



Tisco Construction Limited v Kenya Railways Corporations & another (Environment & Land Petition 10 of 2019) [2023] KEELC 20543 (KLR) (5 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20543 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION 10 OF 2019
LN MBUGUA, J
OCTOBER 5, 2023

BETWEEN

TISCO CONSTRUCTION LIMITED PLAINTIFF

AND

KENYA RAILWAYS CORPORATIONS 1ST RESPONDENT

CHINA ROAD & BRIDGE CORPORATION 2ND RESPONDENT

JUDGMENT

1. The petitioner is the owner of the land LR No. 10572 measuring approximately 0.8ha which is adjacent to the new Standard Gauge Railway Nairobi train terminus. The 1st respondent is a state corporation who has a mandate of developing, managing and operating railway lines within the country. The 2nd respondent was the contractor of the Standard Gauge Railway project.
2. The petitioner avers that its property is served by a main access road which runs along the Standard Gauge Railway (SGR) line. However, during the construction of the said line, the respondents blocked the access road to the petitioner's property.
3. Vide the Petition dated 8.2.2019, the petitioner therefore seeks the following orders:
 - a. A Declaration that the Petitioner's right to property has been violated by the Respondents.
 - b. A Declaration that the Respondent's actions of entirely blocking access to the Petitioner's property, known as L.R No. 10572 measuring approximately 0.8000 hectares, situate in the City of Nairobi within Nairobi County and adjacent to the new Standard Gauge Railway Nairobi Train Terminus, without just cause amounts to curtailing, undermining and/or depriving



the Petitioner's its constitutional right to own, use and enjoy the its subject property.

- c. A permanent injunction restraining the Respondents, their officers, servants and/or agents from howsoever blocking and/or limiting the Petitioner's access and lawful use of its property known as L.R No. 10572 measuring approximately 0.8000 hectares, situate in the City of Nairobi within Nairobi County and adjacent to the new Standard Gauge Railway Nairobi Train Terminus.
 - d. A mandatory injunction compelling the Respondents to forthwith reopen the public access road to the Petitioner's property, known as L.R No. 10572 measuring approximately 0.8000 hectares, situate in the City of Nairobi within Nairobi County and adjacent to the new Standard Gauge Railway Nairobi Train Terminus, and to grant to the Petitioner an unlimited access to its subject property.
 - e. An order for the Respondents to adequately compensate the Petitioner for the violation of its proprietary rights and for loss of use of the subject property.
 - f. General damages and Mesne Profit.
 - g. Costs of the Petition.
4. Pursuant to a consent dated 25.10.2022 and endorsed as an order of the court on 18.1.2023 between the petitioner and the 2nd respondent, the case between the two parties was withdrawn. Thus, the judgement herein concerns the petitioner and the 1st respondent.

Case for the petitioner

5. The petitioner's case is contained in the petition and the supporting affidavit of its managing director one Zhang Yuan Xhiang. It is averred that when the respondents commenced the construction of the SGR line in early 2016, they completely blocked the access to the petitioner's property without providing any alternative route. That persistent requests by the petitioner to the respondents to unblock the access road did not bear fruits.
6. The petitioner avers that on 6.03.2018 they formally wrote to the respondents requesting for a temporary access to its property for purposes of constructing a warehouse and an office block. There was no response prompting the petitioner to write another letter dated 24.04.2018. The 1st respondent replied through a letter dated 3.07.2018 where it acknowledged the petitioner's predicament and indicated that it was in the process of acquiring other parcels of land like that of the petitioner. On the issue of a temporary pass, the first respondent indicated that they had already handed over the SGR facilities including the train terminus to the SGR operator.
7. The petitioner contends that to date they have completely and unlawfully been denied access and use of their property by the respondents. The petitioner therefore avers that the respondent's actions are unconstitutional, illegal, irregular and unlawful. Thus the petitioner has suffered loss and damages and is entitled to be compensated.
8. In support of their case, the petitioners have availed various documents including title of the suit property registered in their name and the letters between the petitioner and the respondents.



Case for the first respondent

9. The 1st respondents filed an answer to the petition on 18.07.2019. They do not deny that the petitioner is the registered owner of the suit property. They however deny that there was an access road of whatever class leading to the suit land, adding that the petitioner ought to have clarified whether the alleged road of access was public or private road and whether it was under Kenya National Highways Authority (KENHA) or Kenya Urban Roads Authority (KURA).
10. The 1st respondent further contended that it is not possible and it is not even safe to have an access road or any road running alongside the railway line, and that even before the construction of the Standard Gauge Railway and Syokimau terminus, there was not even a level crossing road existing at the alleged site.
11. The 1st respondent therefore contends that the petitioners have not in any way established any breach and or violation of their constitutional rights.

Submissions

12. The petitioner's submissions are dated 8.04.2023, where they frame the following issues for determination;
 - i. Whether the respondent's decision to block the petitioner's access road without affording the petitioner any hearing contravened the petitioner's rights under Article 40 and 47 of *the Constitution*.
 - ii. Whether the decision to withhold information and refusal to respond to petitioner's request for grant of a temporary pass violates the petitioner's rights under Article 35 of *the constitution*.
 - iii. Whether the petitioner is entitled to compensation in view of the blockage of the access road.
13. It was submitted that as per the deed plans and survey plans, the petitioner's property was blocked by the 1st respondent, adding that the road in question is a public road as seen in the map from survey department.
14. Citing the provisions of Article 47 of *the Constitution*, the petitioner avers that every person who is to be affected by a decision must be accorded fair administrative action. To this end reference was made to the case of *Judicial Service Commission v Mbalu Mutava & Another* [2015] eKLR where it was held that;

“Article 47(1) marks an important and transformative development of administrative justice, for it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights”.
15. The petitioner also cited the case of *Chief Registrar and 4 others v Nathan Tirop Koech and 4 others* where the issue of the inviolability of the provisions of Article 40 of *the Constitution* were discussed in the following words;

“Land ownership and land rights is both a historical and emotive subject in Kenya. A right to hold property is a constitutional right as well as a human right and no person can be deprived of his property except in accordance with the provisions of *the Constitution* or Statute. The



condition precedent to taking away anyone's property is that the authority must ensure compliance with *the Constitution* and Statutory provisions”.

16. The petitioner avers that the 1st respondent's action of blocking the access road to the petitioner's property had rendered that land to be absolutely landlocked and this amounted to deprivation of property. To this end the petitioner has suffered substantial loss and is therefore entitled to damages.
17. The petitioner claims that it pays monthly rents of Ksh. 675,000 for the offices and Ksh.384192 for the godown making a total monthly sum of Ksh.1,059,192 which gives a figure of Ksh.12,710,305 in a year, thus for the 6 years the amount being claimed by the petitioner is Ksh.76,261,824.
18. The submissions of the 1st respondent are dated 28.04.2023. They contend that the claim ought to be have been brought by way of a plaint to enable the parties file and exchange evidence in the normal way, with the possibility of even having a site visit. That by filing a petition, the petitioner was taking a shorter route.
19. To this end the case of Hon Uhuru Muigai v Nairobi Star Publications Petition [2013] eKLR was cited where it was held that;

“It is important to recognize that even if a case does not raise a constitutional matter, the assessment of whether the case should be heard by this court(constitutional) rests instead on the additional requirement that access to this court must be in the interest of justice and not every matter will raise a constitutional issue worthy of attention.”
20. Further, the case of Patrick Kithinji Mugabi v The National Land Commission & 2 others (Kajiado ELC constitutional pet no E001 of 2020) was proffered where it was held that;

“I find that the suit herein having been commenced vide a plaint, the issues in dispute would have been defined more precisely by elaborate witness statements and documents including valuation reports and paragraphs”.
21. The 1st respondent further avers that the case of the 2nd respondent was withdrawn, yet the acts complained of were committed by the 2nd respondent. In any event, no evidence has been proved that a contractual relationship existed between the two parties.
22. The 1st respondent contends that the claim of damages amounting to 76,261,824 was raised in the petitioners' submissions, yet the claim was not pleaded as special damages in the petition as required by the law. To this end, reference was made to the cases of Patrick Kithinji Mugabi v The National Land Commission & 2 others (supra) and Banque Indosuez vs D.J. Lowe & co. LTD [2006] eKLR.
23. The 1st respondent urges the court to dismiss the suit.

Determination

24. I have considered the pleadings as well as the rival arguments proffered by the Petitioner and the 1st Respondent. I deem it fit to frame the issues for determination as follows;

Whether there was breach of Petitioners rights as stipulated in *the Constitution* including right to property due to the blockage of the access road, and whether the petitioner is entitled to damages.
25. The Petitioner contends that its property is served by one main access road which runs along the SGR Line but the same was blocked during the construction of the said line. At the out set, I pose the question; What is the class of the road identified by the Petitioner as a “ main access road?”



26. The provisions of Section 2 of the *Public Roads and Roads of Access Act* defines a public road as follows:
- “a) a) Any road which the public had a right to use immediately before the commencement of this Act;
 - b) All proclaimed or reserved roads and thoroughfares being or existing on any land sold or leased or otherwise held under the East Africa Land Regulations, 1897, the Crown Lands Act, 1902, or the Government Lands Act (Cap. 280), at any time before the commencement of this Act;
 - c. All roads and thoroughfares hereafter reserved for public use.”
27. The aforementioned Act does not expressly state what a road of access is, but the provisions of, Section 9 thereof gives an elaborate procedure through which a road of access is created. That the said road is created where a parcel of land does not have reasonable access to a public road which is passable to vehicular traffic or to a railway station. The owner of such land was/is required to make an application to the Roads Board to construct a road of access over any lands lying between his land and the public road and railway station. If the application is merited, the leave to create such a road is granted under Section 11 of the said Act, then a notification is sent to the Land Registrar for registration of an entry against the affected title or titles.
28. In the case of *Buruburu Farmers Co. Ltd v Nairobi City County & another* (Environment & Land Case 439 of 2014) [2022] KEELC 2268 (KLR) (7 July 2022) (Judgment), Wabwoto J gave an elaborate distinction between a public road and a road of access in the following words;
- “Having regard to the provisions of the *Public Roads and Roads of Access Act*, the court is persuaded that there is a distinction between a public road and a road of access. A public road is set apart and designated as such and once set aside is available for use by all members of the public without limitation or restriction save as may be determined by the relevant authorities. Limitation as to use may be as to the nature or type of vehicles that may not use such a road. On the other hand, road of access has connotation of private usage and is characterized by a party having made an application to have an access road constructed to connect or link such party to utilities such as a public road, railway station or a halt.”.
29. I have keenly gone through the title of the Petitioner and I find no entry of an access road as envisaged under Section 11 of the *Public roads and Roads of access Act*.
30. In its submissions, the petitioner contends that the road in question is a public road. The deed plan annexed to the title however does not state what class of a road is adjacent to the Petitioners property. However, if the road in question was a public road, it follows then that the entities concerned with roads primarily the Kenya Highways Roads Authority, Kenya Urban Roads Authority, and the Ministry of Lands ought to have been brought into the picture so as to shed light on the rights and interests of land owners adjacent to the SGR Line. After all, such a public road would be expected to be serving not just the petitioner, the property owners in the vicinity of the SGR Line, but even the general public too. The petitioner however opted to leave out the aforementioned entities in this litigation.
31. As rightly submitted by the 1st respondent, the Petitioner chose a shorter route in filing a petition, instead of bringing forth a plaint where parties would have been in a position to exchange, tender and challenge evidence. As the matter stands, this court has not been given adequate information on the issue of accessibility to properties which are adjacent to the SGR Line. I am therefore in agreement



with the holding in the case of Patrick Kithinji Mugabi v The National Land Commission & 2 others and Civil appeal No. 79 of 2022 Banque Indosuez vs D.J. Lowe & co. LTD [2006] eKLR, that the issue raised herein would have been more defined if the matter was commenced in a plaint. This is a matter which probably would have benefited from a scene visit for the court to observe and appreciate the general outlay of the area in terms of accessibility to the properties in that area.

32. The provisions of Section 107 of the *Evidence Act* stipulate that:

- “(1) (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”

33. In Samson S. Maitai & another v African Safari Club Limited & Another [2010] eKLR, the court had this to say in relation to proof.

“Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute.”

Also see Palace Investments Limited v Geoffrey Kariuki Mwenda & another [2015] eKLR.

34. The fact that this suit was filed by way of a petition does not in any way excuse the petitioner from bypassing the statutory criteria relating to burden of proof. In the case at hand, the court has been left to speculate as to how property owners adjacent to the SGR Line access their properties. I take judicial notice and it is in the public domain that the SGR Line is a monumental project traversing hundreds of Kilometres across the country. Any decision given by the court has the potential to occasion ripple effect in relation to other claims. That is why the court deserves more and better particulars on how the issue of accessibility and even security should be dealt with.

35. As at now, I find that the petitioner has not discharged the burden of proof in relation to its claim, thus I need not dwell on the question of damages. This Petition is found to have no merits, the same is hereby dismissed. Each party is to bear their own costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF OCTOBER, 2023
THROUGH MICROSOFT TEAMS.**

LUCY N. MBUGUA

JUDGE

In the presence of:-

Kimosop for Petitioner

Court Assistant: Eddel

