

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ELC CASE NO. 307 OF 2018**

**SORAYA INVESTMENTS LTD.....PLAINTIFF**

**VERSUS**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....  
....DEFENDANT**

**JUDGMENT**

**A. Plaintiff's claim**

1. By a plaint dated 24.12.2018 the plaintiff sued the defendant seeking the following reliefs;

- a. *A declaration that the entry and demolition by the defendant on the property known as CR.49868 Plot No. Subdivision No.16584 (orig.No.3533/2) Section 1 MN(MN/I/1684) was in violation of the plaintiff's proprietary rights and an act of trespass.*
- b. *A permanent injunction do issue to restrain the defendant by itself and/or their agents, employees, assignees, successors and representatives from undertaking demolition, construction, alienating and/or in any other way interfering with the property*

*known as CR. 49865 Plot No. subdivision No. 16584 (Orig. No. 3533/2 Section 1 MN.(MN/I/16584).*

- c. Exemplary damages for trespass.*
- d. Special damages.*
- e. Cost of the suit.*
- f. Interest on (d) and (e) above.*
- g. Any other relief that this honourable court shall deem fit to grant.*

2. The plaintiff pleaded that at all material times it was the legal owner of sub-division No. 16584 (Original No. 3533/2) Section I/MN (*the suit property*) located along the Mombasa-Malindi Highway (*the Highway*). It was pleaded that on 23.02.2018 the defendant invaded the suit property and demolished the perimeter wall around the property in the guise of removing illegal structures or encroachments on the said Highway.
3. The plaintiff further pleaded that thereafter the defendant commenced a process of 'alienating' a portion of the suit property. It was the plaintiff's case that he was never given notice of the illegal entry and demolition of its wall as required under *Section 49 (4) of the Kenya Roads Act*.
4. It was the plaintiff's case that after the said demolition it incurred financial expenses in the sum of Kshs. 748,722/= in

repairing the wall and Kshs. 52,000/= per month with effect from March 2018 in hiring security guards to protect the suit property. It was the plaintiff's case that despite issuance of a demand and notice of intention to sue the defendant had failed to make good its claim thereby making the suit necessary.

**B. Defendant's defence**

5. The defendant filed a defence and counter-claim dated 16.10.2020 in response to the suit. By its defence, the defendant denied liability for the plaintiff's claim. In particular, it pleaded that the suit property formed part of the road reserve for the Highway and that the plaintiff's construction of the perimeter fence constituted an illegal development under *Section 49 (1) of the Kenya Roads Act*.
6. The defendant pleaded that while it was undertaking rehabilitation and upgrading of the Highway it conducted a survey of all the properties abutting the Highway and published relevant notices in the print and electronic media requiring all the concerned parties to remove encroachments on the Highway to pave way for the intended construction works.

7. It was pleaded that the plaintiff was issued with a notice dated 11.03.2016 informing it of the encroachment and intended demolition but the plaintiff did not take steps to remove the offending perimeter wall. The defendant further stated that it conducted sensitization and civic education meetings in the relevant area between 20 -25 June 2016 on the intended project which resulted in many residents removing encroaching structures.
8. The defendant pleaded that the road reserved of the Highway was 36.58M wide all through and that the plaintiff's perimeter wall fell within that reserve.
9. By its counter-claim, the defendant reiterated the contents of its defence and pleaded that the plaintiff had illegally and unlawfully acquired a portion of the road reserve for the Highway. It was pleaded that when a notice of demotion was issued the plaintiff failed to remove the wall in consequence whereof the defendant removed the same pursuant to the provisions of *Sections 49 (5) of the Kenya Roads Act and Section 9(2) of the Traffic Act.*

10. The defendant further pleaded that upon demolition the plaintiff had unlawfully rebuilt the wall pending the hearing and determination of the suit. As a result, the defendant sought the following order in the counter-claim;

*a. A declaration that the plaintiff holds the title to the suit property illegally through fraud, misrepresentation and/or mistake.*

*b. A declaration that the suit property forms part of a road reserve known as Sabasaba- Malindi (B8) road.*

*c. An order that the plaintiff makes good the encroachment on a road reserve known as Sabasaba- Malindi (B8) road.*

**C. Plaintiff's rejoinder**

11. The plaintiff filed a reply to defence and defence to counter-claim dated 03.11.2020. By the reply to defence, the plaintiff denied all the factual allegations contained in the defence and put the defendant to strict proof thereof. The plaintiff denied any encroachment upon the Highway and it maintained that the perimeter wall was within its property and that the same was unlawfully demolished by the defendant without following due process.

12. In its defence to counter-claim, the plaintiff denied all the material allegations pleaded against it and put the defendant to strict proof thereof. It was contended that the size of the suit property as contained in the title documents has never been adjusted downwards by the land registrar. It was further contended that the defendant had given an intention to acquire a portion of 0.2778 ha of the suit property hence it was estopped from claiming that any portion thereof falls within a road reserve.

**D. Trial of the action**

**13.** At the trial hereof, the plaintiff called 3 witnesses before closing its case. The gist of the plaintiff's evidence was that it was still the registered owner of the suit property and that the defendant had unlawfully entered the property and demolished its perimeter wall without lawful justification or excuse. One of the plaintiff's witnesses was a surveyor whereas one other was a valuer.

**14.** On its part, the defendant the called one witness at the trial in defence of the suit and in support of the counter-claim. The witness was Michael Otieno Oboto who was a surveyor in the

defendant's employment. The gist of his evidence was that Highway in question maintained a uniform width of 36.58M (about 120 feet) and that it was the plaintiff who had encroached on the Highway by 0.166ha.

**E. Directions on submissions**

- 15.** Upon conclusion of the trial, the parties were given timelines within which to file and exchange their respective submissions. The record shows that the plaintiff's submissions were filed on 04.01.2026 whereas the defendant's submissions were not on record by the time of preparation of the judgment.

**F. Issues for determination**

- 16.** The court has noted that the parties did not file an agreed statement of issues of determination. As such, the court shall frame the issues as provided for under *Order 15 rule 2 of the Civil Procedure Rules*. Under the said rule, a court may frame issues from any of the following;

- a. The allegations contained in the pleadings or in answers to interrogatories.*
- b. The allegations made on oath by or on behalf of the parties.*
- c. The contents of documents produced by the parties.*

17. The court has considered the pleadings, evidence and documents in this matter. The court is of the view that the main issues for determination herein are as follows;

- a. Whether the plaintiff has proved its claim against the defendant.*
- b. Whether the defendant has proved its counter-claim against the plaintiff.*
- c. Whether the plaintiff is entitled to the reliefs sought in the suit.*
- d. Whether the defendant is entitled to the reliefs sought in the counter-claim.*
- e. Who shall bear costs of the action.*

**G. Analysis and determination**

**a) Whether the plaintiff has proved its claim against the defendant**

18. The court has considered the evidence and submissions on record on this issue. There is really no dispute before the court that the plaintiff is the registered proprietor of the suit property. The material on record shows that the plaintiff has 2 parcels of land in the area of concern. One of them is not under dispute and the defendant has initiated a process of compulsory acquisition thereof. However, the second parcel

(the suit property) is disputed and is the subject of the instant suit.

19. The plaintiff's position was that as the registered owner of the suit property it is entitled to enjoy all the rights of a registered owner and that the defendant's action of demolishing the perimeter wall on the property was unlawful and a violation of its proprietary rights. On the other hand, the defendant's position was that the road reserve for the Highway was surveyed way back in 1956 and that its width has always been maintained at 120 feet wide as shown by subsequent surveys. It was the defendant's case that the width of the road was considerably decreased at the point where the plaintiff constructed perimeter wall.
20. The court has perused the survey plan registered as F/R No.76/49 which was authenticated in 1956. It depicts the highway as being of uniform width even at the bends. There is a subsequent survey plan F/R No. 118/58 registered in 1970 which also maintains the same width of the Highway. It would appear that the plaintiff's later survey of 2003 registered as F/R No. 353/63, which was a sub-division survey, resulted in a

different scenario. It is apparent from the material on record that whereas the Highway maintains a uniform width on the ground both before and after the plaintiff's property, the width considerably narrows specifically at the point where the plaintiff erected the perimeter wall. The court finds no logical or rational explanation for this sudden and erratic deviation of the normal course of the Highway. The only reasonable conclusion which can be drawn from the scenario is encroachment onto the Highway by the plaintiff.

21. The court takes the view that the fact that a property owner holds title documents to a particular parcel does not grant him a blank cheque to encroach on the road reserve abutting his land. The mere fact that the plaintiff obtained development permission from the county government to erect the perimeter fence did not relieve it of the obligation to refrain from encroaching on the road reserve. In the opinion of the court, it doesn't matter if the mistake on survey was made by the surveyors of the previous owner or the plaintiff's surveyors. The net result was encroachment on the Highway which is

strictly prohibited both under *Section 49 (1) (a)* of the *Kenya Roads Act* and *Section 91(1)* of the *Traffic Act (Cap 403)*.

22. *Section 49 (1) (a)* of the *Kenya Roads Act* stipulates that;

*“49. (1) Except as provided in subsection (2), no person or body may do any of the following things without the responsible authority’s written permission or contrary to such permission Authority;*

- (a) erect, construct or lay, or establish any structure or other thing, on or over or below the surface of a road reserve or land in a building restricted area;*
- (b) make any structural alteration or addition to a structure or that other thing situated on or over, or below the surface of a road or road reserve or land in a building restriction area; or*
- (c) give permission for erecting, constructing, laying or establishing, any structure or that other thing on or over, or below the surface of, a road or road reserve or land in building restriction area, or for any structural alteration or addition to any structure or other thing so situated.”*

23. On the other hand, *Section 91(1) (a)* of the *Traffic Act* provides that;

*(1) Every person who, without the written permission of the highway authority—*

- (a) encroaches on a road or on any land reserved therefore at the side or sides thereof by making or*

erecting any building, fence, ditch, advertisement sign or other obstacle, or by digging thereon or by planting or sowing any tree, shrub or seeds thereon; or

(b) deposits or causes to be deposited in any manner whatever on a road any material or matter, other than road-making materials deposited for the purpose of making up or repairing the road; or

(c) digs up, removes or alters in any way the soil or surface of a road, or of any land reserved therefore at the side or sides thereof, or if done for the purpose of moving a vehicle without immediately thereafter making good the damage; or

(d) wilfully fills up, alters or obstructs any ditch or drain, whether on a road or contiguous thereto, made by or under the control of the highway authority, to carry water off the road or to keep it from flowing on to the road; or

(e) allows any sludge or any filthy or noisome matter to flow from any building or land in his occupation on to a road or into any ditch or drain made by the highway authority; or

(f) causes or allows any timber, sledge, plough or other heavy material, vehicle or implement not wholly raised above the ground on wheels to be dragged on a road; or

(g) pitches any tent, booth or stall on a road; or

(h) makes any fire on any road; or

*(i) causes any damage to the road, shall be guilty of an offence.”*

24. In view of the foregoing, the court is of the opinion that the plaintiff has failed to prove its claim against the defendant for the alleged trespass and violation of its property rights. On the contrary, the court is persuaded that the defendant is the one liable for encroachment upon the road reserve as the width of the Highway is only constricted at the point where the suit property is located.

**b. Whether the defendant has proved its counter-claim against the plaintiff**

25. By its counter-claim, the defendant sought at least 2 declarations and an order for the plaintiff to remove the perimeter wall encroaching on the Highway. In the first prayer, the defendant sought a declaration that the plaintiff's title to the suit property was obtained illegally, through fraud, mistake or misrepresentation. The material on record shows that the suit property measures about 4.767 ha whereas the area of encroachment into the Highway measures about 0.166 ha only.

26. There is no evidence on record to demonstrate that the plaintiff acquired the entire 4.767ha illegally, fraudulently or through a

mistake. It was not even clear enough if the portion of 0.166 ha forms part of the plaintiff's title. As such, the court is of the view that the wide declaration sought by the defendant is not a suitable or proportionate remedy in the circumstances.

27. The second declaration sought is equally unjustifiably wide. It seeks a declaration that the suit property forms part of the road reserve. Again, for reasons given before, the court is unable to grant such a declaration. Perhaps the only remedy which the court may grant is a declaration that the plaintiff has encroached upon the Highway to the extent of 0.166 ha and an order for removal of the offending wall.

28. In the premises, the court is only satisfied as to the existence of an unlawful encroachment on the Highway by the plaintiff to the extent indicated in the judgment. There is no adequate evidence on record to support the alleged illegal or fraudulent acquisition of the entire suit property by the plaintiff.

**c. Whether the plaintiff is entitled to the reliefs sought in the suit**

29. The court has already found and held that the plaintiff has failed to prove its claim against the defendant to the required

standard. It would, therefore, follow that the plaintiff is not entitled to the reliefs sought or any one for them since the plaintiff was the one who encroached on the road reserve.

30. The court is satisfied that the plaintiff was given adequate notice to remove the offending wall by the defendant but it failed to do the needful. The court is satisfied that the defendant published notices in the print and electronic media and undertook a sensitization and civil education exercise to alert all project affected persons of the intended project and for the encroachers to remove their structures from the road reserve. The court is further of the view that the encroachment by the plaintiff constituted a criminal offence of strict liability both under the Kenya Roads Act and the Traffic Act hence the plaintiff should not be entitled to any compensation in the circumstances.

**d. Whether the defendant is entitled to the reliefs sought in the counter-claim**

31. As indicated before, the court is inclined to grant a limited declaration and an order the removal of the perimeter wall

encroaching on the Highway. However, the court is not inclined to grant the broad declarations sought in the counter-claim.

**e. Who shall bear costs of the action**

32. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the *proviso* to *Section 27* of the *Civil Procedure Act (Cap 21)*. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons -vs- Twentsche Overseas Trading Co. Ltd [1967] EA 287*. The court finds no good reason why the successful party not be awarded costs of the suit. Accordingly, the defendant shall be awarded costs of the suit and the counter-claim.

**H. Conclusion and disposal orders**

33. The upshot of the foregoing is that the court finds and holds that the plaintiff has failed to prove its claim against the defendant on a balance of probabilities as required by law. The court has found that the defendant has proved encroachment upon the Highway road reserve by the plaintiff. As a

consequence, the court makes the following orders for disposal of both the suit and counter-claim;

***a. The plaintiff's suit against the defendant is hereby dismissed in its entirety.***

***b. The defendant's counter-claim is hereby allowed in the following terms only;***

***i. A declaration is hereby made that the plaintiff has encroached into part of the road reserve along the Sabasaba- Malindi Road (B8) to the extent of 0.166 ha.***

***ii. The plaintiff is hereby ordered to remove the encroaching perimeter wall within 60 days from the date hereof in default of which the defendant shall do so at the plaintiff's cost.***

***c. The defendant is hereby awarded costs of the suit and the counter-claim.***

It is so decided.

**Judgment dated** and **signed** at **Mombasa** and **delivered** virtually via Microsoft Teams on this **29<sup>th</sup> day** of **January 2026** in the presence of the parties as indicated below.

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**Y. M. ANGIMA**

**JUDGE**

In the presence of:

Gillian - Court assistant

Ms. Opondo for the plaintiff

Ms. Kinyua and Mr. Muganda for the defendant