



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

PETITION NO. 8 OF 2019

IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA

EUSTACE KATHUKU..... PETITIONER

VERSUS

COUNTY GOVERNMENT OF MERU..... RESPONDENT

RULING

1. This matter relates to a Notice of Motion dated 1/5/2019 brought pursuant to *Article 40 of the Constitution of Kenya* and all other enabling provisions of the law. The applicant seeks the following orders:

1) Spent.

2) *THAT the honorable court be pleased to issue conservatory orders by restraining the respondent through any and/or all its officers from demolishing any and/or all developments that are upon the petitioner's plot No. 26B LAARE TOWNSHIP pending the hearing and determination of this application.*

3) *THAT the honorable court be pleased to restrain the respondent through any and/or all its officers from in anyway whatsoever interfering with the petitioner's use, occupation and/or control of all the developments upon plot No.26B LAARE TOWNSHIP pending the hearing and determination of this application.*

4) *THAT the honorable court be pleased to order that the respondent's principal officers to wit (i) MERU COUNTY GOVERNOR – HON. KIRAITU MURUNGI (ii) THE MERU COUNTY SECRETARY – HON. RUFUS MIRITI and (iii) THE MERU COUNTY DIRECTOR OF PHYSICAL PLANNING AND URBAN DEVELOPMENT – ENGINEER MUSYOKA be served with a notice of penal consequences explaining that they would singularly and/or jointly be liable to imprisonment for a period not exceeding two (2) years if they breached this court's orders.*

5) *THAT the honorable court be pleased to confirm prayers (2) and (3) supra upon inter parties hearing of this application*

6) *THAT costs of this application be provided for.*

2. The application is supported on the grounds set out in the body of the application and in the supporting affidavit of the applicant. In summary, the applicant avers that he bought a fully developed commercial complex plot no. 26 at Laare Market way back in 1969, which plot was later subdivided into plot 26A and 26B. The latter plot was transferred into his name. He has diligently been paying rates to both the former Nyambene County Council and the County Government of Meru. The applicant contends that he is not guilty of encroaching on a public road since the alleged public road was not in existence when his plot was surveyed and developed.

3. It was argued for the petitioner that his buildings were approved by the Nyambene County Council and the Respondent did not provide pre-existing maps to justify their position of demolition, that the site visit report has no maps on records and that the planned demolition is an afterthought. The petitioner therefore contends that any demolition should take into account the element of compensation of the property earmarked for such demolition.

4. The respondent has opposed the application through the affidavit of the county physical planner. It averred that the county government

was dealing with the issue of encroachment on road reserves. They established that the suit Parcel No. 26 at Laare township had encroached on an access road to the Igembe North CDF office. In essence the petitioner has gone beyond what is availed to him on the ground.

5. It was argued for the Respondent that this is a situation whereby the petitioner extended his developments on the road of access as born out from the affidavit of the physical planner, that it is not the entire building which is marked for demolition and that it is only the few feet where there is encroachment on the public road that is set to be demolished.

6. To this end, the court was urged to look at the public interest vis a vis the individual interests who has encroached on a public road of access. The respondent also averred that there is construction of the road which is ongoing where cabro placement is being done, but the work has stalled because of the stay orders.

7. In support of the case for the respondents, the following authorities were proffered;

i. Meru E.L.C Constitution Petition no. 12 of 2019. Hellen Muthoni Kabengi & 20 others Vs County Government of Isiolo & 4 others

ii. Supreme Court Petition No. 2B of 2014, Gatirau Peter Munya Vs Dickson Mwenda Kithinji & Another.

Analysis

8. I have keenly examined the manner in which the applicant has approached this court. After the filing of the petition and the application on 2.5.2019, the court granted injunction orders against the respondent on 23.5.19. On the same date, the court gave directions that there be a scene visit to be conducted by the Executive Officer in the presence of the parties, the county physical planner and surveyor.

9. The Executive Officer of this court was to avail a report thereof to capture the nature and extent of the land use on the suit land. The two experts on the other hand (the physical planner and county surveyor) were to file their own joint report to capture the nature of encroachment (if any).

10. Several months thereafter on 7.10.2019 the Respondent's counsel gave an account of how the petitioner had frustrated the scene visit exercise. Records indicate that indeed the matter was mentioned before the DR severally to ascertain the compliance with scene visit exercise. The end result was that the Executive Officer of the court was unable to conduct a scene visit exercise in absence of the Petitioner. The physical planner did proceed to visit the scene and filed a report which the applicant has termed as partisan. The said report indicates that the petitioner has encroached on the road of access which has hindered road construction.

11. The applicant has not demonstrated any seriousness in this matter. In particular, no reasonable explanation was advanced by the applicant as to why he snubbed the scene visit exercise. As such, he cannot be had to say that the report by the physical planner is partisan. The said report gives an account of the extent of the petitioner's encroachment on the road of access.

12. In the case of Meru **ELC Constitutional Petition No. 12 of 2019 Hellen Muthuni Kabengi and 20 others Vs County Government of Isiolo & 11 others**, I cited the case of **Gatirau Peter Munya vs Dickson Mwendwa Kithinji and 2 others [2014]eKLR** where the court had this to say on issue of conservatory orders.

“Conservatory orders’ bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as ‘the prospects of irreparable harm’ occurring during the pendency of a case, or ‘high probability of success’ in the applicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes”

13. The Court of Appeal case of **Joseph Wainaina Kinyanjui & another v Kenya National Highways Authority [2018] eKLR** aptly captures this scenario of encroachment on a public road, where it was stated as follows;

“The respondent is a public body and has the mandate to build and protect public roads and highways and should not be hindered through injunction from carrying out public duties through injunctions granted to private citizens. Although the applicants hold a title to the land the respondent was able to show before the High Court that there was encroachment on to a road reserve by the applicants and such encroachment was hindering expansion of the Nyahururu-Nakuru road, to the detriment of the public. We are satisfied, like the learned judge, that the applicants would adequately be compensated in damages should the intended appeal succeed.”

14. Having considered all the material presented before me, and keeping in mind that the petitioner has for no reason at all shunned and frustrated the scene visit exercise as ordered by this court, I come to the conclusion that the applicant has not met the criteria required in issuance of conservatory orders.

15. In the circumstances, the application filed on 2.5.2019 is hereby dismissed with costs to Respondents. Any orders of injunction or stay granted herein are hereby discharged.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 12TH DAY OF FEBRUARY, 2020

IN THE PRESENCE OF:-

C/A: Kananu

Gikonyo for petitioner present

Mutegi holding brief for Muriuki for respondent – present

Parties absent

HON. LUCY. N. MBUGUA

ELC JUDGE