



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

PETITION NO. 16 OF 2017

BETWEEN

ALLOYS OTIENO ABOKAPETITIONER

AND

KENYA NATIONAL HIGHWAY AUTHORITY.....1ST RESPONDENT

LAND REGISTRAR, KISUMU.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

JUGDMENT

The Petitioner brought this petition on 15th July 2016 seeking orders for a declaration that the Petitioner's freedom from discrimination and equality and right to dignity as enshrined in Articles 27 and 28 of the Constitution has been infringed by the Respondent. A declaration that the Petitioner has been subjected to psychological torture, unfairly punished and treated in a cruel and inhuman manner, further his rights to peaceful possession of his property was infringed upon, legitimate expectation to fair administrative action, and right to fair hearing has been infringed upon in violation of Article 29, 40, 47, and 50 of the Constitution. An order of reasonable compensation to the Petitioner for violation of his rights and fundamental freedom. He prays for Special damages for the Value of demolished property and land exercised off Ksh. 1,900,000/= Loss of rental income from two shops demolished at Ksh. 800/= per shop (Ksh. 16,000) for a period of three months Ksh. 48,000/=Cost of repairs Ksh. 150,000/=Exemplary/punitive damages as against the respondent for perpetuation of blatant illegality. Any other such orders. Costs of the petition.

The Petitioner states those at all material times he has been the owner of the suit parcel known as LR NO. KISUMU/MANYATTA "B"/2562 measuring approximately 0.03 Ha located along the Kisumu – Highway at Nyamasaria area of Kisumu County. That he has had peaceful possession of the parcel since acquiring it and developed it to have two shops at the front and five rooms at the back, earning Ksh. 38,500/= as monthly income.

That the 1st Respondent, pursuant to its mandate, had contracted Sinohydro Co Ltd to expand the Kisumu – Nairobi Highway to a dual carriage road with necessary exits and pedestrian paths. That upon construction of the pedestrian/cyclist path, the 1st Respondent's agents without notice in April 2014 demolished the front portion of the Petitioner's property and hived off 0.001 Ha from the suit parcel, reducing its acreage to 0.02 Ha. That the illegal action was condoned by the 2nd Respondent's officers from the Ministry of Lands and Housing , and armed police officers who provided security to the officers as they demolished the property.

The Petitioner averred that as at 2002 when he was acquiring the property, the Registry Index Map had a provision of 40 metres for the National Highway but this was changed to 60 metres by a Gazette Notice in 2008. That the extension within the Nyamsaria section was much wider than 60 metres as it included exits and pedestrian paths. That by making this extension the Respondents did not formally acquire any portion of the parcel nor was the Petitioner given any notice by the government to formally and compulsorily acquire a portion of his title. That his title was a freehold title free from any encumbrance.

The Petitioner averred that the Respondents failed to comply with Section 4 of the Eviction and Resettlement Procedures Bill 2012 stating that a person shall not be forcibly evicted from their home or have their property demolished without a court order authorising the eviction or demolition. That the summary procedure adopted by the Respondents in demolishing the Petitioner's building was illegal and in breach of the principles of natural justice and all known tenets of the law.

The Petitioner state that the open market value for the property before demolition was Ksh. 5,000,000/= of which value has since diminished to Ksh. 3,100,000/= causing him a loss of Ksh. 1,900,000/=. That he has lost rental income with regard to the two shops demolished and

claims loss of user.

Specifically, the Petitioner averred that he was discriminated against and not given equal treatment before the law, contrary to Article 27 of the Constitution; that he was subjected to psychological torture, was unfairly punished and treated in a cruel and degrading manner contrary to Article 29 (d) of the Constitution; that the unlawful demolition and excising of his property was illegal and contrary to Article 40 of the Constitution; and that he was summarily condemned without the application of the rules of natural justice in contravention of the maxim *audi alteram partem*, and in violation of Article 47 and 50 of the Constitution.

In his supporting affidavit in which he reiterated his pleadings, the Petitioner attached a copy of the title deed to the suit parcel in his name, a valuation report on the property with a copy of the Registry Index Map indicating a 40 metre width Road Reserve for Nairobi Road.

Respondents Guilty of Laches

The Respondents did not file any response to the petition and the matter was mentioned severally until 12th February 2019 when the court granted the Respondents one last opportunity to file and serve their reply, if any, within 21 days. When the matter came up for mention on 25th June 2019, the Respondents had still not filed any reply. The matter was consequently fixed for hearing on 30th October 2019. On 30th October 2019, Counsel for the Respondents conceded that they had not filed a response and sought a last mention to put a reply. The court held that the respondents were guilty of laches and therefore had lost the opportunity to file a reply. However, on 29th November 2019, the 1st Respondent attempted to sneak in a replying affidavit along with its written submissions, contrary to the order of the court. The purported replying affidavit filed should therefore be ignored and the true position is that the Respondents effectively failed to file a replying affidavit.

What then is the effect of the Respondents' failure to file a replying affidavit on the submissions that they have subsequently filed? The Supreme Court in ***Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others* [2018] eKLR** held:

“A Replying Affidavit is the principal document wherein a respondent’s reply is set and the basis of any submissions and/or List of Authorities that may be subsequently filed. Absence this foundational pleading, the Replying Affidavit, it follows that even the Written Submissions purportedly filed by the 1st Respondent ... are of no effect.

Be that as it may, as a court of Law, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the Court will as a matter of course grant the sought orders. It behoves the Court to be satisfied that prima facie, with no objection, the application is meritorious and the prayers may be granted.”

Similarly, with the absence of a replying affidavit, the written submissions of the Respondents herein are of no legal effect and the petition stands unopposed. This, however, does not discharge the court of its duty to determine whether the petition is meritorious and deserving of the orders sought.

Petitioner’s Submissions

Counsel for the Petitioner filed written submissions on 21st November 2019. Counsel submitted that as at 30th October 2019, the Respondents had not filed any grounds of opposition or replying affidavit in response to the issues raised in the Petition. That the petition being unopposed and the facts pleaded therein uncontroverted, the court should find that the Petitioner has proved his case on a balance of probability.

Counsel submitted that the Petitioner specifically pleaded and put in evidence a valuation report to prove that the value of the damaged property and land excised off was Kshs. 1,900,000/= plus loss of rent of Kshs. 48,000/= and cost of repairs at Kshs. 150,000/= totalling Kshs. 2,098,000/=.

Counsel submitted that once a breach of a fundamental right is proven, the Petitioner would be entitled to reasonable damages that were not punitive but should suffice to vindicate the Petitioner. Counsel asserted that the Petitioner was also deserving of punitive/exemplary damages as the Respondent agency did not have an eviction order as mandatorily required under Section 4 (1) of the Eviction and Resettlement Procedures Bill, nor did they have the courtesy of respecting the Petitioner’s absolute ownership of the suit parcel. Counsel prayed for Ksh. 3,000,000/= as general damages and Kshs. 1,000,000/= for punitive/exemplary damages

Issues for Determination

1. Whether the petition is merited

The underlying issue for determination is the proper position of the common boundary between the National Road Reserve and the Petitioner’s parcel. Although the Petitioner claims that the width of the road reserve was extended from 40 to 60 metres by a Gazette Notice of 2008 after he had acquired the property, the Petitioner failed to adduce any evidence of the existence of such a Gazette Notice.

Further, the valuation report attached to the Petitioner’s affidavit stated at Section 13.0 that there seemed to be a conflict between the Registry Index Map of Manyatta “B” Registration Section which indicated the highway to be 40 metres while the adjoining Nyalenda B map showed the highway to be 60 metres wide. That there was need **“to get clarification from the Survey Department at Kisumu Lands Office regarding this matter and how it affects the title in question.”**

From the foregoing, the Petitioner has failed to definitively prove on a balance of probability that the correct width of the road reserve

bordering his parcel should be 40 metres and not 60 metres, and that as a result the Respondent encroached on his parcel and violated his rights and fundamental freedoms as enshrined in the Constitution. Without clarity on the true position of the common boundary, the court cannot make a determination on the prayers sought.

Since the root of the conflict herein is essentially a boundary dispute, the first forum for its resolution should have been the Land Registrar as provided for in the Land Registration Act. Section 18 provides that the court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined and Section 19 provides for the procedure of ascertaining and fixing the boundaries where there is a boundary dispute. The Petitioner did not demonstrate that he had made an application to the Land Registrar to ascertain and fix the boundary as is required. Therefore, the court cannot make any premature determination relating to the alleged acts of encroachment asserted by the Petitioner.

There were also other alternative avenues to resolve the conflict that would have come into play had the Petitioner given notice of his claim and intention to commence legal action to the 1st Respondent as is required by law, specifically Section 67 (a) of the Kenya Roads Act 2007. The Petitioner has not adduced evidence to show that such notice was served upon the 1st Respondent.

Kibunja J. in **Michael Otieno Nyaguti and others V Kenya National Highways Authority and 5 others (2015) eKLR OBSERVED:-**

“...indeed Section 67 (a) of the Kenya Roads Act No.2 of 2007 requires a one month notice containing particulars of the claim and the intention to commence legal action to be served upon the Director – General by the party or its agent before legal proceedings are commenced. The requirement is couched in mandatory terms.

“The court holds the view that the requirement of a notice being served on the Director General would not amount to hindering a litigant from accessing the seat of justice (court). It only creates an opportunity to the Director General's office of exploring an out of court settlement and is in line with the provision of Article 159 of the constitution which at sub-article 2(c) encourages " alternative forums of dispute resolutions". The provision of section 67 of the Kenya Road Act 2007 is not in contravention with the constitution 2010....

Superior courts have in several cases taken the position that where infringements of rights under the Constitution can be pursued adequately as a claim under a substantive legislative framework, then the court will decline to declare whether there has been a breach of the said rights. The superior courts have also held that other constitutional bodies or state organs under a legislative framework should be given the opportunity to resolve the dispute before the court can exercise its jurisdiction under the Constitution.”

2. Relevant orders

The upshot of this is that the petition ought to be, and is hereby dismissed with each party bearing its own costs.

DATED AND DELIVERED 27TH DAY OF FEBRUARY 2020.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

In the presence of:

M/S BAGWASI FOR PETITIONER

M/S ONSONGO FOR 1ST RESPONDENT

N/A FOR 2ND AND 3RD RESPONDENTS

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE