



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC PETITION NO. 15 OF 2019

IN THE MATTER OF

ARTICLES 3 (1), 19(3), 20 (1), 22 (1), 23 (1) & (3), 24, 40, 47,

48, 64, 65 (3) (a), 66, 67 (2) (h), 68 (2) (C), 165

AND 258 (1) OF THE CONSTITUTION

IN THE MATTER OF

ALLEGED VIOLATION AND THREATS TO ARTICLES 2 (1) & (2), 3 (1), 4 (2), 10, 24, 40, 47, 48, 258 (1)

AND 259 (1) OF THE CONSTITUTION

IN THE MATTER OF LAND ACT AND LAND ACQUISITION ACT

IN THE MATTER OF

VIOLATION OF RIGHTS TO ACQUIRE AND OWN PROPERTY AND RIGHT TO

PROTECTION OF THE RIGHT TO OWN PROPERTY IN FRAGRANT

CONTRAVENTION OF ARTICLES 40 AND 47 OF THE CONSTITUTION.

IN THE MATTER OF

THE UNREASONABLE AND UNJUSTIFIABLE LIMITATION OF

THE HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF A PERSON, CONTRARY TO

THE VALUES FO AN OPEN DISREGARD OF THE SPIRIT, PURPORTED OBJECT OF

THE BILL OF RIHGTS

IN THE MATTER OF

BREACH AND THREATENED CONTINUED BREACH OF

THE BILL OF RIGHTS UNDER ARTICLES 10, 24, 29, 40, 47, AND 50 OF

THE CONSTITUTION.

IN THE MATTER OF

ILLEGAL AND UNCONSTITUTIONAL MARKIGN OF

THE PETITONER'S PROPERTY FOR DEMOLITION AND CONTINUED THREATENING OF

THE PETITIONER'S PROPERTY FOR DEMOLITIONS.

IN THE MATTER OF

THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)

PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

SIMONASH INVESTMENT LTD.....PETITIONER

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITY.....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

Simonash Investment Ltd, (hereinafter referred to as the Petitioners) has come to court against the Kenya National Highways Authority, National Land Commission, The Attorney General (hereinafter referred to as the Respondents) praying that pending hearing and determination of this petition, the respondents by themselves, their servants, agents or otherwise however be restrained from demolishing, trespassing onto, entering, remaining on, taking possession, developing out in any other way, initiating within the petitioners title to, occupation and user of the property LR. KISUMU/KANYAKWAR "A"/80 situate at Kisumu County and its developing thereof.

The application is based on grounds that:

- a) **The Petitioner is the registered owner of the property LR. KISUMU/KANYAKWAR "A"/80 situate at Kisumu County.**
- b) **That the said property was regularly purchased with due diligence required and update it shows no restrictions, encumbrances or reservations whatsoever.**
- c) **The said property is therefore not a public land by whatever means.**
- d) **The Petitioner after purchasing the said property in or about the year 2010 took and remained in possession of the suit premises and with relevant approvals from the government began developing the said land with the constructions still on-going of a hotel.**
- e) **The 1st Respondent has marked the same property for demolitions to allow space for road expansion currently on going along Kisumu – Kakamega road.**
- f) **The conduct of the Respondents has occasioned great panic as to possible financial loses, damages to property and tremendous mental torture and anguish to the Petitioner as the said property is now standing in the middle of the Kisumu-Kakamega road currently on-going construction.**
- g) **The Respondents failed/neglected and/or refused to produce an eviction notice or any notice/documents howsoever which donates to them any right over the suit property which are superior/overrides that of the Petitioner.**
- h) **The unlawful, malicious, unjustifiable and unconstitutional denial of use, owning and right to property by the Petitioner orchestrated by the 1st Respondent, are tantamount to abuse of constitutional and statutory powers and were done and continues to be done without extending the right to fair administrative action to the Petitioner, and further in violation of the rights under articles 2 (1& 2), 3 (1), 4 (2), 10, 24, 40, 47, 48, 258 and 259 (1) which rights were and continues to be violated.**
- i) **The Respondents intend, unless restrained by this Honourable Court to continue with their unlawful, malicious, unjustifiable and unconstitutional denial of use, owning and right to property by the Petitioner, acts against the Petitioner which include demolitions of the property, entering and remaining in the suit premises without any permission howsoever, and thereby causing massive destructions to the suit premises and to the developments which are on the suit premises and total violation of the Petitioners fundamental rights.**
- j) **It is unconstitutional and unlawful of the Respondents to mark for demolitions and threaten to demolish Petitioner's property that is developed on private land without any justifications, actions which are in violation of articles, 2 (1 & 2), 3 (1), 4 (2), 10, 24, 40, 47, 48, 258 and 259 (1) of the Constitution.**

k) The Respondents intend, unless restrained by this Honourable Court, to continue interfering with the Petitioner's quiet and peaceable enjoyment of their property and the Petitioner's right to property LR. KISUMU/KANYAKWAR "A"/80 situate at Kisumu County.

l) The Court has jurisdiction under Article 165 of the Constitution of Kenya to supervise and curtail the actions and decisions of the Respondent and the Petitioner has the right under Articles 22, 65 (3) (a) and 258 of the Constitution of Kenya to institute these proceedings to remedy the Respondent's contravention or threatened contravention of his rights and the Constitution.

m) That unless this Honourable Court urgently intervenes and grants the orders sought herein as an interim measure, the Petitioner's fundamental rights contained including but not limited to right to property; right to have his dignity respected and protected and the right to fair administrative actions would continue to be egregiously infringed and/or violated.

n) That it is only fair that this Honourable Court expeditiously hears this instant Application and Petition in order to preserve and promote constitutionalism, uphold human rights and fundamental freedoms and prevent abuse of constitutional and statutory power.

o) That no prejudice will be suffered by the Respondents if the Orders/prayers sought in the interim stage are allowed.

The 1st Respondent in his response has explained that pursuant to the provisions of Sections 3, 4, 22, 23 and 24 of the Roads Act, No. 2 of 2007, she is established as a corporate body with the exclusive mandate and responsibility to manage, develop, rehabilitate, and maintain national roads in Kenya, and that mandate includes the authority to acquire land, whether from private persons or public land, for its said purposes, either by allocation from the relevant line ministries, or by purchase from private persons or by initiation of compulsory acquisition of the same on its behalf, through the National Land Commission, which is the 2nd Respondent herein.

In the exercise of that mandate, the 1st Respondent, is presently undertaking the construction and rehabilitation of the Kisumu-Kakamega-Webuye-Kitale Highway, and the parcel of land which is now the subject of the instant application for injunction, namely Kisumu Kanyakwar 'A'/80, is adjoining or otherwise share a common boundary with the said road under construction and rehabilitation, and is specifically located on the right hand side of the road on the way to Kakamega from Kisumu, at the junction of the Kisumu-Kakamega Road and Migosi-Kenya Re road.

It is not in dispute from the Petitioner's own documents in support of the application and Petition, that the original owner of the said parcel of land was one Peter Oyugi Opiyo, who appears to have transferred his interest in the said parcel of land to various persons before it was finally transferred to the instant Petitioner, as its registered owner.

He has explained that before 1983, the Kisumu-Kakamega-Webuye-Kitale Highway, at that section where the Petitioner's parcel of land is situate, was originally a Forty (40) metre wide road, but that road reserve of Forty (40) metres was expanded to Sixty (60) metres in 1983, when the government of Kenya compulsorily acquired an additional Ten (10) metres from either side of the road from the adjoining adjacent land owners for the public purpose of construction of the road over the railway line crossing nearby there, which was ultimately constructed, but this portion of the Ten (10) metre additional road reserve acquired was then utilised as place for diversion of traffic while the road was under construction.

From the records held by the 1st Respondent, and supported by the correspondences between various government offices which disclose cheque numbers, amounts of each of those cheques, the parcels of land whose portions were compulsorily acquired for the additional increase in size of the road, specific sizes of the portions acquired and the names of the persons who were then registered as proprietors of those parcels of land, and those who were compensated for the same, it is clear that the original owner of the said parcel of and known as Kisumu Kanyakwar 'A'/80, one Peter Oyugi Opiyo, was compensated in 1983, for the portion of his land measuring 0.32 Ha. Which constitute the additional 10 metres from the centre of the road. He is indicated in the documents to have been paid a sum of Kshs. 1,750/- as compensation in those days.

From a reading of both the Petitioner's case as read with that of the 1st Respondent, it is apparent that it is this portion of the same land which had been compulsorily acquired for the public use of the extension of the road, which the instant Petitioner is seeking to protect by the instant application for temporary injunction. The Petitioner, is claiming that the Respondents have encroached on its land, while the 1st Respondent has maintained that the position that it is lawfully seeking to demolish the Petitioner's structures is a road reserve extended from the original 40 metres to its current 60 metres width, after the original owner of the land parcel had been lawfully compensated for the compulsory acquisition expressed in the documents produced thereon to have been under the then applicable Land Acquisition Act, Chapter 284. This is the dispute which both parties seek a resolution to in this suit.

According to the 1st Respondent, there cannot be any logical basis for the Plaintiff to claim compensation for the second time again when the person from whom he acquired the land had already been compensated for the same portion, as shown above.

The 1st Respondent has explained that despite the portion of the Petitioner's land having been duly compulsorily acquired and compensated for as shown above, the 1st Respondent being under immense pressure from the contractor of the road in issue, for colossal loss of amounts of monies which had risen to about Kshs. 341,857,828/- ordered to be paid as penalty to the contractor by 2018 on account of the 1st Respondent's inability to deliver vacant possession of the affected portion of the land needed for the road construction, had thought it more prudent to consider compensating the Petitioner for the minimal value of the portion required of its land, while the previous suit was pending indefinitely with an interim order of temporary injunction in favour of the Petitioner, in comparison with the colossal amounts of monies which would continue to accrue as penalties to the contractor.

Lastly, the 1st Respondent has explained that the intended compensation collapsed when the Petitioner insisted to be compensated for the remaining portion of land not required by the Authority for the road construction.

The parties have filed and exchanged submissions.

I have considered the application, the affidavits on record and do find that the salient facts of this case are that the Petitioner is the registered owner of the subject land being L.R. No. Kisumu Kanyakwar "A"/80 situated in Kisumu County. The 1st Respondent has marked the building for destruction or demolition. It is my considered view that this is a matter that requires full hearing as the Petitioner's case appears of equal strength to the 1st Respondent's case at this point. I do order that there be no demolition of the structures on the suit property until the matter is heard and determined. The main Petition to be heard Viva Voce in the month of November. Orders accordingly.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 30TH DAY OF SEPTEMBER, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE