



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 26 OF 2019

PROF. GEOFFREY MULUVI.....PLAINTIFF

VERSUS

KENYA NATIONAL HIGHWAY AUTHORITY.....1ST DEFENDANT

THE COUNTY GOVERNMENT OF KITUI.....2ND DEFENDANT

NATIONAL LAND COMMISSION.....3RD DEFENDANT

RULING

1. In the Notice of Motion dated 15th March, 2019, the Plaintiff has prayed for the following reliefs:

a. That pending the hearing and determination of this Application and or suit, the Defendant whether by themselves, their employees, agents and or servants be restrained by way of an injunction from demolishing the Plaintiff's building and or development on parcel of land known as Plot No. 45 Chuluni Market, Kitui County or marking the building or in any other way whatsoever interfering with the Plaintiff's right and interest in the suit building.

b. That costs of the Application be provided for.

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that he is the registered proprietor of parcel of land known as Plot No. 45 Chuluni Market, Kitui County (*the suit property*); that he purchased the suit property from one Mwalimu Muluvi and that the then Municipal Council of Kitui approved the said purchase and recommended for the transfer of the land to him.

3. The Plaintiff deponed that on 7th July, 1999, he was issued with a Letter of Allotment from the Ministry of Lands; that on 4th November, 2010, the 2nd Defendant approved his building plans and that between the years 2010 and 2012, he developed the suit property by building a two storey commercial building at an estimated cost of Kshs. 20 million.

4. According to the Plaintiff, on or about the year 2018, the 1st Defendant commenced construction works of upgrading the Kibwezi-Mutomo-Kitui-Kabati-Migwani Road; that the 3rd Defendant surveyed and compulsorily acquired land from people and that his land was not affected by the road project.

5. The Plaintiff deponed that while undertaking its survey, the Defendants were guided by the 1983 survey map and the Part Development Plan as approved by the Director of Physical Planning and that on 4th March, 2019, the 2nd Defendant purported to change and divert the road course thus affecting all the properties on the right side of the road.

6. The Plaintiff stated that the 2nd Defendant marked a section of the suit property for demolition; that on 13th March, 2019, the 1st Defendant issued him with a Notice for removal of the marked portion of the building and that the 2nd Defendant's decision was unlawful and was made without authority.

7. The Plaintiff finally deponed that the 1st and 2nd Defendants reached their decision without affording him a fair hearing and that the Defendants arbitrarily determined the width of the road to be 60 meters as opposed to 30 meters.

8. The 1st Defendant's Senior Surveyor deponed that indeed, the 1st Defendant is constructing the Kibwezi-Mutomo-Kitui-Migwani Road; that the said Road is a class "A" road whose recommended road reserve corridor is 60 meters and that the Road transacts Chuluni market where the Plaintiff's land is situated.

9. The 1st Defendant's Surveyor deponed that the Plaintiff's building, amongst others, has encroached on to the road reserve by 10 meters thus necessitating the removal of the encroached section and that it is the mandate of the 1st Defendant to survey and ascertain the requisite land for carrying out its projects and removal of encroached buildings on designated road reserves.
10. The 1st Defendant finally deponed that compulsory acquisition of private land is only applicable to privately owned land acquired for public purpose; that the suit property has encroached on public land by 10 meters and that in the event the suit is decided in favour of the Plaintiff, then the Plaintiff will be compensated by way of damages.
11. According to the 1st Respondent's Affidavit, the pendency of any orders aimed at restraining the 1st Respondent from constructing the subject road exposes the 1st Respondent to unwarranted costs which accrue on a daily basis and that the Application should be dismissed with costs.
12. On his part, the 3rd Defendant's Acting Director, Land Valuation and Taxation, deponed that no request has been made to the 3rd Defendant to acquire all that parcel of land known as Plot No.45 Chuluni Market, within Kitui County for purposes of upgrading the road project in question.
13. The Plaintiff's advocate submitted that the road reserve within Chuluni market is 30 meters and not 60 meters as alleged by the 1st Defendant; that the photographs exhibited by the Plaintiff show the construction of the road has been done past the suit property and that there is 10.4 meters' space between the building and the road.
14. Counsel submitted that even assuming that the suit property is within a road reserve, the Plaintiff is an innocent purchaser in good faith; that the property was allotted to the Plaintiff by the 2nd Defendant and that the documents availed by the parties are not conclusive of the size of the road reserve. Counsel relied on numerous authorities which I have considered.
15. In his Supplementary Affidavit, the Plaintiff deponed that the purported survey map which has been exhibited by the 1st Defendant is not legible; that all the land opposite the suit property has been compulsorily acquired and that after the said acquisition, the contractor has now done the road past the suit land leaving a distance of 10.4 meters road reserve between the road and his building.
16. The 3rd Defendant's advocate submitted that the Plaintiff's suit property is not a subject of compulsory acquisition because the 3rd Defendant has not received a formal request from the 1st Defendant for its compulsory acquisition and that the 3rd Defendant is not in breach of the Plaintiff's right to ownership of the suit property.
17. The Plaintiff is seeking for an injunction restraining the Defendants from demolishing the development on parcel of land known as Plot No. 45 Chuluni Market. The principles governing the grant of an injunction are now well known.
18. As was held in the celebrated case of *Giella vs. Cassman Brown & Company Limited [1973] EA 358*, the Applicant must show a prima facie case with a probability of success; an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages; and if the court is in doubt, it will determine such an Application on the balance of probabilities.
19. It is not in dispute that the Plaintiff is the owner of Plot No. 45 Chuluni Market, Kitui County. It is also not in dispute that on the said land stands a two storey commercial building. According to the Plaintiff, the suit property ought not to be affected by the ongoing construction of the Kibwezi-Mutomo-Kitui-Kabati-Migwani road because the said land is not on a road reserve.
20. The Plaintiff's case is that according to the 1983 survey map and the Part Development Plan that was approved by the Director of Physical Planning on 3rd December, 1996, the road fronting the suit property measures 30 meters, and not 60 meters as claimed by the 1st Respondent. The Plaintiff has annexed the said maps and the Development Plan to support his case.
21. The 1st Defendant on the other hand has claimed that the Kibwezi-Mutomo-Kitui-Kabati-Migwani road has a road reserve of 60 meters and not 30 meters and that the Plaintiff's land has encroached on the said road reserve by 10 meters. The 1st Defendant has attached on its Affidavit a map.
22. Indeed, at this stage, it is not clear to this court if the Kibwezi-Mutomo-Kitui road, and specifically the road at Chuluni Market is 60 meters or 30 meters wide. That being the case, the issue of the measurement of the said road can only be ascertained after trial; and after *viva voce* evidence has been tendered.
23. However, it is obvious that if the Plaintiff's two storey building is demolished before the issue of whether the road in question is 30 meters or 60 meters wide, he will suffer irreparable injury that will not be adequately compensated by an award of damages, especially considering that the suit property has not been valued.
24. Indeed, if the said road had not passed, the policy of this court, which always considers the interests of the public first, is to allow the construction of the road, and deal with the issue of compensation, if at all, after trial. However, in this particular case, the road being done by the 1st Defendant has already passed. Therefore, the issue of whether the Plaintiff's land encroaches on the road reserve by 10 meters can be dealt with at trial without necessarily demolishing the building on the suit land before the matter is heard and determined.
25. That being the case, and considering that the trial court will make a final determination on whether the suit property has encroached on the road reserve or not later, I shall allow the Plaintiff's Application dated 15th March, 2019 as follows:

a. That pending the hearing and determination of this Application and or suit, the Defendant whether by themselves, their employees, agents and or servants be restrained by way of an injunction from demolishing the Plaintiff's building and or development on parcel of land known as Plot No. 45 Chuluni Market, Kitui County or marking the building or in any other way whatsoever interfering with the Plaintiff's right and interest in the suit building

b. Each party to bear his/its own costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 15TH DAY OF MAY, 2020.

O.A. ANGOTE

JUDGE