



Muluvi v Kenya National Highways Authority & 2 others (Environment & Land Case 14 of 2021) [2022] KEELC 14866 (KLR) (16 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14866 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND CASE 14 OF 2021
LG KIMANI, J
NOVEMBER 16, 2022**

BETWEEN

GEOFFREY MULUVI PLAINTIFF

AND

KENYA NATIONAL HIGHWAYS AUTHORITY 1ST DEFENDANT

COUNTY GOVERNMENT OF KITUI 2ND DEFENDANT

NATIONAL LAND COMMISSION 3RD DEFENDANT

RULING

1. What is coming up for determination before this Court is the Notice of Motion dated April 22, 2022 by the Plaintiff, seeking the following orders:
 1. That the suit herein be marked as adjusted wholly and/or compromised and/or the claim by the plaintiff as satisfied by the Defendants.
 2. That each party to bear its own costs.
2. The background to this suit is a Plaint dated March 15, 2019, where the Plaintiff claimed to be the registered proprietor of land known as Plot No 45 Chuluni Market, Kitui County on which he has developed a 2-storey commercial building at an estimated cost of Kshs 20 million.
3. The Plaintiff claims that the 1st Defendant commenced construction works of upgrading the Kibwezi-Mutomo-Kitui-Kabati-Migwani A9/B64 Road project and proceeded to compulsorily acquire land belonging to affected persons. The Plaintiff noted that his name was not on the list of the persons whose land was affected and was to be compensated. He claims that sometime in 2019, the 2nd Defendant purported to change and divert the course of the road to the effect that the Plaintiff's property among that of other people and that on or about March 13, 2019 he was issued with a notice for removal of his construction on a portion of the suit property.



4. The Plaintiff filed the present suit seeking a permanent injunction to prevent the Defendants from interfering with the suit property and a declaration that the decision by the Defendants to divert the course of the road to affect the suit property is unlawful, illegal, null and void. He averred that unless the orders sought are granted, he stands to suffer substantial and irreparable damage.
5. The 1st Defendant filed a defence to the suit herein.
6. The grounds relied on are that the construction of the Kibwezi-Mutomom-Kitui-Kabati-Migwani (A9/B64) road has already been completed without affecting the suit property. That since the 3rd Defendant has not taken steps to wards compulsory acquisition of the suit property; it has no interest in the same and it is the Applicant's contention that the actions of the defendants have compromised the suit herein and that the Defendant have satisfied the claim by the Plaintiff and therefore no useful purpose will be served to have the suit proceed to hearing.
7. The Applicant averred that after this court issued an order of injunction restraining the Defendants from demolishing the suit property, the defendants compulsorily acquired parcels of land opposite the suit property in order to accommodate and pave way for the construction of the said road.
The Plaintiff's advocates wrote letters to the Defendants' Advocates dated October 7, 2021 and March 17, 2022 seeking to have the suit marked as settled with no orders as to costs but they received no reply.
8. In their written submissions, the Applicant stated that even though the Respondents contend that the suit property is on a road reserve and that the road measures 60 meters, the Plaintiff maintains that the road at Chuluni Market measures 30 meters.
9. It is the Plaintiff/Applicant's submission that the suit has been overtaken by events and invokes the provisions of Order 25 Rule 5 of the *Civil Procedure Rules* and urged the court to take into account the fact that there is no counter-claim from the Defendants which asserts that the suit property is public land. The Plaintiff concluded by submitting that there will be no useful purpose served to take the court through a full oral hearing of the matter because the same has been adjusted and whose adjustment is not contested.

The 1st Defendants/Respondents' Case

10. In opposition thereof, the Defendant filed Grounds of Opposition dated June 28, 2022 opposing the application on grounds That:
 1. The 1st Respondent has filed a substantive statement of Defense contesting the Plaintiff/Applicant's claim in toto.
 2. The said Defence raises triable issues to wit;
 - a. Whether the permanent structure erected by the Plaintiff encroached upon public land (road reserve).
 - b. Whether the recovery of the land by the 1st Defendant would amount to compulsory acquisition subject to compensation.
 - c. The extent of the boundaries of Plot No 45 Chuluni Market.
 3. The statement of Defense contains no admissions to warrant summary judgment as prayed by the Plaintiff.
 4. In determining the Plaintiff's/Applicant's Application dated March 15, 2019, the Honourable Court issued interim orders pending the hearing and the determination of the main suit.



5. Whether or not the 2nd Defendant has completed construction of the highway does not make right the occupation of public land by the Plaintiff.
6. It is therefore in the interest of justice and the public that this suit be determined on merit.
11. The 1st Defendant also filed written submissions stating that no admissions have been raised in the 1st Defendant's Defence to warrant the orders sought by the Plaintiff, which orders are tantamount to an order of judgment on admission.
12. The 1st Defendant highlighted that the triable issues raised in their Defense are that a section of the Plaintiff's property has encroached upon public land; that is; a road reserve and thus the Plaintiff needs to remove the offending section. It is the 1st Defendant's submission that whether or not the road has been constructed does not excuse the encroachment of the Plaintiff's property upon the road reserve which is under the domain of the 1st Defendant.
13. Invoking the provisions of Article 50(1) of the *Constitution* of Kenya 2010, which gives every person the right to have any dispute that can be resolved by an application of law decided in a fair and public hearing, the 1st Defendant submitted that it is in the interest of justice to hear and determine the matter as it concerns the protection of public land.

Analysis and Determination

14. After considering all the documents and records in issue, I am of the opinion that the issue that arises for determination is whether the suit has been compromised and should be marked as such.
15. The application is brought pursuant to Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 25 Rule 5 of the *Civil Procedure Rules (2010)*. Order 25(5) provides that:

“Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith.

(2) The Court, on the application of any party, may make any further order necessary for the implementation and execution of the terms of the decree.”
16. The *Black's Law Dictionary* defines the word 'compromise' as:

“An arrangement arrived at, either in court or out of court, for settling a dispute upon what appears to the parties to be equitable terms, having regard to the uncertainty they are in regarding the facts, or the law and the facts together.”
17. In the case of *Tasmac Limited v Nassau Limited & 4 others [2021] eKLR* the Court stated as follows regarding compromise of a suit:

“The autonomy of the parties to litigation is so wide, that they have even a freedom by express agreement to choose to compromise the suit by way of a withdrawal or entering into a consent. A Court will not interfere with the consent order entered into by the parties within their power and free will.”



18. Apaloo JA in the Court of Appeal's case of *Specialized Engineering Company Ltd v Kenya Commercial Bank Ltd* [1988] eKLR was of the opinion that compromise of suit brings it to an end when stating that:

‘In my opinion, a civil suit can be compromised and that done, litigation in so far as the issues compromised are concerned, is at an end. The common law position is stated at page 403 paragraph 756 of vol 30 of *Halsbury's Laws of England 3rd Edn* as follows: -

“All or any of the questions in dispute in an action may be settled between the parties by compromise without trial, and if such compromise is bona fide and validly entered into, the Court does not allow the question so settled to be again litigated between the parties to the settlement.”

19. The definition of a suit having been compromised or adjusted wholly in part by any lawful agreement does not apply to this suit since there is no agreement nor consent with the defendant nor compromise on the part of any of the parties to the suit. In fact, the 1st Defendant is against having the suit marked as settled in this manner.
20. The Plaintiffs suit was based on the notice dated March 13, 2019 and the same noted that the Plaintiff had encroached on the Kibwezi-Mutomo-Kitui-Kabati-Migwani (A9/B64) road without written permission of the Director General KENHA. The Plaintiff was notified to remove the construction on the building at the risk of the same being removed by the 1st Defendant. The Defendants were restrained from demolishing the Plaintiffs building pending hearing and determination of the suit herein by an order issued by the court on 18th March 2019. The Plaintiff now states that the Defendants completed construction of the road without interfering with his building and this amounted to compromise of the suit.
21. In my view the acts of the Defendants completing construction of the road without affecting the Plaintiffs building do not amount to compromise of the suit since in the first instance they were acting in compliance with the terms of a court order. Further, the Defendants have not withdrawn the notice issued to the Plaintiff claiming that his building is partly on the road reserve and that he ought to remove the portion that is on the road reserve failure to which they intend to demolish it.
22. In my opinion the Plaintiff has not shown that the suit has been adjusted wholly or in part by any lawful agreement or compromise, or that the defendant has satisfied the plaintiffs claim in any way. In the event that the Plaintiffs position is satisfied by the fact that the road construction did not affect his building he is at liberty to simply withdraw the suit under Order 25 (1) of the *Civil Procedure Rules (2010)*. In the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others*, Supreme Court Application No 16 of 2014, the Supreme Court stated as follows;
- “a party's right to withdraw a matter before the court cannot be taken away. A court cannot bar a party from withdrawing his matter. All that the court can do is to make an order as to costs where it is deemed appropriate.”
23. The 1st Defendant contends that their defence has raised triable issues that the Plaintiff has built on a road reserve. I am satisfied that the defence filed by the 1st Defendant does indeed raise triable issues of whether a portion of the Plaintiffs building lies on the road reserve or the same lies on his own land. The 1st Defendant further contends that the road reserve measures 60 meters and not 30 meters as claimed by the Plaintiff. This is an issue for determination by the court. A triable issue was defined as follows in



the case of *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono (2015) eKLR* where the Learned Justices of Appeal stated as follows: -

“What then is a defence that raises no bona fide triable issue? A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The *Black's Law Dictionary* defines the term “triable” as, “subject or liable to judicial examination and trial”. It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.”

24. Similarly, the same court quoted with approval the case of *Giciem Construction Company v Amalgamated Trade & Services LLR No 103 CAK* where it was held:

“....A triable issue is said to exist if there is a dispute in the facts, which dispute can only be resolved after ventilation in a full hearing. As a general principle, where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has a bona fide defence, he ought to have leave to defend.”

25. Following the findings of the court I am satisfied that the Plaintiff has not shown that the Defendants have compromised the suit herein as envisaged under Order 25 Rule 5 of the *Civil Procedure Rules*. Consequently, the application dated April 22, 2022 cannot stand and the same is hereby dismissed with costs to the 1st Defendant. The Plaintiff is hereby directed to set down the suit for pretrial directions within the next 30 days. Pretrial on January 31, 2023. The Court to serve the parties with a pretrial notice.

DELIVERED, DATED AND SIGNED AT KITUI THIS 16TH DAY OF NOVEMBER, 2022.

L G KIMANI

JUDGE ENVIRONMENT AND LAND COURT

Ruling read in open court in the presence of-

Musyoki Court Assistant

No attendance for Applicant

No attendance for Respondents

