



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

PETITION NO. 5 OF 2020

(FORMERLY MILIMANI HIGH COURT CONSTITUTIONAL PETITION NO. E223/2020)

PETER NDIRANGU KIMERIA.....PETITIONER/ APPLICANT

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITY.....1ST RESPONDENT

KENYA URBAN ROADS AUTHORITY.....2ND RESPONDENT

THE CABINET SECRETARY

MINISTRY OF ROADS AND INFRASTRUCTURE.....3RD RESPONDENT

THE CABINET SECRETARY

MINISTRY OF LANDS AND URBAN DEVELOPMENT.....4TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....5TH RESPONDENT

RULING

The Petitioner/ Applicant filed the instant Petition together with an Application seeking for conservatory orders. However, the 1st Respondent herein filed a Notice of Preliminary Objection and averred that the Court has no jurisdiction to deal with the Petition. The Court directed that the Notice of Motion Application and the Preliminary Objection be heard together.

In the **Notice of Motion Application** dated **22nd July 2020**, the Petitioner/Applicant sought for orders that;

1. That this Honourable Court be pleased to issue conservatory orders and/or orders restraining the 1st and 2nd Respondents whether by themselves, their authorized agents, servants, employees, workers or otherwise howsoever from trespassing on, wasting damaging and / or demolishing the building erected on land reference No. Kiambaa/ Ruaka/1625 (the suit property) or otherwise interfering with the Petitioners quiet possession of the suit property pending the hearing and determination of this Petition.

2. THAT the costs of this Application be provided for.

The Application is premised on the grounds that on **8th July 2020**, the Petitioner was served with Demolition Notice dated **23rd June 2020**, by the 1st Respondent indicating that the suit property had encroached on a Road Reserve along the Western By-pass road and that the Petitioner's building having allegedly been constructed at Ruaka Coordinates **N9866948.22 E253198.501**, without the written permission by the 1st Respondent's Director General. Further that the **Notice** required the Petitioner to demolish and remove the building within 30 days from the date of the **notice**, failure to which the 1st Respondent would remove the encroachment. It was contended that the Notice would lapse on **23rd July 2020**. Further that the Notice indicated that the Petitioner's building was situated on part of parcel **L.R Kiambaa/Ruaka/467**, which had been acquired for road development via **Gazette Notice 3345 and 3346** of **31st October 1969**. That the Notice further outlined the alleged contraventions by the Petitioner/Applicant.

That prior to the development, the 2nd Respondent had issued a removal notice dated **13th October 2011**, addressed to owners of properties in Ruaka area claiming that some properties had encroached on the Eastern and Northern **By-pass** reserves. The Petitioner/ Applicant contended that at the time of his acquisition of the suit property, he ascertained that the suit property did not fall on, nor encroach on any road

reserve or public land as per the records held by the Ministry of Lands. Further that the title deed issued to the Petitioner/ Applicant has never been revoked nor cancelled. It was further contended that there was no valid acquisition of **L.R Kiambaa/Ruaka/ 467**, and that any action by the 1st and 2nd Respondents including the intended demolition would be arbitrary deprivation and illegal expropriation of the Petitioner/ Applicant's suit property and infringements of his rights to property as guaranteed by the Constitution. Further that the unlawful demolition will cause undue hardship to the Petitioner's/ Applicant and his tenants, as the notice issued is too short and oppressive. That as a result of the demolition threats issued by the 1st and 2nd Respondents, the Petitioner has suffered and continues to suffer distress and anxiety and he urges the Court to protect his proprietary rights. That unless the Court intervenes and issues conservatory orders, the Petitioner's/ Applicant's right will be deprived, contravened occasioning him to suffer irreparable harm and loss.

In his supporting Affidavit sworn on **22nd July 2020**, the Petitioner/ Applicant **Patrick Ndirangu Kimeria** averred that he acquired the suit property from one **Jill Elizabeth Mumbi** on **28th June 2005** for **Kshs. 950,000/=** and was registered as the absolute owner on **6th December 2005**. That upon acquisition, he developed the suit property and has invested in excess of **Kshs. 15,000,000/=**. It was his contention that the intended demolition contravenes the records held at the Ministry of lands. That proper administration of the law and his legitimate expectation require that the Petition be allowed as he has disclosed Constitutional violations.

The Application is opposed and the 1st Respondent filed a Replying Affidavit sworn by **Daniel Mbuteti**, its Assistant Director, Survey department in the Directorate of Highway Planning and Design on **8th August 2020**. It was his contention that the encroached suit property was compulsorily acquired for road development on **31st October 1969**, through gazette notice **3345** and **3346**. He further averred that the demolition notices issued to the Petitioner/Applicant were issued in line with the provisions of **Section 49 (1) (a)** of the Kenya Roads Act and **Section 9 (1) of the Traffic Act**. That upon conducting an inspection on the site, it was established the Petitioner's/ Applicant's buildings were encroaching on the road reserve with some being constructed on top, beside and even past the road marker posts erected by KENHA. It was his contention that the erected structures are a risk to motor vehicle users and that the Petitioners are risking their lives and therefore their omissions and actions must not be left to endanger road users and their neighbours through interference with road utilities and reducing visibility along the road.

He further contended that the Petitioner/ Applicant did not serve the Director General of **KENHA** with one months' notice as required under **section 67(a) of the Roads Act 2007**, outlining his grievances as required by law. That the purpose of the notice is to afford the Authority an opportunity to resolve any disputes and the same cannot amount to hindering a litigant from accessing the seat of justice. It was his contention that the matter as filed by the Petitioner is fatally defective as he failed to serve the one month's notice and that had the Petitioner served the said Notice, the 1st Respondent would have advised them of the provisions of **Section 18(2) of the Land Registration Act** which reserves boundary disputes to the determination of the Land Registrar. He further averred that the dispute presented is a boundary dispute and the Application is premature. Further that this Court can only exercise Appellate and not original jurisdiction over matters relating to compulsory acquisition of land. That the Petition offends **Section 133, 133B**, of the Land Act that establish the Land Acquisition Tribunal to hear and determine Appeals from the decision of the National Land Commission. It was his contention that the Petitioner/ Applicant cannot benefit from an illegality and that the Petitioner has no recourse as against the 1st Respondent for legally discharging their mandate. That the Petitioner/ Applicant can air their grievances to the right authority and the Court should not be used to sanitize illegal occupation of public land. He urged the Court to dismiss the Application.

The 1st Respondent filed a Notice of Preliminary Objections and grounds of Opposition dated **8th August 2020** on the grounds that;

- 1. The Petitioner/ Applicant's Application and Petition are fatally defective as the Petition does not comply with the mandatory provisions of Section 67(a) of the Kenya Roads Act 2007 requiring thirty (30) days' notice to the Director general prior to the filing of a suit.**
- 2. The Applicant's Application is one whose subject matter is the boundary dispute of plot Kiamba/ Ruaka/467 and encroachment on road reserve. The Applicant's Application is premature as it offends section 18 (2) of the Land Registration Act, 2012 which mandatorily reserves boundary disputes for determination by the Land Registrar in the first instance, prior to moving this Honourable Court.**
- 3. The Applicant challenges the fact that Plot No. Kiambaa /Ruaka/467 was compulsorily acquired via gazette Notices 3345 and 3346 of 31st October 1969 . The entire Petition offends the provisions of section 13(4) of the Environment and Land Court Act which provides that this Honourable Court can only exercise Appellate and not original jurisdiction over matters relating to compulsory acquisition of land under section 13(2) (b) of the Environment and Land Court Act.**
- 4. The Petition offends Section 133A,133B of the Land Act that establish the Land Acquisition Tribunal to hear and determine Appeals and determine Appeals from the decision of the National Land Commission. The instant Petition is prematurely before Court and this Court lacks jurisdiction to entertain the instant Petition.**
- 5. The instant Petition, though clothed as a claim for violation of the Petitioners Constitutional rights, is actually a dispute over the boundary of the plot No. Kiambaa/Ruaka/467 and the jurisdiction on boundary disputes lies with the land registrar in accordance with section 18(2) of the Land Registration Act 2012 and not this Honourable Court.**

The Petitioner **Patrick Ndirangu Kimeria** swore a Supplementary Affidavit on **20th August 2020**, in opposition to the Notice of Preliminary Objection and the Replying Affidavit dated **8th August 2020**. It was his contention that the arguments advanced by the 1st Respondent offend all notions of justice, equity, fairness and rationality as it has misconstrued the jurisdiction of the Court to deal with a dispute of this nature, as the Court is vested with jurisdiction in accordance with **Section 162(2)(b)** of the Constitution and provisions of the Environment and Land Court Act i.e **Section 13(2) (d) of the Act**. He further averred that 1st Respondent has overlooked and disregarded critical issues raised by the Petition. That there was failure by the Land Registrar to note against the register and other records held by the lands office that the suit property had been acquired for purpose of road developments and therefore the said land was never validly acquired.

It was his contention that the dispute herein is not a boundary dispute and neither is it a dispute pertaining to compulsory acquisition. That he is not opposed to the lawful acquisition of his property for public use, but that the 1st Respondent should demonstrate that it validly acquired the suit property and therefore the Court has jurisdiction. He further averred that Courts have held that statutory provisions that seeks to hinder any person's access to justice must be seen to violate **section 48** of the Constitution and prejudice the litigant. He contended that as the Petitioner, he has met the threshold for the Court to exercise its discretion in his favour and he urged the Court to dismiss the Preliminary Objection and issue the conservatory orders based on merit.

The Application and the Notice of Preliminary Objection were canvassed by way of written submissions which the Court has now carefully read and considered together with the pleadings of the parties, the annexures thereto and the cited authorities and finds the issues for determination are;

1. Whether the Notice of Preliminary Objection is merited.

2. Whether the Notice of Motion Application dated 22nd July 2020 is merited.

1. Whether the Notice of Preliminary Objection is merited.

A Preliminary Objection was described in the **Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696** to mean:-

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Further Sir **Charles Nabbold, JA** stated that:-

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

The above being the description of a **Preliminary Objection**, it is evident that a **Preliminary Objection** raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However it cannot be raised if any facts has to be ascertained from elsewhere, the Court is required to probe evidence or the court is called upon to exercise judicial discretion. In the case of **Quick Enterprises Ltd..Vs..Kenya Railways Corporation, Kisumu HCCC No. 22 of 1999**, the Court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

In determining a **Preliminary Objection**, the Court will take into account that a **Preliminary Objection** must stem from the pleadings and raises pure point of law. See the case of **Avtar Singh Bhamra & Another...Vs....Oriental Commercial Bank, Kisumu HCCC No.53 of 2004**, where the court held that:-

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

The Court will first determine whether what the 1st Respondent has raised amounts to a Preliminary Objection as described in the **Mukisa Biscuit Case (supra)**.

In its **Preliminary Objection**, the 1st Respondent/Objector has averred that the Court lacks Jurisdiction to deal with the instant suit as the Petitioner/ Applicant has failed to satisfy the requirements of **Section 67 (a) of the Kenya Roads Act No. 2 of 2007**, which requires that a **written notice**, be served upon the Defendant/ Objector before a suit is to be commenced. It is not in doubt that the issue of whether or not the provisions of the law have been complied with before the filing of the suit, goes to the jurisdiction of the Court and further does not require the ascertaining of the facts. Therefore, this Court holds and finds that the objector by the 1st respondent is a proper Preliminary Objection as it goes to the jurisdiction of the Court.

The other grounds raised in the Preliminary Objection are that the Petition herein is a boundary issue and not an encroachment issue and that it offends **Section 18(2) of the Land Registration Act 2012**. Further that it challenges the fact that **L.R 467** was compulsorily acquired and it offends **section 13(4) of the Environment and Land Court Act**. The final ground was that the dispute is actually a boundary dispute.

The court notes that the instant suit has been filed as a Petition. Further, the Court has perused the Petition and it is clear that the reliefs sought by the Petitioner are declarations that the Rights of the Petitioner/ Applicant have been violated and therefore the acts are unlawful. It is the Court's considered view that the grounds that the 1st Respondent/ Objector is raising are matters of facts that must be ascertained. For the court to be able to effectively come to a conclusion that the cause of action in the suit are challenging of compulsory acquisition or it is a boundary dispute, it will have to ascertain facts and probe evidence. This aspect of ascertaining facts does not amount to a Preliminary Objection and the court finds that these are mere grounds upon which the Petition is founded but not the reliefs sought. See the case of.

Oraro...Vs... Mbaja (2005) 1KLR 141, where the Court held that:-

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence.”

The above is more so as the Petitioner has disputed the fact that the suit is not a boundary dispute. In the case of Mombasa ELC. No. Constitutional petition 1 of 2019 Lucy Msigo Waita...Vs...KENHA submitted by the Defendant/ Objector the Court held that;

“The right to property is protected under Article 40 of the Constitution. Generally speaking, in order for a Petitioner to succeed in any constitutional petition, the law requires Petitioner must demonstrate that the constitutional rights subject matter of the Petition have been actually denied or violated.”

Since the Court will have to probe evidence and ascertain facts to enable it come to a conclusion that the Petitioner’s rights have actually been violated, then this Court finds and holds that the other grounds as raised cannot be raised as Preliminary Objections.

Therefore, this Court finds that only the issue of Jurisdiction has properly been raised as a Preliminary objection. Did the Petitioner comply with **Section 67(a) of the Roads Act** requiring a party to give 30 days written notice before filing of a suit?

It is not in doubt that the instant suit is a Petition. Given that the instant suit is a Petition and the Petitioner/ Applicant has averred that his rights have been violated, the Court finds that such a right cannot be taken away on the mere fact that a **notice** of intention to sue has not been served. See the case of Benson Ruiyi Njane ...Vs... Kenya Rural Roads Authority & 36 Others [2016] eKLR where the Court held that;

“The limitation set out in Section 67 of the Roads requiring notice of thirty days to the Authority before instituting suit only applies to ordinary civil claims. It does not apply to cases (Petitions/Applications) alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or threatened. The Respondents’ claim to the contrary is not borne out by the Constitution, and that leg of defence therefore fails.”

Further in the case of Anthony Ngili Munguti & 12 Others ...Vs... Kenya National Highways Authority & Another [2017] eKLR;

“A fundamental right guaranteed by the Constitution cannot be taken away on the basis that demand notice stating intention to sue was not issued. It is the finding of this court that such a right is so supremely protected, that even a verbal notice such as for example, “Hey, this is our home, do not demolish it” is valid enough to stop the respondent on its track. Such a right cannot be defeated by statutory provision. It is the finding of the court that a constitutional provision on access to justice supersedes any statutory powers limiting enforcement of constitutional rights.”

Having held that the instant suit is a Petition and the requirements of **Section 67(a)** are not mandatory, then the Court finds and holds that the Notice of Preliminary Objection is not merited and the same is dismissed with costs to the Petitioner.

2. Whether the Notice of Motion Application dated 22nd July 2020 is merited.

The Petitioner/Applicant has sought for conservatory orders. Conservatory orders can also be referred to as temporary orders of injunction. In determining whether or not to grant the orders sought, the Court is guided by the principles as set out in the case of Giella ...Vs... Cassman Brown Co Ltd (1973)EA 358. These principles are:-

“The conditions for granting a temporary injunction in East Africa are well known and these are: First, the Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which might not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience. See also E.A Industries ..Vs...Trufoods (1972) EA 420.”

It is therefore the duty of the Applicant to establish that it has a *prima-facie* case with probability of success. A *prima-facie* case was described in the case of Mrao Ltd...Vs...First American Bank of Kenya Ltd & Others (2003)KLR, to mean:-

“A case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

Has the Petitioner /Applicant then established a prima facie case? It is not in doubt that the Petitioner/ Applicant is the registered owner of the suit property having been issued with a title deed on the **6th December 2005**.

As a registered owner, the Applicant is deemed to be an absolute and indefeasible proprietor whose proprietorship can only be challenged as provided by the law. See **Section 26(1) (a) & (b)** of the Land Registration Act.

Being the registered proprietor of the suit property, the Petitioner/Applicant has established that he has an interest over the suit property and he did so by production of title of ownership. The Applicant is the owner of the suit property, but it is not in doubt that he has been threatened with demolition vide the letter dated **23rd June 2020**, confirming that indeed there is likely hood of his rights being infringed

upon. Taking into account the above analysis of facts, the Court finds and holds that the Plaintiff/Applicant has established a **prima facie** case with probability of success as the Applicant's rights can only be curtailed in accordance with the law.

On whether the Plaintiff/ Applicant will suffer **irreparable harm**. '**Irreparable loss**' was described in the case of **Paul Gitonga Wanjau... Vs...Gathuthi Tea Factory Co. Ltd & 2 Others, Nyeri HCC No.28 of 2015**, as **simply injury or harm that cannot be compensated by damages and would be continuous**.

It is evident that the Petitioner/Applicant is in possession of the suit property and has developed on the said property. The Court find that if the conservatory orders are not granted and the Petitioner's building is demolished without granting him an opportunity to first prosecute his Petition, then the Petitioner might suffer irreparable harm that cannot be compensated by way of damages. See the **Case of Niaz Mohammed Janmohammed ...Vs... Commissioner for Lands & 4 Others (1996) eKLR**, where the Court held that:-

"It is no answer to the prayer sought, that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such right or atone for transgression against the law, if this turns out to have been the case. These considerations alone would entitle the Applicant to the grant of the orders sought".

Equally in this case, the Court finds that if the Applicant's rights are infringed, no amount of money can compensate such infringement. Therefore the Court finds that the Applicant has established that he is likely to suffer irreparable loss and/or injury which cannot be adequately compensated by an award of damages.

On the third limb of ***if the Court is in doubt, then it ought to determine the matter on the balance of convenience***, the Court finds that it is not in doubt and there is no need of determining the balance of convenience.

Having carefully considered the Notice of Motion Application dated **22nd July 2020**, bought by the Petitioner/Applicant, the Court finds it merited and the same is allowed entirely with costs to the Petitioner/Applicant.

It is so ordered.

Dated, signed and Delivered at Thika this 8th day of October, 2020

L. GACHERU

JUDGE

8/10/2020

Court Assistant - Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Gikaria for the Petitioner

Mr. Munga for the 1st Respondent

No appearance for the 2nd Respondent

No appearance for the 3rd Respondent

No appearance for the 4th Respondent

No appearance for the 5th Respondent

L. GACHERU

JUDGE

8/10/2020