



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

CONSTITUTIONAL PETITION NO. 19 OF 2020

TWIN FLAMES LIMITED.....PETITION

-VERSUS-

KENYA RURAL ROADS AUTHORITY.....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

INTRODUCTION

1. Vide Petition dated 2nd June 2020, the Petitioner seeks the following Reliefs;

- a. *Declaration that your humble Petitioner's rights as enshrined under **Article 40 (3), 41(1) and 60(1) (b) of the Constitution 2010**, in respect of the acquisition of L.R No. 29403 and L.R No. 49403 have been violated and infringed upon by the Respondents jointly and/or severally in the manner pleaded herein above.*
- b. *An order directing the Respondents, jointly and/or severally to forthwith compensate the Petitioner.*
- c. *The honourable court be pleased to award the Petitioner General damages against the 1st respondent for losses and inconveniences suffered by the Petitioner*
- d. *The honourable court be pleased to award the Petitioner Exemplary Damages for breach of the Petitioner's fundamentals rights*
- e. *An order that the Petitioner is entitled to interest on the compensation awarded from the date of trespass in 2018 until payment in full at commercial rates.*
- f. *The cost of the Petition be borne by the Respondents jointly and/o severally*
- g. *Any other relief that this court may deem just to grant*

2. The subject Petition has been supported by an affidavit of one Jeremy Njenga, sworn on the 2nd June 2020 and to which the deponent has attached and/or exhibited five annexures, in support of the contention that the Respondents herein, have in fact encroached upon, trespassed onto and/or otherwise annexed portions of the Petitioner's property, details which have been alluded to elsewhere herein before.

3. Upon being served with the Petition, the 1st & 3rd Respondent herein duly entered appearance and thereafter filed a Replying affidavit, the latter by one, **Engineer Kenneth Mbogori**, sworn on the 18th March 2021. For clarity, the deponent of the Replying Affidavit has attached thereto three sets of documents, **including two Maps Referenced Spring valley or South A37/GD3(148/4)**, which are said to be indicative of the position, extent and size of the roads which is complained against.

DEPOSITION BY THE PARTIES

4. On behalf of the Petitioner, one Jeremy Njenga swore the affidavit dated 2nd June 2020, and in respect of which same has averred that the Petitioner herein is the registered proprietor and/or owner of the parcels of land L.R No.'s 29403 and 29404, respectively situate along Kagundo road, within the city of Nairobi.

5. It is the the Deponent's further averment in the supporting affidavit that the Petitioner herein purchased and/or acquired the suit properties on or about the 16th August 2016, and in this respect, the deponent has exhibited two [2] sub lease instruments relating to the suit properties and which were presented for registration and were duly registered on the 5th December 2016.

6. On the other hand, the deponent has further averred that the sub leases in favor of the Petitioner herein, were duly sanctioned and/or authorized by the head lessor and to this effect, the deponent has further exhibited a copy of the lease, speaking to the original title, showing the respective entries and/or registrations, as pertains to the various sub leases.

7. Other than the foregoing, the deponent has further averred that the Respondents herein commenced and undertook of the expansion of Laikipia Road in the year 2018 and in the course of the improvement of the said road, the Respondents have encroached onto and thereby annexed portions of the suit property, belonging to and registered in the name of the Petitioner.

8. It is the deponent's further averment that the encroachment has deprived and/or denied the Petitioner of his lawful rights over the suit properties, to the extent that the Petitioner has thus suffered loss.

9. It is the deponent's further averments that the actions and/or activities of the Respondents herein, which have culminated into annexation of the suit properties, is tantamount to compulsory acquisition albeit, without just and prompt compensation, in accordance with the provisions of Article 40 of the Constitution 2010.

10. Finally, the deponent has further averred that the construction and/or improvement of the Laikipia road, which is said to have eaten into and/or encroached upon the suit property, was carried out and/or undertaken without public participation, involvement and/or consultation and hence the construction of the said road was in violation of the provisions of Article 10 of the Constitution 2010.

11. Owing to the foregoing, the Petitioner has thus implored the honourable court to find and hold that her fundamental rights and freedoms and in particular, rights to property have been breached, violated and/or infringed upon.

THE RESPONDENTS' CASE:

1ST AND 3RD RESPONDENTS' CASE

12. The 1st & 3rd Respondents' have responded to the Petition herein through a Replying affidavit of one Engineer Kenneth Mbogori, sworn on the 18th March 2021, and in respect of which the deponent, first and foremost identified himself as the Regional Director of the 1st respondent, particularly in charge of the 1st Respondent's Nairobi regional office.

13. On the other hand, the deponent has further pointed out that the 1st Respondent carried out and/or undertook the improvements of Laikipia road (D1995), along Kangundo road, sometimes in the year 2018, following the process of prioritization for the improvement of roads by the constituency roads committee (Embakasi central) in the financial year 2017/2018.

14. The deponent further avers that prior to and/or before undertaking the improvements of the said Road, public participation and/or consultation, culminating into the improvement of the said road was conducted and/or otherwise undertaken. In this regard, the deponent has exhibited annexure 1, being minutes relating to Embakasi Central Constituency roads committee meeting on the 21st December 2017.

15. Besides, the deponent has further averred that the total length of the Laikipia road is 8.93km and that only a portion thereof was improved. For clarity, the deponent has averred that the section improved by the 1st Respondent measure 0.5km only.

16. Other than the foregoing, the deponent of the Replying affidavit has also averred that prior to the improvement, which is now complained of, the county government has previously been rehabilitating the said road severally in order to facilitate them in the collection of revenue from the quarry. In this regard the deponent has stated that during the previous rehabilitations of the said roads, there have been no complaints arising from and/ or touching on the suit properties.

17. Other than the foregoing, the deponent of the replying affidavit has also averred that the Road works in respect of the Laikipia road, code named D1995, were carried out on an existing road corridor with a Road Reserve of 18m wide.

18. For the avoidance of doubt, the deponent has exhibited a copy of the relevant map, indicating of the existence of the Road corridor.

19. Besides, the deponent of the Replying affidavit has further averred that the map attached in the Petition is in conflict with the map reference as **Spring valley or (south A37/GD3 (148/4))**. For clarity, the deponent avers that the map attached to the petition is not an accurate reflection of the position on the ground, as it is a resent map and it does not reflect the Road corridor on the ground.

20. Finally, the deponent has gone ahead to aver that is it the suit properties, which have encroached onto the road reserve and not otherwise and therefore the protection and compensation claimed, are intended to defraud the Respondents of the tax payer's money. In this regard, the deponent has reaffirmed that what is claimed by the Petitioner herein as part of the suit properties, lie and fall within the road reserve.

21. In the premises, it is the deponent's position that the improvement and/or road works that were carried out were undertaken within and/or on the stipulated road reserve and that there was no any encroachment on the suit properties, either as alleged or at all.

2ND RESPONDENT'S CASE:

22. The 2nd Respondent herein does not appear to have entered appearance and/or filed any reply in response to the Petition. Besides, the 2nd Respondent has not been participating in the proceedings herein.

SUBMISSIONS

23. On the 17th November 2020, the Petition herein came up before the honourable Judge for purposes of directions, whereupon directions were issued on how the Petition shall be disposed of.

24. For the avoidance of doubt, it was directed that the Petition was to proceed on the basis of affidavit evidence and thereafter parties were to file and exchange written submissions.

25. Pursuant to and in line with the foregoing directions, the Petitioner herein filed her set of written submissions on the 8th July 2021, and in respect of which the Petitioner has exhibited and/ or attached various decisions in support of the submissions.

26. On the other hand, the 1st & 3rd Respondent have also filed their set of written submissions dated the 5th October 2021, to which the 1st & 3rd Respondent have opposed the claim for compensation by and/or on behalf of the Petitioner.

27. Suffice it to say, that the two sets of submissions which have been alluded to, form part and parcel of the court record, and same shall be duly considered and taken into account.

ISSUES FOR DETERMINATION:

28. Having evaluated and/or appraised the Petition dated the 2nd June 2020, the affidavit in support thereof and the written submissions filed on behalf of the Petitioner, on one hand, and having similarly evaluated the Replying affidavit, sworn on 18th March 2021, as well as submissions filed on behalf of the 1st & 3rd Respondent, **I am of the considered view that the following issues arise for determination;**

I. Whether the Petitioner is the registered owner of L.R No.'s 29403 and 29404, and if so whether the Petitioner is entitled to the benefits of the rights arising from such ownership

II. Whether the construction and/or improvement of the Road has encroached onto the suit properties, either as alleged or at all

III. Whether the petitioner is entitled to compensation for breach and/or infringement of the Petitioner's right to property and if so the quantum of such compensation

ISSUE NUMBER 1:

29. The Petitioner herein has availed and supplied to the court the sub-leases pertaining to and in respect of L.R No. 29403 and 29404, respectively, showing that the said properties were transferred to and thus registered in favor of the Petitioner herein.

30. On the other hand, the Petitioner has also availed to the honourable court a copy of the lease of the original property containing the entries and/or endorsement, in respect of the sub- leases. Perhaps, it is important to take cognizance of entries number 9 & 10 on the lease which provide as hereunder;

Entry Number 9.

Sub lease to Twin Flames Limited L.R No. 29403 (original 18303/23) area 0.015 Ha. Term 99 years w.e.f 1st April 1992 (less last three days) A/Rent-11250 (revisable) vide I.R Number 187385 presentation number 444 date of registration 5th December 2016, signed

Entry number 10.

Sub lease to Twin Flames Limited L.R No. 29405 (original 18303/25) area 0.0097 Ha. Term 99 years w.e.f 1st April 1992 (less last three days) A/Rent-11250 (revisable) vide I.R Number 187386 presentation number 445 date of registration 5th December 2016, signed

31. From the entries which have been supplied herein before, it is shown that the Petitioner herein is the registered proprietor of the lease over and in respect of L.R. No.'s 29403 and 29405, respectively. However, the entries and/or endorsements which are contained on the original lease do not allude and/or advert to the existence of L.R No. 29404, which is the other title, against which the Petitioner is seeking compensation.

32. Suffice it to say, that the Petitioner herein is the lawful and legitimate owner of the leasehold document in respect of L.R. No. 29403, of which a sub-lease was duly executed and thereafter presented and ultimately registered on the 5th December 2016.

33. As pertains to L.R No. 29404, I am unable to authenticate the Petitioner's claim and/or interests in respect thereof. This is because, there is no entry of the existence of that particular title in the original lease, a copy of which was placed before the honourable court by the Petitioner.

34. On the other hand, I must also point out that there is also a third title, against which the Petitioner herein has alluded to and this is title in respect of L.R No. 49404, which is reflected in the Reliefs section and in particular, paragraph A thereof.

35. As pertains to title number L.R No. 49404, I must say that I have not seen either a duly executed sub – lease or any entry made against the original lease, showing that such a title does exist or if so, that it is registered in the name of the Petitioner.

36. Be that as it may, I am prepared to find and hold that the petitioner has placed before the court sufficient material to confirm and authenticate ownership over and in respect of L.R No. 29403. Consequently, it is my finding and holding that the Petitioner herein is the lawful and legitimate owner thereof and same is hence entitled to protection under the law.

37. On the other hand, as pertains to L.R No. 29404, though there exists a duly executed sub-lease, the absence of registration and endorsement thereof against the original lease, negates a Declaration and/or confirmation in favor of the Petitioner

38. Consequently, as pertains to L.R No. 29403, the Petitioner's title herein is deserving of protection and thus any action that infringes upon and violates the Petitioner rights thereto, would be unlawful, illegal and thus unconstitutional.

39. In support of the foregoing observations, I invoke and subscribe to the findings of the court in the decisions in the case of **Isaac Gathungu Wanjohi & another v Attorney General & 6 others [2012] eKLR**, where the honourable court held as hereunder;

We hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest.”

ISSUE NUMBER 2

40. The crux of the Petition before the court is that the Respondents herein and in particular, the 1st Respondent, during the course of the improvements, which were carried out and/or undertaken on Laikipia road, encroached to and thereby annexed portions of the suit properties belonging to and registered in the name of the Petitioner.

41. Towards and in a bid to prove encroachment onto and/or annexation of portions of the suit properties, the Petitioner herein availed and/or supplied the court with a copy of a map, ostensibly to indicate the ground location of the suit property *vis a vis* the offensive road.

42. I must say, that though I have looked at the map exhibited and/or displayed by the Petitioner, I have not been able to discern any evidence of certification to confirm and/or authenticate that indeed it is a certified copy of the true map held and/or kept by the relevant authority, in accordance with the relevant laws.

43. As concerns production and/or reliance on public record and/or documents, the law is settled and in my humble view, it behooves the person that relies on such documents to either avail the original copy or a certified copy thereof. For clarity, this requirement was neither complied with nor adhered to.

44. In respect of the foregoing holding, I can do no better than to reproduce provisions of Section 79, 80 & 81 of the Evidence Act which provides as here under;

Distinction between public and private documents
(1) The following documents are public documents—
(a) documents forming the acts or records of the acts—
(i) of the sovereign authority; or
(ii) of official bodies and tribunals; or
(iii) of public officers, legislative, judicial or executive, whether of Kenya or of any other country;
(b) public records kept in Kenya of private documents.
(2) All documents other than public documents are private.

45.
80. Certified copies of public documents
(1) Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed whenever such officer is authorized by law to make use of a seal, and such copies

so certified shall be called certified copies.
(2) Any officer who by the ordinary course of official duty is authorized to deliver copies of public documents shall be deemed to have the custody of such documents within the meaning of this section.

81. Proof by certified copies
Certified copies of public documents may be produced in proof of the contents of the documents or parts of the documents of which they purport to be copies.

46. Other than the fact that the map, which has been availed and/or supplied by the Petitioner has not been certified as required under the law, I must also point out that the said map has not also been accompanied by a report by a licensed surveyor, to point out the ground position of the suit properties viz- a vis the position of the Laikipia Road, the latter which has been said to have encroached onto and/ or upon the suit properties.

47. In the absence of a report by a licensed surveyor, it is not practicable nor possible, for the Judge who is not schooled in surveyor and related geospatial area, to comprehend how the suit properties sit and/ or are placed as against the road, including their respective sizes.

48. Besides, it is also not open for the judge to venture into issues of speculation and/or imagination and thereby make a decision founded and/or anchored on supposition and/or hypothesis.

49. As pertains to the map which has been exhibited by the petitioner, I am afraid that same has been thrown onto to my head and I'm thus required to grope in darkness and to ascertain whether I can extricate something favorable to the Petitioner to support the allegation of infringement.

50. Notwithstanding the foregoing, there is also a Replying affidavit, which was sworn by Engineer Kenneth Mbogori, on the 18th March 2021 and whose contents are poignant and/or pertinent.

51. It will be recalled that the contents of the said Replying affidavit were substantially reproduced and/or alluded to herein before and the pertinent averments thereto included the following;

- a. **There existed a road corridor which is the one against the improvement were carried out**
- b. **The road reserve as pertains to the offensive road was 18meters**
- c. **The constructions and/or improvement was carried out and/or under taken on the portion comprising on the road reserve**
- d. **That the Petitioner's lands, that are the one that have been encroached onto and/or illegally extended to the road reserve**
- e. **The map annexed and/or exhibited by the Petitioner is incorrect and not authentic**
- f. **That the Petitioner's claim is predicated on public land and thus compensation as claimed, would amount to defrauding the Respondents of tax payer's money**

52. Faced with the foregoing averments, one would have expected the Petitioner herein to file a further affidavit to react to and/or otherwise controvert the averments and thereby clarify the position and by extension, the record.

53. However, even though leave to file a supplementary affidavit was granted on the 17th November 2020, it does not appear that same was appropriated and therefore by the time of filing of the respective submissions, the last affidavit to have been filed was the Replying affidavit by and/or on behalf of the 1st & 3rd Respondent, which I have alluded to.

54. I must say that the Burden of proof lies on the shoulders of the Petitioner and thus it was incumbent upon the Petition herein to place sufficient material before the honourable court, to establish and/or authenticate the encroachment, trespass and/or unlawful annexation of the Petitioners land.

55. In support of the foregoing observations, I venture to rely on and/or take refuge in the provisions of Sections 107 and 108 of the Evidence Act, Chapter 80, Laws of Kenya, which provides as here under;

Burden of proof
(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.

108. Incidence of burden
The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

56. Other than the provisions of the Evidence Act, Chapter 80, which I have alluded to in the preceding paragraph ,it is also imperative to restate the observation by the court of appeal in the case of **Daniel Toroitich Arap Moi v Mwangi Steven Muriithi & Another (2014) eKLR**, where the honourable court observed as hereunder;

It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.

57. In my humble view, the Petitioner herein was obliged and/or obligated to prove and/or establish that the improvements, which were being carried out on Laikipia road, indeed extended to and/or encroached upon the suit properties, but no such firm or credible evidence was tendered.

58. In my view, the only credible evidence that would have proven, satisfied and/or established encroachment and/or annexation of the suit properties, would have been Report by a licensed surveyor, or such other expert with knowledge geospatial area. Unfortunately, no such expert report was tendered.

59. Consequently, the allegation of encroachment and/or trespass onto the suit properties, remains unproven and in this regard, I reach the inescapable conclusion that no encroachment arose, occurred and/ or has been proven before the Honourable Court.

ISSUE NUMBER 3

60. The Petitioner herein had sought for General as well as Exemplary damages, based on the infringements and violation of the Petitioner's right to property.

61. True to it, if the Petitioner had proved her case on a balance of probability, same would no doubt, be entitled to reasonable compensation both on account of General damages, but as well as Exemplary damages, taking into account that during this age and time and with a robust transformative constitution, the government and/or government agencies cannot be allowed to descend upon private properties, in utter disregard of the bill of rights.

62. In support of the foregoing position, I rely in the decision in the case of **Arnacherry Limited v Attorney General (2014) eKLR**, where the court held as hereunder;

“This is indeed a sad and distressing Petition. It is not expected that the State, in this age and time and with a robust Constitution such as ours, can actively participate in acts of impunity such as the forceful take-over of personal property without due compensation. The take-over has lasted 30 years and that makes the said action all the more disturbing.

63. However, I have found and held that the Petitioner herein has not established and/ or authenticated any trespass and/or oppressive, arbitrary or unconstitutional behavior on the part of the Respondents.

64. In the premises, the Petitioner is not entitled to any award under the heading of General and Exemplary damages.

65. Notwithstanding the foregoing, if the Petitioner had established and proven the infringements and violation alluded to in the Petition and subject to authentication of the size and/or extent of the encroachment, I would have been constrained to award to the Petitioner the sum of **Kenya Shillings 2, 000, 000/=** only on account of General damages and **Kenya Shillings 10, 000, 000/=** only on account of Exemplary damages, based on the decision in the case of **Titus Gatitu Njau v Municipal Council of Eldoret (2015) eKLR**.

FINAL DISPOSITION:

66. Having addressed and/or dealt with all the issues enumerated herein before, I am now called upon to make the requisite Dispositive orders.

67. In view of what I have explained in the body of the judgment herein, I find and hold that the Petitioner has not proven her case on a balance of probability. Consequently, the Petition herein is hereby Dismissed.

68. As pertains to costs, I direct that either party shall bare their own costs.

69. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF NOVEMBER 2021.

HON. JUSTICE OGUTTU MBOYA,

JUDGE,

ENVIROMENT AND LAND COURT, MILIMANI.

In the Presence of;

June Nafula Court Assistant

N/A for the Petitioner

Mr. Motari for the 1ST and 3RD Respondents.