



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 114 OF 2014

IN THE MATTER OF ARTICLE 10 AND 165(3) OF THE CONSTITUTION

**IN THE MATTER OF ALLEGED AND/OR THREATENED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 40(3), 47(1) & (2), 60(1) (b)**

BETWEEN

LALY FURNISHING HOUSE LIMITED.....PETITIONER

AND

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

CHINA ROAD AND BRIDGE CORPORATION.....2ND RESPONDENT

THE MINISTRY OF TRANSPORT AND

INFRASTRUCTURE.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

Before me is a Petition dated **6th February 2014**. The Petitioner seeks orders that:

- a. *Spent.*
- b. *The Court be pleased to issue a declaration that the Petitioner is the sole, lawful and proper owner of the suit property, L.R. [Particular withheld]*
- c. *The Court be pleased to issue a declaration that the Respondents' actions were unconstitutional and a violation of the Petitioner's constitutional right to property and fair administrative action.*
- d. *The Court be pleased to issue an order of prohibition restraining the Respondents jointly and severally by themselves, their agents or otherwise from entering in, encroaching on or otherwise interfering with the Petitioner's quiet and peaceful enjoyment of its property, LR. [Particular withheld] or in any way interfering with the Petitioner's free and unhindered use of and access to the suit property.*

- e. *The Court be pleased to issue an order of prohibition restraining the Respondents jointly and severally by themselves, their agents or otherwise from acquiring the Petitioner's property being LR. [Particular withheld] in any way other than lawful compulsory acquisition.*
- f. *The Court be pleased to order the Respondents to pay the Petitioner's costs of and incidental to these proceedings on a full indemnity basis.*
- g. *The Court be pleased to order the Respondents to pay damages to the Petitioner for infringing its constitutional rights.*
- h. *The Court be pleased to make any further order as it deems just in the circumstances.*

The Petitioner's case is that it was the registered owner of a parcel of land known as **LR**. [Particular withheld] (**hereinafter the "original property"**). However, on by a letter dated **13th December 2006**, the Ministry of Roads and Public Works notified the Commissioner of Lands stating that the original property had encroached on the Southern By-Pass by approximately **0.1540Ha**. The Petitioner was notified of this information by the Chief Engineer Roads in a letter dated **30th January 2007**. Subsequently, the Petitioner commissioned a survey of the original property to ascertain its exact dimensions and upon completion of the re-surveying process, the Petitioner executed a surrender of the portion measuring **0.1540Ha**, the original **Grant** [Particular withheld] in respect of the original parcel to the Government of Kenya and, in return, it was issued with a new Lease for the parcel, situated in close proximity to the Nairobi Southern By-Pass, known as **LR**. [Particular withheld] (**hereinafter the suit property**) **Deed Plan** [Particular withheld] The Petitioner states that a valuation report as at **10th January 2014** carried out by **Chapter Property Consultants Limited** indicates that the current market value of the property as **Kshs. 410 Million**.

It is the Petitioner's averment that it became aware of the Southern By-Pass/ Mombasa Road inter-change billboard erected within the general vicinity of the suit property advertised jointly by the Respondents and that the billboard illustrated that a roundabout would take up the entire suit property. Apprehensive that the Respondents would encroach on the property without following due process of compulsory acquisition, the Petitioner through its advocates wrote to the 1st Respondent on **9th December 2013** inquiring the likelihood that the suit property will be compulsorily acquired by the State. The 1st Respondent acknowledged receipt of the said letter on **19th December 2013** and undertook to revert shortly. On **27th December 2013**, the 1st Respondent wrote to the Petitioner requesting confirmation of the location of the suit property. In response the Petitioner on **15th January 2014** forwarded the Survey Plan issued by the Survey of Kenya showing the precise location of the property. A follow up letter by the Petitioner on **29th January 2014** to the 1st Respondent was not responded to.

In the meantime, the Petitioner avers that on **5th February 2014**, the Respondents unlawfully entered into the suit property and began excavation and road building works thereon. This is despite its failed attempts to establish the 1st Respondent's intention regarding the suit property which has raised its apprehension of imminent deprivation of its property without compensation. The Petitioner contends that the fourth roundabout at the Southern By-Pass/ Mombasa Road inter-change is a variation of the initial 1993 Physical Planning Map illustrating the presence of only three roundabouts. As a result of the Respondent's action, the Petitioner states that it has been forced to halt any transactions, plans and developments on the suit property thereby incurring losses. The Petitioner avers that the Respondent's action has violated its constitutionally right to property whereas it has since acquiring the same, complied with the laws by paying land rates and rent to the relevant authorities.

1st Respondent's Response

Thomas Gacoki, the Manager Survey at Kenya National Highways Authority swore a Replying Affidavit and Further Affidavit on **10th March 2014** and **9th April 2014**, respectively. He gave a background of the matter. The Manager deposed that in response to high traffic along Mombasa Road, the Government

proposed to construct a by-pass from A104 Mombasa Road at Parkside Towers through to Carnivore Restaurant, crossing Lang'ata Road to Kibera Slums, Ngong' and Dagoretti Forests then rejoins A104 North of Kikuyu town, referred to as Southern By-Pass. At Mombasa Road, the By-Pass joins Likoni Road to Industrial Area. The junction of Mombasa Road and Likoni Road was identified and designated as the take off point for the By-Pass and to allow for the construction of the inter-change at the take-off, wide truncations were provided to allow for adequate design of the junction resulting from these roads.

It was deposed that in the 1970's the Government in conjunction with John Burrow and Partners identified a number of properties affected by the proposed road improvement project which were classified in two categories: Government Land and Private Property. The deponent stated that the suit property fell partly under road reserve and partly buffer zone and therefore Government Land, thus no requirement for any Government agency to engage in compulsorily acquisition the same. It was his deposition that it would be inequitable for the 1st Respondent to make compensation for the same purpose for which it was reserved. Consequently, that having reserved the same for road construction, then the 1st Respondent as the Government Agency implementing the project has an overriding interest over the title to the suit premises which was not extinguishable upon the Petitioner's acquisition of title.

The Ministry of Works, Housing, and Planning was instructed to undertake the project and it developed the **Nairobi South Structure Plan** [*Particular withheld*] dated **5th June 1985** which made provisions for present and future planning including making provisions for the Southern By-Pass. Further, that the Governments of Kenya and Japan retained Japan International Cooperation Agency (JICA) to fine tune the design. JICA finalized the plan and submitted to the Chief Engineer (Roads) **vide Memorandum Ref. No. NBJ/90-35** dated **28th September 1990**, who in turn forwarded it to the Director of Physical Planning *vide* letter [*Particular withheld*] dated **2nd October 1990**, copied to the Chief Engineer, Nairobi City Commission. The deponent stated that the design by JICA was made to include a fourth roundabout within the land reserved for the Southern By-Pass interchange and it shows the boundaries of the inter-change cover the area, subject matter of the Petition.

The deponent urged the Court to determine the Petitioner's claim to ownership before entertaining the applications for declarations and other reliefs sought in the Petition on the basis that the Petitioner's acquisition of title including the transfer is doubtful. It was deposed that the suit property was alienated and designated as a road reserve in **1985** well before the Petitioner and or any of its predecessors in title had a claim on it. Further, that the final design of the by-pass was completed before the Petitioner acquired title to the land. Additionally, the creation of the road reserve was done in the national interest which has in the recent times escalated. Consequently, that the Petitioner ought to have ascertained and verified that the suit property was reserved for construction of the by-pass before making any claims of ownership. The deponent stated that the Petitioner did in fact have knowledge that the suit property was on a road reserve in view of its action to voluntarily surrender a portion thereof during which time there was no dispute that the same was Government Land reserved for the by-pass.

3rd and 4th Respondents' Response

The 3rd and 4th Respondents filed Grounds of Opposition dated **5th May 2014** wherein they averred that the Petitioner's application is misconceived, mischievous, and abuse of the court process and further that the Petitioner is guilty of non-disclosure and not entitled to the Prayers sought for reasons that there is a pending case **HCCC No. 1245 of 2002** where the Petitioner is the Plaintiff in which ownership of **LR. [*Particular withheld*]** from which **LR. No. 209/18172** was excised is disputed. Thus, that until ownership of the original property is determined in **HCCC No. 1245 of 2002** the Petition herein ought to be dismissed with costs.

Timothy W. Mwangi, a Deputy Director in the Department of Physical Planning in the Ministry of Lands and Housing and Urban Development swore a Replying Affidavit on **29th September 2014**. He deposed that their records on the **Nairobi South Structure Plan** [*Particular withheld*] dated **5th June 1985** indicates that **LR. [*Particular withheld*]** was identified and planned as a road reserve by the Government in **1985**. The deponent outlined the procedure, at the time, for allocation of Government

Land by the Commissioner of lands as follows: first, the interested party would write a letter to the Commissioner of Lands for allocation of the parcel. Secondly, on receipt of the expression of interest, the Commissioner would write to the Director of Physical Planning to prepare a Part Development Plan (PDP). Thirdly, the Director would prepare the PDP and send it to the Commissioner for approval. Lastly, a letter of allotment is issued to the interested party, a survey is done, a deed plan prepared and a Certificate of Lease processed.

It was his deposition that the Director of Physical Planning prepared a **PDP [Particular withheld]** dated **6th August 1991** in respect to Commercial Development sites in the area marked A, B, C, D, E, F, G, H, and J. That, under this plan original property from which the suit property was excised as claimed by the Petitioner is non-existent as it forms part of the road reserve and therefore no PDP to this parcel was ever prepared. Consequently, in the absence of a PDP, the Commissioner could not issue a letter of allotment or certificate of lease nor deed plan prepared. In the circumstances, the deponent stated, the certificates of lease issued to the Defendant for parcels **209/12058 and 209/18172** were illegal and irregular as no PDP was ever approved in respect to the said parcels and as such no deed plan could have been prepared. Consequently, the orders sought cannot be granted as the mother title from which the suit property was excised is suspect and therefore right to property enshrined under **Article 40(1) of the Constitution** does not extend to property that has been unlawfully acquired.

Petitioner's Further Affidavits

Sukhdev Singh, the Director of the Petitioner swore Further Affidavits on **14th March 2014** and **6th October 2014**. He refuted the claim that the suit property falls within the portion reserved in the Nairobi Southern Structure Plan of **1985** (marked "TG1") as alleged since nowhere in the said plan shows the neither the original or suit property. He deposed that the 1st Respondent's annexures "TG1" and "TG2" have no probative value as they merely state the background information that has no linkage to the issue before Court. It was also deposed that the 1st Respondent had not adduced any evidence to substantiate the claim that the suit property was designated as a road reserve. On the other hand, that the Petitioner availed the original title, communications from the Ministry of Lands about a portion of the original property encroaching on the By-Pass, a Deed of surrender and a new title issued for the suit property supporting its contention of ownership. The deponent referred to annexed correspondence from the Ministry of Lands and Ministry of Roads and Public Works marked "SS6 and SS7" and deposed that the said correspondences confirm the authenticity of his documents and that the encroaching on the By-Pass was only a portion measuring **0.1540Ha**.

The deponent referred to the design by JICA annexed to the 1st Respondent's affidavit marked "TG3" and deposed that it illustrates three roundabouts at the inter-change and clearly shows the Petitioner's original property, now the suit property as private property and thus not part of the inter-change. Additionally, that the JICA design marked "TG3" evidences the same position as the Survey Map/Approved Development Plan of **1993** availed by the Petitioner. The deponent also pointed out to the design map annexure "TG5". He deposed that whereas the 1st Respondent alleges that the design map was done in 1990 it shows area marked "G" with **L.R. [Particular withheld] (the suit property)**, which was excised from the original property in **2007** and a title issued in **2009**. Consequently, that the design map marked "TG5" cannot be proper since it refers to a land reference number that as at **1990** was non-existent. The deponent stated that the only viable explanation was that the design map is a recent internal document that was completed after the Petitioner received the new title and to justify the Respondents' illegal actions.

It was deposed that the **Survey Map of 1993/Approved Development [Particular withheld]**, which was signed by the Director of Physical Planning on **26th May 1993** and approved by the Commissioner of Lands on **3rd June 1993**, shows only three roundabouts and is the official document issued by the Physical Planning Department of the Ministry of Lands and Settlement. Further, that it was questionable that the design map of **1990** referred to by the 1st Respondent would be at odds with the **Approved Development Plan . [Particular withheld]** The deponent stated further that the said design map was a fabrication firstly because there is a major road newly constructed and in harmony with the **Approved Development Plan of 1993** that passes through the proposed roundabout. There that therefore

is no way a major road can pass through a roundabout. Secondly, that it would be illogical to construct and complete a major road if there was planned that there would be a fourth roundabout.

On the claim of overriding interest over the Petitioner's title made by the 1st Respondent, it was deposed that the same could only be exercised through compulsory acquisition process as to do otherwise would be to negate the safeguards of ownership as provided under **Section 26 of the Land Registration Act and Article 40 of the Constitution**. Nevertheless, that even where the 1st Respondent would be right on its contention of the suit property being a road reserve, the constitutional principle of fair administrative action would require the 1st Respondent to approach the Court for appropriate orders and not act unilaterally by invading the property.

In the Further Affidavit, the deponent outlined how the Petitioner acquired the original property. He referred to annexures marked "SSL1", "SSL2", "SSL3", "SSL4" "SSL5", and "SSL6" being a letter of expression of interest for allocation of the original property, a letter by the commissioner of lands directing the Director of Physical Planning to prepare PDPs, a letter to the interested party confirming that PDPs had been prepared, an allotment letter, survey and deed plan issued thereby meeting the procedure for Government Land allocation. The deponent stated that the affidavits sworn for the Respondents did not disown, disavow or cast aspersions on the probity, factual accuracy and/or authenticity of the numerous letters and documents availed by the Petitioner which support its assertions as the lawful and proper proprietor of the suit property which is neither a road reserve nor a buffer zone.

Submissions

The Petition was canvassed by way of written submissions filed together with bundles of authorities. I have diligently read through the submissions and appreciate the authorities pointed out by the Counsels.

Determination

Both parties went to great lengths in support of their urgings on the ownership of the suit property. The Petitioner, in its List of Documents filed on **7th February 2014**, availed copies of title for original property as well as the suit property and took the Court through the process through which it surrendered a portion of the original property upon receipt of information that the said portion had encroached on the By-pass. The Petitioner, in its Further Affidavit sworn on **6th October 2014**, also went beyond the titles to meticulously show how it acquired the property. Notably, however, the 3rd and 4th Respondents in their Grounds of Opposition raised an issue that is pertinent to the disposition of this Petition. Thereunder, it was averred that there is a suit pending before this Court **ELC No. 81 of 2007 formerly ELC No. 1245 of 2002** in which the original property herein from which the suit property was excised is the subject matter. This averment was explained in detailed in the submissions filed by the Litigation Counsel on behalf of the 3rd and 4th Respondents on 13th October 2014.

It was submitted that the Petitioner herein, who is the Plaintiff in the said suit had failed to disclose to the Court of the pendency of the said matter. Further, that ownership of the original property being the subject of dispute in the said suit, ought to be determined before this Court can entertain the Petition. Following this revelation, this Court indeed sought directed the Deputy Registrar to avail the said file for perusal. I have carefully gone through the file and established that there is indeed a dispute as to ownership of the original property. In the Amended Plaint dated 19th February 2004, the Plaintiff, the Petitioner herein, avers that there was an intended revocation of its title by the Commissioner of Lands allegedly on the grounds that the deed plan used to acquire the title was a forgery. The Plaintiff further reveals that the Commissioner of Lands allocated the said property to the 4th Defendant who subsequently transferred the same to the 5th and 6th Defendants therein. The record shows that the matter was last in Court on **23rd November 2009** wherein parties by consent took out the matter to pave way for negotiations. The matter was to be mentioned on **15th February 2010** for further orders. On **28th May 2012**, the Plaintiff filed a list of documents.

From the foregoing, it is evident that the property, subject matter of the Petition is also the subject of a pending suit. Further, and most importantly, issue in dispute is ownership thereof. This being a Court of record, it would be clearly indicated in the proceedings if the suit (**ELC No. 81 of 2007**) had been disposed off whichever way. In the absence of such record, I do find that the suit pends determination. This brings me to **Prayer (b)** of the Petition wherein the Petitioner seeks a declaration that it is the owner of the suit property. In view of the pending dispute as to ownership of the property, this Court cannot with certainty enter issue this declaration because doing so would be to avert the determination of **ELC No. 81 of 2007** noting that the Defendants therein are not party to this Petition. I am also of the considered view that the issues raised in this Petition as to whether the suit property is Private Property or Government Land can be determined in the said suit.

Having found that the Petitioner's ownership of the property is subject of dispute in another matter, it follows therefore it cannot claim (**Prayer c**) that its constitutional right to property and fair administration under **Articles 40 and 47 of the Constitution**. Similarly, I cannot make a finding of (**Prayer g**) damages in favour of the Petitioner. In my view, an award of damages is tied to the issue of ownership, in that one must establish prima facie that they are the lawful proprietors of a property. Until such time as ownership is determined in the **ELC No. 81 of 2007**, this Court shall refrain from making this declaration.

The remaining question is whether the Petitioner is entitled to the injunction orders as prayed in (**Prayers d and e**). As found hereinabove, ownership of the suit property is yet to be determined. However, even if the Court were to rule on the basis that the Petitioner is the lawful proprietor thereof, I would decline to issue injunction orders. My finding is premised on the principle of public interest. The suit property is described to be at the mouth of the Southern By-Pass on Likoni Road. The Petitioner also admits that the suit property is in very close proximity to the By-Pass. Admittedly, there is a lot of debate as captured in the summary whether there was intended to be created a fourth roundabout/inter-change which essentially would swallow up the suit property. Importantly, however, it was deposed for the 1st and 2nd Respondents that the basis of construction of the by-passes and inter-change is to divert traffic from the City Centre. I agree with the Respondents that such construction would serve the public at large and in particular serve to decongest the city centre which lately has continued to suffer unprecedented traffic snarl ups and congestion. Mutungi J. aptly stated in the case of **Veronicah Waithira Trustee Of Inter-Christian Churches & 3 others v Kenya National Highways Authority ELC Civil Suit No. 911 OF 2013 [2014] eKLR** that:

“Although there is no doubt the plaintiffs would be greatly inconvenienced and would suffer damages if their developments on the suit property were to be demolished, my view is that the wider public would suffer more if the road, the Southern Bypass that is intended to help decongest the City Centre is stalled by reason of an injunction having been granted barring its construction..... hindering the completion of the construction of the Southern By pass, no doubt involves the expenditure of colossal public funds. “

In safeguarding the right to ownership of property, **Article 40(3) (b) of the Constitution** envisages a situation where person may be deprived of its property where such deprivation is for public purpose or public interest, save that it must be carried out in accordance with the law.

It is my finding, therefore, and I do so hold, that construction of the inter-change represents greater public interest. However, I do note that the Petitioner may also have an interest thereon in the event that it succeeds in the pending suit. In such eventuality, the Petitioner will be at liberty to sue for compensation.

The upshot is that the Petition herein is hereby dismissed with no order as to costs.

For the avoidance of doubt, I wish to clarify that the dismissal of this Petition shall not bar the Petitioner from pursuing compensation in the event that it is successful in proving ownership.

Dated, Signed and Delivered this 4th day of June 2015

L.N. GACHERU

JUDGE

In the Presence of:-

.....For the Petitioner

.....For the 1st and 2nd Respondents

.....For the 3rd and 4th Respondents

..... Court Clerk

L.N. GACHERU

JUDGE