



**Ayoti Distributors Limited v Kenya National Highways Authority (Environment & Land Case E006 of 2023) [2023] KEELC 20361 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20361 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE E006 OF 2023  
BN OLAO, J  
OCTOBER 5, 2023**

**BETWEEN**

**AYOTI DISTRIBUTORS LIMITED ..... PLAINTIFF**

**AND**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... DEFENDANT**

**RULING**

1. Ayoti Distributors LTD (the Plaintiff) moved to this Court vide its plaint dated and filed herein on 9<sup>th</sup> March 2023 seeking against the Kenya National Highway Authority (KENHA), the Defendant, various remedies. For purposes of this ruling, the relevant remedy is prayer NO (d) which is:
  - (d) An order directing the Physical Planner, the Land Registrar, the County Surveyor and official of the Defendant together with other necessary experts to visit the site, carry out the necessary inquiries and establish whether any part of L.R No Busia Municipality/120 sits on the road reserve.
2. The basis of the Plaintiff's case is that it is the registered proprietor of the land parcel No Busia/ Municipality/120 (the suit land) yet on or about March 2023, the Defendant's officials went to the Plaintiff's premises at the National Bank and placed several "X" marks on the perimeter well contending that the parking lot which is 15 metres inside the National Bank's compound is on the road reserve. They then threatened to demolish the wall any action which the Plaintiff alleges is against its property rights, amounts to compulsory acquisition of land and is contrary to the Fair Administrative Actions Act.
3. The Defendant is yet to file its defence.
4. Simultaneously with the plaint, the Plaintiff filed a Notice of Motion premised under the provisions of Sections 1, 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act*, Order 40 Rule 1(a) (b), 2(1), 3(1) and Order 51 Rule 1, 4, 6, 20(1) and 2 of the *Civil Procedure Rules*. It sought the following orders:



1. Spent
  2. Spent
  3. Spent
  4. That this Court do issue an order of temporary injunction against the Defendant by itself, it's agents, workers or any other person appointed by the Defendant from continuing to demolish, alienate, fence off or in any manner whatsoever interfere with the Plaintiff's right over the land parcel No Busia Municipality/120 pending the hearing and determination of this suit.
  5. That the OCS Busia Police Station do assist in effecting this order.
  6. Spent.
  7. That costs of this application be provided for.
5. That application which is the subject of this ruling is predicated on the grounds set out therein and supported by the affidavit of Charles Wesonga Mbingi the Plaintiff's Director.
  6. The gist of the application is that the Plaintiff is the registered proprietor of the suit land on which the National Bank of Kenya runs their Busia Branch. That in or about March 2023, officers from the Defendant went to the suit land and painted several 'X' marks on the perimeter wall contending that it is on the road reserve yet it is almost 15 metres inside the said Bank's compound. The said officials threatened that they would return to demolish the perimeter wall which was constructed over 25 years ago and with the approval of the Ministry of Public Works whose officers marked the position which it occupies. Such action is injurious, inimical and contravenes *the Constitution* of Kenya 2010 as well as the Fair Administrative Actions Act.
  7. Annexed to the supporting affidavit are the following documents:
    1. Certificate of lease for the land parcel No Busia Municipality/120 in the name of the plaintiff.
    2. Photographs of the perimeter well marked 'X'.

In opposing the application, the defendant filed a replying affidavit by Moses Gambo it's Engineer Roads dated 11<sup>th</sup> April 2023 in which it is deposed, inter alia, that the Busia County is in the process of re-organising the town by removing encroaching structures. That the Busia County Government instructed it to confirm the extent of the road reserve which it did. That the perimeter wall erected on the suit land is encroaching on the Defendant's road reserve by about 4-5 metres as it's boundary is demarcated by beacons marked B8, B5, BT15 and B9. The Plaintiff's perimeter wall was found to be encroaching by between 4-5 metres onto the road reserve hence the mark on the perimeter wall. That the encroachment by the Plaintiff stands out since the immediate neighbouring parcels developed with storey buildings were found not to encroach on the road.

8. The perimeter wall contravenes Section 49(1) of the *Kenya Roads Act* 2007 and the Plaintiff did not seek the Defendant's approval as provided under Regulation 6 of it's regulations. Further, that the Plaintiff's encroachment is in contravention of Section 91 of the *Traffic Act* and the Defendant is currently carrying out a demarcation process along the road reserve and once the process is completed, notices to remove illegal structures will be issued to the Plaintiff and others.
9. That the application has been filed without the approval of the Plaintiff's Board and does not meet the threshold set out in the case of *Giella -v- Cassman Brown & Company LTD* 1973 EA 358 and others.



That this Court lacks jurisdiction for failure by the Plaintiff to adhere to the provisions of Section 67(a) of the *Kenya Roads Act* and this is entirely a boundary dispute.

10. When the application was placed before me on 8<sup>th</sup> March 2023, I directed that it be canvassed by way of written submissions to be filed on or before 30<sup>th</sup> March 2023. However, only Mr Ashioya counsel for the Plaintiff filed his submissions. I have therefore not had the benefit of the Defendant's submissions.
11. I have considered the application, the rival affidavits and the submissions by the Plaintiff's counsel Mr Ashioya.
12. At the commencement of this ruling, I set out one of the remedies sought by the Plaintiff other than the declaratory order that the actions of the Defendant's officials are unlawful and also an order of permanent injunction. That remedy which I consider germane for purpose of this application is in paragraph (d) and due to its relevance, I shall cite it again in extenso. It reads:

(d) "An Order directing the Physical Planner, the Land Registrar, the County Surveyor and Officials of the Defendants together with other necessary experts to visit the site, carry out the necessary inquiries and establish whether any part of L.R No Busia Municipality/120 sits on the road reserve." Emphasis mine.

In paragraphs 20 and 21 of the replying affidavit by Mr Moses Gambo, it is also deposed as follows:

20: "That the Defendant's claim is not of ownership of the parcel in its entirety but the encroaching portion of the title L.r No Busia Municipality/120."

21: "That the Applicant has failed to enjoin the Land Registrar, Busia County to resolve the present dispute which is predominantly a boundary dispute." Emphasis mine.

13. A wholesome reading of the above averments by both parties clearly show that the dispute involves a boundary. Counsel for the Plaintiff has submitted at length on the issue of sanctity of the title under Section 24 of the *Land Registration Act* as well as the right to property under Article 40 of the *Constitution*. However, the Plaintiff's title is not under challenge. The issue is whether in developing the suit land now occupied by the National Bank, the Plaintiff put up a perimeter wall beyond its legitimate boundary and encroached onto the road reserve. That is really a boundary dispute.

14. Section 18(2) of the *Land Registration Act* provides that:

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(2) "The court shall not entertain any action or other proceedings relating to a dispute as to the boundary of registered land unless The Boundaries Have Been Determined in accordance with this Section." Emphasis mine

Section 19 of the same Act goes on to provide for the procedure of how the Land Registrar shall determine disputes involving boundaries to land. This has been restated in many cases including in *Azzuri Limited -v- Pink Properties Limited* C.a. Civil Appeal No 93 of 2017 [2018 eKLR], where the Court of Appeal, after citing the provisions of Sections 18, 19 and 20 of the *Land Registration Act* said:

"This means that under the aforesaid provisions, boundary disputes pertaining to lands falling within general boundary areas must be referred to the Land Registrar for resolution; while disputes pertaining to lands with fixed boundaries may be investigated and possibly resolved simply through a surveyor."

It follows therefore that this Court must decline jurisdiction in this matter.



15. Jurisdiction is usually the first point of call and as was held in *Owners Of Motor Vessel 'Iilian S'-v- Caltex Oil Kenya Ltd* 1989 KLR, jurisdiction is everything and without it, the Court must down its tools. Further, as was held in *Kimani Wanyoike -v- Electoral Commission* Civil Appeal No 213 of 1995 [UR]:

“Where there is a law prescribed by either *the Constitution* or an Act of Parliament governing a procedure for the redress of any particular grievance, that procedure should be strictly followed.”

See also *The Speaker of the National Assembly -v- Hon James Njenga Karume* Civil Appeal No 92 of 1992.

16. In the circumstances, this Court’s jurisdiction has not been properly invoked. The Plaintiff must pursue his grievance in the proper forum.
17. Ultimately therefore, this suit and with it, the Notice of Motion dated 7<sup>th</sup> March 2023 are struck out with costs.

**RULING DATED, SIGNED AND DELIVERED ON THIS 5<sup>TH</sup> DAY OF OCTOBER 2023 BY WAY OF ELECTRONIC MAIL.**

**BOAZ N. OLAO**

**JUDGE**

