



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC. CASE NO. 1468 OF 2016

CABANA POINT LIMITED.....PETITIONER

VERSUS

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....1ST RESPONDENT

KENYA URBAN ROADS AUTHORITY.....2ND RESPONDENT

JUDGMENT

Introduction

1. This petition was triggered by a pedestrian footbridge erected by the Ministry of Roads of the Republic of Kenya across Airport North Road, Embakasi, Nairobi. The Petitioner, Cabana Point Limited, is said to be the proprietor of an abutting parcel of land surveyed as Land Reference Number 26939, comprised in Grant Number IR 94372 and measuring approximately 2.630 hectares. The petitioner contended that the footbridge was constructed in front of its land and had blocked and or obstructed the land, thereby occasioning great difficulty in the user of the land. The petitioner further contended that the footbridge was erected without the requisite Environmental Impact Assessment Report and Licence and without consulting them. It was the position of the petitioner that their attempts to obtain information from the respondents relating to the licensing of the footbridge were in vain. Consequently, the petitioner contended that their right to administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair; their right to be given written reasons for administrative action taken by the respondents; and their right to access information, had been infringed.

2. Consequently, the petitioner sought the following verbatim reliefs against the respondents:

- 1) A declaration be made by this honourable court that the petitioner's right to access of information has been infringed.***
- 2) A declaration be made by this honourable court that the petitioner's right to fair administrative action has been infringed.***
- 3) An order compelling the 2nd respondent to demolish the footbridge constructed on Airport North Road blocking LR No. 26939.***
- 4) In the alternative to number 3, an order compelling the 2nd respondent to change the design of the footbridge constructed on Airport North Road so that it does not block/ obstruct LR No. 26939.***
- 5) The cost of this petition to be awarded to the petitioner.***

3. On 13/11/2017, counsel by the name *Monje* attended court on behalf of the 1st respondent and confirmed that parties to the petition were negotiating with a view to settling the dispute amicably. The dispute was, however, not resolved amicably. The 1st respondent did not file a reply to the petition. Similarly, they did not file submissions.

4. The 2nd respondent filed a replying affidavit sworn on 30/11/2016 by Eng John Mwicha Mwatu in which he deposed that the impugned footbridge was part of the complementary works included in the *Nairobi Eastern and Northern Bypass Project* which included a redesigned grade level interchange, safety footpaths/footbridges, landscaping, and beautification. He further deposed that the processes and strictures of law governing the implementation of such public projects, including those in the Environment Management Co-ordination Act [EMCA] were duly observed, both before commencement of the Bypass Project and before implementation of the Complimentary Works. He urged the court to dismiss the petition.

5. The petition was canvassed through affidavit evidence and written submissions.

Petitioner's Case

6. The petitioner's case was contained in the petition dated 24/11/2016; the supporting affidavit sworn by Mr Faraaz Tejani on 24/11/2016; and the petitioner's written submissions dated 28/1/2020. In summary, their case was that they were the registered proprietor of **Land Reference Number 26939 (the petitioner's land)** situated along Airport North Road. In 2014, the 2nd respondent erected a footbridge across Airport North Road for use by pedestrians. The footbridge was erected in front of the petitioner's land and had acted as a blockage and or obstruction to the petitioner's land, making it difficult for the petitioner to use the land. On noticing the construction of the footbridge, the petitioner wrote to the 1st respondent on 7/8/2015, requesting to be supplied with an environmental impact assessment report [EIA Report] regarding the footbridge. The 1st respondent failed to respond to the letter, prompting the petitioner to write a second letter on 23/9/2015 making the same request. On 1/10/2015, the 1st respondent wrote to the petitioner requesting the petitioner to visit their offices in order to peruse the files concerning the footbridge and to be issued with copies of the report. An unnamed agent of the petitioner visited the 1st respondent's offices on 12/10/2015 and was served with files containing the EIA Report of Airport North Road. The file did not contain any report relating to the construction of the footbridge on Airport North Road.

7. The petitioner further contended that on 21/10/2015, they informed the 1st respondent that their agent had visited their offices but did not find any EIA Report relating to the footbridge and that it was the petitioner's belief that the footbridge was not licensed. The petitioner thereafter sought to know from the 1st respondent any legal steps they intended to take to protect the petitioner's right from being infringed by the obstruction caused by the footbridge. The 1st respondent, through a letter dated 12/11/2015 promised to carry out an inspection on the petitioner's premises before taking any further action. The 1st respondent did not, however, furnish the petitioner with the findings of their inspection.

8. The petitioner added that when their efforts to obtain a copy of the EIA Report from the 1st respondent failed, they wrote to the 2nd respondent on 26/4/2016, informing them about the obstruction caused by the footbridge and how their effort to obtain a copy of the EIA Report regarding the footbridge from the 1st respondent had turned futile. The 2nd responded through a letter dated 11/5/2016, stating that the necessary NEMA approval and licence were procured. The petitioner wrote back to the 2nd respondent on 22/5/2016 stating that the 1st respondent had denied carrying out any environmental impact assessment study regarding the footbridge. In reply to the petitioner, the 2nd respondent, through a letter dated 9/6/2016, "acknowledged" that there was no environmental impact assessment on the footbridge.

9. It was the case of the petitioner that the two respondents conspired to put up an illegal footbridge without following the due process of carrying out the investigation and examining the environmental impact and effect of the footbridge as required under **Section 10(2) (i)** of the **Kenya Roads Act**. They added that the two respondents had failed to execute their mandate by refusing, failing and/or neglecting to issue to the petitioner information or report relating to the impugned footbridge thereby occasioning infringement of the petitioner's rights. Lastly, the petitioner contended that failure to carry out the environmental impact assessment and failure to consult the petitioner before erecting the footbridge had occasioned a violation of the petitioner's rights under **Article 47 (1) and (2)**

2nd Respondent's Case

10. The 2nd respondent's case was contained in the replying affidavit sworn by Eng John Mwacha Mwatu on 30/11/2016 and the written submissions by the Attorney General dated 26/5/2020. Their case in summary was that they were the statutory corporation under the State Department of Infrastructure charged with the responsibility to manage, develop, rehabilitate and maintain urban national roads, and to control their reserves and accesses in Kenya. It was in pursuance of the above mandate that they oversaw works on the Nairobi Eastern and Northern Bypasses Project. Execution of the Project did not commence on time due to variations and additional works which were conceived, appraised and documented as complementary works. The complementary works included a redesigned grade level interchange, safety footpaths/footbridges, landscaping and beautification.

11. It was the 2nd respondent's case that the process and strictures of law governing the implementation of such public projects, including those in the EMCA were duly observed, both before commencement of the Bypasses Project and before implementation of the complementary works. The Bypasses project was duly licensed by NEMA under EIA Licence No 0003065 issued on 8/4/2009 and subsequently varied under a Certificate of Variation Number dated 21/6/2013. All the parties affected by the project were duly notified of the ensuing works and allowed sufficient time to relocate their accesses. Further, they were invited to discuss the attendant modalities with the 2nd respondent's implementation team. The petitioner was not invited because its property was undeveloped and did not have a frontal access to the Bypass. The location of the footbridge was identified based on technical and other relevant aspects germane to footbridges, including convenience, safety, terrain, topography, soils, accessibility, clearance and aesthetics. The 2nd respondent added that the petitioner did not raise any objection during the project implementation.

Analysis & Determination

12. I have considered the petition; the 2nd respondent's reply to the

petition; the parties' respective submissions; the relevant constitutional and legal frameworks; and the relevant jurisprudence on the key issues falling for determination in the petition. The petitioner itemized in the petition Seven (7) issues on which they sought the court's determination. Subsequently, the petitioner itemized in their written submissions Five (5) issues on which they sought the court's determination. On their part, the 2nd respondent submitted on the Seven (7) issues which the petitioner had identified in the petition dated 24/11/2016.

13. Taking the foregoing into account, the following are, in the court's view, the key issues falling for determination in this petition: (i) Whether there was a legal requirement for a stand alone EIA approval for the impugned footbridge on Airport North Road; (ii) Whether the impugned footbridge on Airport North Road was erected without the requisite approval under the Environmental Management and Co-ordination Act [EMCA]; (iii) Whether the respondents acted in breach of **Article 35 (1) (a)** by refusing or neglecting to give the petitioner a

copy of the environmental impact assessment report relating to the footbridge; (iv) Whether the respondents acted in breach of **Article 47 (1)** by not according the petitioner its right to fair administrative action; (v) Whether the petitioner is entitled to all or any of the reliefs sought in the petition; and (vi) What order should be made in relation to costs of the petition. I will briefly analyse the six issues and make sequential findings in the above order.

14. The first issue is whether there was a legal requirement for a stand alone EIA approval for the impugned footbridge on Airport North Road. The legal framework on environmental impact assessment licensing is set out in Section 58 of the Environmental Management and Co-ordination Act [EMCA]. Section 58(1) of the EMCA Provides as follows:

(1) Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before for an financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.

15. Projects which require environmental impact assessment licensing are itemized in the Second Schedule to the Act. The relevant paragraph of the Schedule is Paragraph 3 which itemizes the following as the projects which require environmental impact assessment licensing: (a) *All paved roads*; (b) *Construction of new roads in environmentally sensitive areas*; (c) *Railway Lines*; (d) *Airports and airfields*; (e) *Oil and gas pipeline*; (f) *Water transport*; and (g) *Construction of tunnels*.

16. It is apparent from the Second Schedule that there is no requirement for a stand alone environmental impact assessment licence for a footbridge which is executed as part of complementary works on a road project. The petitioner's contention that there ought to have been a stand alone environmental impact assessment licensing approvals for the footbridge is therefore without legal basis. Consequently, it is my finding that there was no legal requirement for a stand alone environmental impact assessment approval for the impugned footbridge on Airport North Road.

17. The second issue is whether the impugned footbridge on Airport North Road was erected without the requisite approval under the Environmental Management and Co-ordination Act. I have looked at the evidence presented by the 2nd respondent. It does emerge from the affidavit of Eng Mwatu that the impugned footbridge was part of the complementary works on the Eastern and Northern Bypasses Road Project. It does also emerge that the Project was duly licenced by NEMA on 8/4/2009 under Environmental Impact Assessment Licence No 0003065. A Certificate of Variation of the above Licence was issued on 21/6/2013. No controverting evidence was tendered to challenge the Environmental Impact Assessment Licences and the fact that the footbridge was part of the complimentary works under the Bypasses Road Project. In the circumstances, the court finds that the impugned footbridge was part of the complementary works under the Eastern and Northern Bypass Road Project and was duly licenced under Environmental Management and Co-ordination Act [EMCA].

18. The third issue is whether the respondents acted in breach of Article 35 (1) (a) of the Constitution by refusing to give the petitioner a copy of the environmental impact assessment Report. The petitioner confirmed at paragraphs 21 and 22 of the petition that they were invited to peruse relevant files and an unnamed agent of their director visited the 1st respondent's office where he was served with files containing the environmental impact assessment report for Airport North Road. It is therefore clear that the petitioner was allowed access to the relevant records. It is also apparent that the petitioner wanted to be given a stand alone environmental impact assessment report relating to the impugned footbridge. The stand alone report was not available because the footbridge was part of the complementary works on the Bypasses Road Project. There is therefore no merit in the petitioner's contention that they were denied access to information. Consequently, my finding on the third issue is in the negative.

19. The fourth issue is whether the respondents acted in breach of Article 47(1) by not according the petitioner its right to fair administrative action. The 2nd respondent explained that prior to implementation of the Project, all parties who had developed properties with frontal access to Airport North Road were duly consulted and given ample time to relocate their accesses. They further explained that the petitioner was not consulted because, firstly, access to his land was not through the Airport North Road, and secondly, its land was undeveloped. The two explanations have not been challenged. No evidence of an existing development on the petitioner's land has been exhibited. Further, I have looked at Deed Plan Number 248756 attached to the petitioner's Grant. It does bear an access road to the land which is not fronting Airport North Road. I therefore agree with the 2nd respondent that they were justified in not inviting the petitioner for consultation. It is accordingly my finding that there was no breach of Article 47(1) by the respondents as alleged by the petitioner.

20. Having come to the above findings, it follows that the petitioner has not proved their case as required by the law. Consequently, they are not entitled to any of the reliefs sought in the petition dated 24/11/2016.

21. Lastly, it does emerge that this litigation was largely prompted by the mistaken belief that a stand alone environmental impact assessment licensing approval was required for the footbridge. The 1st respondent did not categorically set the record clear when the petitioner made inquiries. A clearer picture emerged when the affidavit of Eng Mwatu was filed. In the circumstances, I will not condemn the petitioner to bear costs of the petition. Each party shall bear their respective costs of the petition.

Summary of Findings & Disposal Orders

22. In summary, my findings on the key issues in this petition are as follows:

i. The impugned footbridge was part of the complementary works under the Nairobi Eastern and Northern Bypass Road Project and did not require a separate and stand alone environmental impact assessment approval process under Section 58 of the Environmental Management and Co-ordination Act as read together with paragraph 3 of the Second Schedule to the Act.

ii. The impugned footbridge was part of the complementary works under the Nairobi Eastern and Northern Bypass Road Project

and was approved under environmental impact assessment Licence No 0003065 issued on 8/4/2009 and varied on 21/6/2013 hence it was legal.

iii. There is no proof that the respondents breached the petitioner's right of access to information under Article 35(1) and (2) of the Constitution.

iv. There is no proof that the respondents breached the petitioner's right to fair administrative action under Article 47(1) of the Constitution.

v. The petitioner has not proved their case against the respondents as by law required, hence they are not entitled to any of the reliefs sought in the petition.

vi. In light of the background and nature of this litigation, parties will bear their respective costs of the petition.

23. In the end, the petition herein is dismissed for lack of merit. Parties shall bear their respective costs of the petition.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8TH DAY OF JUNE 2021.

B M EBOSO

JUDGE

In the Presence of: -

Ms Makaba for the Petitioner

Court Assistant: June Nafula