4857/121 along Ring Road, Kileleshwa (the suit property). According to the petitioner, in the year 2006, it decided to develop the suit property; that prior to the developments, it submitted its architectural drawings and building plans to the relevant government departments and that it was granted approval by the 2nd respondent and the 1st interested party to build apartments on the suit property.
26. The petitioner averred that in the year 2008, the agents of the Nairobi Water and Sewerage Company Limited, the 3rd respondent, started building sewers on the riparian way leave which diverted the water from the river bank into its perimeter wall.
27. It is the petitioner's case that on June 10, 2010, it was issued with an order of demolition of the perimeter wall and the apartments on the allegation that it had encroached on the riparian way leave; that on September 27, 2017, the Water Resources Management Authority, the 1st respondent, also issued to it an order of demolition of the perimeter wall and the apartments standing on the suit property and that the 1st and 2nd respondents seem to have based their allegations on the man-made river created by the 3rd respondent.
28. The respondents have acknowledged that on June 10, 2010, the 2nd respondent issued a restoration order to the petitioner who had allegedly constructed on riparian reserve and that whereas the petitioner was issued with an Environmental Impact Assessment License for the project, the same required that the project proponent observes a six (6) meters riparian reserve which he failed to do.
29. It was averred that the petitioner is making reference to approvals and building plans which have not been attached to the petition and as such has not demonstrated the extent to which it complied with the said approvals.



30. The court has perused the documents that were annexed on the petitioner's affidavit. The deed plan annexed on the Petitioner's affidavit shows that the suit property abuts river Kirichwa Kubwa. Indeed, the said river appears to be the boundary of the suit property on the eastern side of the land.
31. The Constitution of Kenya provides for environmental sustainability, including the acknowledgement of the right to not only a clean, but also a healthy environment. Although the Constitution does not expressly mention riparian land, it stipulates the general context for its management. One of the principles of the Land Policy and article 60 of the Constitution is the conservation and protection of ecologically sensitive areas.
32. For this principle to be achieved, the state has the mandate under article 66 of the Constitution to regulate the use of any land for land use planning and in the interest of the public. Therefore, the laws, regulations, policies, and practices that Kenya implements while managing riparian land must recognize and enhance conservation and sustainability of riparian land.
33. The Survey Act reserves for conservation purposes land of not less than 30 meters in width above the high-water mark of all tidal rivers. Regulation 6 (c) of the Environmental Management and Coordination Act (Water Quality Regulations), 2006 prohibits cultivation or undertaking of any development within a river's full width, to a minimum of 6 meters and a maximum of 30 meters on both sides, depending on the highest flood level.
34. The other pieces of legislation that are geared towards the conservation of riparian land in Kenya are the Agriculture Act (Basic Land Usage Rules), 1965. Regulation 118 (1) of the Water Resource Management Rules outlaws the following activities on riparian land: cultivation, clearing of vegetation, building of permanent structures, disposal of waste, quarries, planting of exotic species and any other activity that may degrade the quality of water.
35. Regulation 116 (1) of the Water Resources Management Rules, 2007, provides that riparian land does not imply that there is a change of ownership of land, but imposes management controls on land use for water resource quality as defined by the rules.
36. All these laws prohibit landowners from using riparian land either for cultivation or development purposes notwithstanding the fact that they may have proprietary rights on the riparian land, or land abutting riparian reserve.
37. The restoration of riparian zones, in both agricultural and urban areas, provide significant benefits and contribute to the ecosystem services they offer. As a result, efforts to rehabilitate and preserve riparian land is critical and urgent. Apart from species conservation, the restoration of riparian land also improves the water quality and aesthetics of rivers.
38. Restoration activities, which includes floodplain reactivation, is critical for water filtration, recreation, and flood management in any country. Protecting and restoring riparian land thus can aid human needs while also providing ecological sustainability.
39. Although the petitioner has averred that it obtained approvals from the relevant authorities to put up 27 units on the suit property, the petitioner did not annex the said plans. Indeed, this court would have benefitted immensely by perusing the approved plans, especially the site plans, to ascertain the location of the perimeter wall vis a vis the position of the river.
40. Indeed, the petitioner did not provide to this court the copy of the NEMA license approving the construction of 27 units on the suit property. Although NEMA has averred that it only approved the development of 22 units on the suit property, the Petitioner has acknowledged that it put 27 units on the land.



41. Having not annexed on its affidavit an EIA license approving the construction of the 27 units on the suit property, and having failed to exhibit the approved site plans, it is the finding of this court that the petitioner must have encroached on riparian land as deponed by the respondents.
42. Section 108 of the EMCA provides for the issuance of Environmental Restoration Orders. In the Restoration Order issued to the petitioner, the petitioner's attention was drawn to the provisions of the EMCA and in particular to regulation 45 (2) (d) of the [EMCA \(Impact Assessment Audit\) Regulations](#).
43. Indeed, under section 108 of the EMCA, NEMA is mandated to issue an environmental restoration order to any person to prevent the person from taking any action that is reasonably likely to cause harm to the environment. That is what happened in the instant case.
44. NEMA having ascertained on visiting the suit property that the petitioner had encroached on the riparian reserve issued a restoration order to the petitioner. No evidence has been placed before this court to show that the said order was illegally issued.
45. In his supporting affidavit, the petitioner's director deponed that "the petitioner being the registered proprietor of the property comprised in title registered as LR No 4857/121 has an indefeasible title against the whole world."
46. The argument by the petitioner that it has a monolithic aggregate of entitlement over its land, in an era of rapid land use regulation for conservation purposes, seems to place priority of land rights over and above environmental protection. This argument has been used by many landowners whose land abuts or forms part of riparian land to conceptualize land ownership from a wrongful perspective of unlimited range of land rights that are good against everyone else, and who argue that land rights are more legitimate than environmental restrictions which are not registered, and therefore not binding.
47. Indeed, the subject of land rights has long been linked to the notion of liberty and freedom from state regulation and intervention. Notwithstanding the constitutional provisions which mandates the state to regulate the use of land for conservation purposes, recent case law indicates that property rights' holders are against environmental regulation of their land rights.
48. The argument by landowners that they should be allowed to exercise their proprietary rights over land forming part of riparian zone unrestricted, like in this case, is what has led to the continued encroachment on and degradation of riparian land. This is a notion that should be disabused by landowners.
49. The traditional concept of property rights, which the landowners have relied upon to encroach on riparian land, have encouraged the imposition of ecologically arbitrary boundaries, reinforcing the notion that human beings are distinct and separate from natural surroundings; the treatment of natural resources as entitlements that can be converted into human assets or wealth, with little concern of the broader consequences of unsustainable resource use; and the failure to recognize the existing links between the use of natural resources and ecosystem health.
50. Considering the importance that is bestowed on human beings to exploit the environment sustainably, and to abide with the regulations relating to environmental protection, which includes conservation of riparian land, there is a need to align the land rights of landowners with the responsibilities that come with ownership of land for the conservation of riparian land. That is what the petitioner was required to do in this case, and which he failed to do.
51. That being the case, it is the finding of this court that the current petition is not meritorious. The petition is dismissed with costs.



DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 30TH DAY OF SEPTEMBER, 2022.

O. A. ANGOTE

JUDGE

In the presence of:

Mr. Mambiri for the Petitioner

No appearance for 1st Respondent

Ms Abobo for 3rd Respondent

Mr. Omondi for Kangata for the 1st Interested Party

Court Assistant - June

