



**Republic v County Government of Mombasa; Acacia Holdings (Exparte)
(Judicial Review 7 of 2020) [2022] KEELC 3966 (KLR) (7 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3966 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
JUDICIAL REVIEW 7 OF 2020**

**M SILA, J
JULY 7, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY GOVERNMENT OF MOMBASA RESPONDENT

AND

ACACIA HOLDINGS EXPARTE

JUDGMENT

1. The applicant sought and obtained leave to commence judicial review proceedings seeking an order of mandamus directing the respondent to take all necessary steps to demolish the encroachment on the county road at the rear of the *ex-parte* applicant’s property Mombasa/Block XX/521 (the suit property). The suit property is situated along Nyerere Avenue, Mombasa.
2. The background is that the *ex-parte* applicant wishes to develop a multi storey commercial cum residential building on her property, with a basement, ground floor, four mezzanine floors and two floors of residential apartments. The plans for this development have been approved by the respondent. This development also needed the approval of NEMA, which approval was granted, subject *inter alia* to the following two conditions being conditions 4.7 and 4.8 in the EIA licence:-
 - 7.1 - The proponent shall ensure that the designs for vehicular movement into and out of the proposed facility is implemented to ensure the accessibility is from the access road behind the project site.
 - 7.2 - The proponent shall ensure that the access road behind the project site is opened.
3. It is apparent therefore that there is an access road to the rear of the suit property. The *ex-parte* applicant contends that this road has been blocked by her neighbour, the Muslim Women’s Institute,



the interested party herein, which has erected two walls across the road and has added the area between the walls as its kitchen, thus preventing the flow of traffic on the road. The *ex-parte* applicant avers that she wrote a letter dated May 2, 2019 requesting the respondent to take action to remove the encroachment. The County Surveyor surveyed the land, and on 2 July 2019, sent a memo to the Land Planning and Housing Department confirming that the access road has indeed been blocked by the interested party and recommended that the Inspectorate Department be involved so as to unblock the road. Through a letter dated 24 July 2019, the respondent's Chief Officer- Land Administration, wrote to the interested party requiring her to demolish the encroachment but this has not been done. The *ex-parte* applicant wrote several letters to the respondent but still the encroachment has not been dealt with. It is for that reason that the *ex-parte* applicant filed this suit seeking the order of mandamus to compel the respondent to demolish the encroaching wall and open up the road.

4. The respondent replied to the motion through the affidavit of Dr June Mwajuma, the respondent's Chief Officer in charge of the Department of Physical Planning, Lands and Housing. She avers that the respondent took measures to ensure that the access road is cleared by instructing a surveyor to survey the site; wrote to the entity blocking the road; and requested the *ex parte* applicant to cater for the expenses. She averred that the respondent does not have the requisite equipment to clear the blockage and does not have funds to outsource the equipment owing to challenges in disbursement of funds to the counties. She avers that the *ex-parte* applicant ought to have sought redress against the entity blocking the road. She is of the view that the motion is unfounded.
5. The interested party responded to the motion through the replying affidavit sworn by Zahra Shariff Ahmed Badawy who is her Chairlady. She acknowledges that they have put up the walls blocking the road but contends that the *ex-parte* applicant has also encroached on the road. She alleges that the *ex-parte* applicant has erected a building, gate, iron fence and placed other materials on the subject road which also block access. She stated that she will file a survey report to demonstrate this. She urged that if the respondent is ordered to demolish the gate that the interested party has erected, the respondent should also demolish the alleged encroachment by the *ex-parte* applicant. She annexed photographs to demonstrate the alleged encroachment by the *ex-parte* applicant.
6. I thought that the matter may be resolved given the replies of the parties and directed parties to attempt a settlement out of court, but in the end, no resolution was reached and the case had to proceed.
7. I directed that the motion be canvassed by way of written submissions and I have taken note of the submissions filed by Mr Omollo, learned counsel for the *ex-parte* applicant, Mr Tajbai, learned counsel for the respondent, and Ms Juaje, learned counsel for the interested party. I will only mention that in his submissions, Mr Tajbai inter alia stated that though the interested party has built a permanent kitchen and gate on the road, the interested party was considerate enough to build the kitchen at the far end of the road so as not to inconvenience anyone, and that the purpose of the gate was to deter theft, drug peddlers and mushrooming of street families. He also submitted that the *ex-parte* applicant has dumped building materials though this has changed because the building is now complete. He averred that the same gate that the *ex-parte* applicant is complaining about protected her building materials. He thought that the existence of the gate has more advantages than its absence. With respect, these are matters of fact that ought to have been placed in a replying affidavit and not in submissions. I regret that I cannot consider the same for the said reason.
8. Having taken into consideration all factors, I hold the following view :-
9. To recap, the *ex-parte* applicant wishes to develop its property and has been granted the requisite approvals save that the EIA licence requires that the road at the rear be opened up for vehicular access. The *ex-parte* applicant has written to the respondent asking the respondent to open up this road. The



respondent does not deny receiving the request from the *ex-parte* applicant but claims that the *ex-parte* applicant ought to seek redress against the person encroaching, said to be the interested party. The respondent has also alluded to inability to open up the access road due to shortage of funds. The interested party on her part does not deny encroaching but also claims that the *ex-parte* applicant has encroached and should remove her materials.

10. In her reply, the interested party stated that they would supply a survey report to demonstrate the encroachment by the *ex-parte* applicant, but despite being given time and opportunity to file the report, none was given. I am therefore unable to take seriously the claims of the interested party that the *ex-parte* applicant has also encroached on the road. Even assuming that the *ex-parte* applicant has also blocked and encroached on the road, does it mean that the interested party therefore has no duty to remove what she herself has put up to block the road? Forgetting for a moment that I have not found evidence that the *ex-parte* applicant has blocked the road, the interested party cannot purport to point at the speck in the eye of the *ex-parte* applicant and fail to appreciate the log in her own eye. She first ought to remove whatever she has put up that blocks the road. To me, the claim that the *ex-parte* applicant has also blocked the road is a red herring and I refuse to be distracted by it. Whether or not the *ex-parte* applicant has blocked the road does not remove any obligation from the interested party to undo what she has illegally put up and does not help the interested party at all. Moreover, the *ex-parte* applicant has nothing to gain by blocking the access road, because it is in her interest to open it up so that she can proceed with her development and comply with the terms of the EIA licence. My finding and conclusion is that the blockage that is the subject matter of this suit has been caused by the interested party. She had a duty to remove the blockage upon being informed to do so and stop pointing fingers at others.
11. I also do not think that the respondent did enough to address the concern of the *ex-parte* applicant and remedy the mistake of the interested party. In her reply, the respondent stated that she sent a surveyor, who confirmed the encroachment, and also wrote to the interested party to remove the encroachment. I have indeed seen the letter dated 24 July 2019 from the respondent to the interested party, giving the interested party 7 days to remove the blockage. Apart from that, I have seen nothing else from the respondent. Was that really enough? I am not persuaded. I have seen that the *ex-parte* applicant wrote numerous letters to the respondent on the matter. There is a letter dated 23 September 2019, where the *ex-parte* applicant refers to the respondent's letter of 24 July 2019 and points out that it is more than two months since the letter was written, yet the letter gave notice of 7 days that has not been complied with. I have seen no reply to this letter. There is another letter of 8 October 2019, in which the *ex-parte* applicant states that she has had a conversation with one Edward Dzila Nyale, an employee of the respondent, over the matter. In the said letter, the *ex-parte* applicant states that she is ready to shoulder any expenses required to open up the road. The *ex-parte* applicant also informs the respondent of the provision of section 7 (a) of the [Mombasa County Roads Act, 2018](#), which founds an offence of creating an illegal structure on a public road, and asks the respondent to consider invoking this provision. In the same letter, the *ex-parte* applicant gives the respondent another option, that is, for the respondent to instruct a contractor and the *ex-parte* applicant will pay the contractor for the works. The *ex-parte* applicant explains to the respondent that the continued blockage of the road is causing her massive losses thus the need to act swiftly. This letter does not appear to have elicited any response because the *ex-parte* applicant wrote another letter dated 22 October 2019, seeking a reply to that letter. The letter of 22 October 2019 appears to have been met by stone-walled silence.
12. I am appalled by the manner in which the respondent treated the *ex-parte* applicant. All that she did was write one letter to the interested party and proceed to fold her hands. Here is a rate paying resident literally pleading for assistance and the respondent seems completely unmoved by her plight. There is not even the courtesy of replying to the correspondences of the *ex-parte* applicant. That is not what the



public expects from administrators and civil servants employed by the County Governments. Servants of County Governments need to be alive to the provisions of article 10 of the Constitution which espouses the national values and principles of governance, and article 232 of the Constitution which elaborates the values and principles of public service. They provide as follows :-

National values and principles of governance

- (1) The national values and principles of governance in this article bind all State organs, State officers, public officers and all persons whenever any of them—
 - a. applies or interprets this Constitution;
 - b. enacts, applies or interprets any law; or
 - c. makes or implements public policy decisions.
- (2) The national values and principles of governance include—
 - a. patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
 - b. human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
 - c. good governance, integrity, transparency and accountability; and
 - d. sustainable development.

232. Values and principles of public service

- (1) The values and principles of public service include—
 - a. high standards of professional ethics;
 - b. efficient, effective and economic use of resources;
 - c. responsive, prompt, effective, impartial and equitable provision of services;
 - d. involvement of the people in the process of policy making;
 - e. accountability for administrative acts;
 - f. transparency and provision to the public of timely, accurate information;
 - g. subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;
 - h. representation of Kenya's diverse communities; and
 - i. affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of—
 - (i) men and women;
 - (ii) the members of all ethnic groups; and



- (iii) persons with disabilities.
 - (2) The values and principles of public service apply to public service in—
 - a. all State organs in both levels of government; and
 - b. all State corporations.
 - (3) Parliament shall enact legislation to give full effect to this article.
- 13. The national values and principles of governance laid out in article 10 of the *Constitution inter alia* bind all public officers. These values and principles include good governance and accountability. You cannot say that you have engaged in good governance when you do not act when a genuine complaint is made by a member of the public. Under article 232 of the *Constitution*, public servants are expected to have high standards of professional ethics. Not replying to a letter is sufficient exhibition of very low levels of professionalism. From the same article 232, public servants are also expected to be responsive, prompt and effective. I do not see any adequate prompt and effective action from the respondent. I reiterate that there was no response by the respondent to the requests and offers of assistance from the *ex-parte* applicant. Two, three months after the request, and more, nothing was done. Clearly no action was taken that would be effective in removing the nuisance caused by the interested party. The respondent could have arrested the interested party if the latter did not act on her letter of 24 July 2019. She could also have sued her in a civil suit demanding that she removes the wall. The respondent further had the option of having the *ex-parte* applicant proceed on her behalf as the *ex-parte* applicant was ready to shoulder the costs. Instead of using all this arsenal at her disposal, all that the applicant did was write one letter and go to sleep. That certainly was not good enough.
- 14. Having evaluated the matter, I am not in doubt that the *ex-parte* applicant was fully merited in coming to court. In fact, all her options had run out. I have already stated that I am galled by the response of the interested party. You cannot close a public road and act as if you have done nothing wrong and proceed to be stubborn even when you have been asked to take remedial action.
- 15. From the foregoing, I am moved to first order the interested party, at her own cost, to proceed and remove all developments that she has made, and remove any other blockage on the subject access road, and cater away all debris, within the next 14 days. If the interested party does not do so, an order of *mandamus* is hereby issued compelling the respondent to proceed to do so within the following 14 days, and refer the costs thereof to the interested party. If neither the interested party nor the respondent act as above, the *ex-parte* applicant is at liberty to proceed with this action, and all expenses that the *ex-parte* applicant will incur will be shouldered jointly and severally by both the respondent and the interested party, who must pay these expenses within 14 days of being informed of the same. The respondent is further ordered to oversee and supervise the exercise of clearing of the road whether it is done by the interested party or by the *ex-parte* applicant.
- 16. The only issue left is costs. I have pointed out the inaction by the respondent. She ought to have done better. For that reason, she will shoulder 25% of the costs of this suit. The other 75% of the costs of this suit will be shouldered by the interested party as she is the most culpable and the one who put up the blockage.

Judgment accordingly.

DATED AND DELIVERED THIS 7 DAY OF JULY 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT MOMBASA

