



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO.331 OF 2017

RISING FREIGHT LIMITED.....1ST PLAINTIFF

COMPUTECH LIMITED.....2ND PLAINTIFF

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITY.....1ST DEFENDANT

THE REGISTRAR OF TITLES.....2ND DEFENDANT

COMMISSIONER OF LANDS.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

RULING

The Plaintiffs filed the plaint dated 17/5/2017 contending that the 2nd Defendant revoked their title over land reference number 209/11967 (“the Suit Property”) vide the Gazette Notice dated 29/7/2011. Following the revocation, they filed **Petition No. 257 of 2011- Rising Freight Limited and Computer Tech Limited v Registrar of Titles and the Commissioner of Lands**, which was consolidated and heard as **Petition No. 178 of 2011** and judgement delivered on 19/6/2012 in their favour, declaring the said revocation unconstitutional and confirming the petitioners’ constitutional right to the Suit Property.

They alleged that in contravention of the orders given on 19/6/2012, the 1st Defendant on or about the year 2014, encroached on the Suit Property, took over the land and constructed a road on it. Due to the 1st Defendants’ actions, they contended that they incurred expenses in the sum of Kshs. 624, 450/= for electricity supply to the Suit Property and Kshs. 1,083,144.05 for the construction of the boundary wall. They seek a refund of these expenses together with general, punitive and exemplary damages for contempt of court orders, and violation of their constitutional rights.

The 1st Defendant entered appearance and filed the notice of preliminary objection dated 13/6/2017. The 2nd, 3rd and 4th Defendants are yet to enter appearance and file their defences. The 1st Defendant’s objection is that the Plaintiffs’ claim against is not maintainable for being time barred by virtue of Section 67 of the Kenya Roads Act, No. 2 of 2007 which requires actions against the 1st Defendant to be instituted within twelve months of the date the act, neglect, default complained of, or in the case of a continuing injury or damage, within six months next after its cessation. The 1st Defendant contended that the Plaintiffs ought to have filed this suit by April 2015, but they filed it on 17/5/2017. It relied on the case of **Sumac Development Company Limited v Kenya National Highways Authority & 2 Others HCCC No. 348 of 2013**, in which the court dismissed the suit against the 1st Defendant for non-compliance with Section 67 of the Kenya Roads Act following the 1st Defendant’s submission that the suit against it was incompetent.

The 1st Defendant also urged that the Plaintiffs have no cause of action against it for the reason that on 17/7/2017, the National Land Commission (NLC) vide the Kenya Gazette Special Issue, directed the Chief Land Registrar to revoke the title over the Suit Property citing the reason that the land was public utility land that was reserved for the Mombasa Road Interchange Section but was illegally allocated to private individuals. The 1st Defendant argued that the cause of action was against NLC and not the 1st Defendant.

The Plaintiffs opposed the 1st Defendant’s objection through the submissions dated 5/10/2018. They submitted that their claim against the 1st Defendant was for redress over violation of their constitutional right to the Suit Property. They relied on **Jamlik Muchangi Miano v Attorney General [2017] eKLR** where the court held that in petitions concerning redress for violation of fundamental rights, statutes of limitation do not apply. They also submitted that the right to property under Article 40 of the Constitution cannot be overridden by provisions

of the Kenya Roads Act No.2 of 2007, and that the operation of the limitation imposed by Section 67(b) of the Kenya Roads Act is only applicable where the 1st Defendant was acting within the law and within its mandate as stipulated by the Act. They argued that for the 1st Defendant to have acquired the Suit Property pursuant to the Act, it would have had to comply with Section 23 of the Act which limits the legitimate means of acquisition to only two modes, that is consensual agreement and compulsory acquisition, which modes they argued were not pleaded by the 1st Defendant.

On the 1st Defendant's assertion that the Plaintiffs have no cause of action because title to the Suit Property had been revoked by NLC, the Plaintiffs submitted that NLC's power to revoke titles is not absolute since the court is empowered to safeguard the right to property. They argued that in any case, the revocation gazette notice was issued by NLC in July 2017 while their cause of action arose in 2014.

The court has considered the 1st Defendant's preliminary objection, as well as the submissions by both parties. It is not in dispute that the Plaintiffs in the instant suit filed **Petition 257 of 2011- Rising Freight Limited and Computer Tech Limited v Registrar of Titles and the Commissioner of Lands**, in which judgement was issued in their favour on 19/6/2012 confirming their right to the Suit Property.

The 1st Defendant's position is that the suit is time barred for non-compliance with Section 67 (b) of the Kenya Roads Act. The court has considered the authorities cited by the 1st Defendant. The facts in those authorities are distinguishable from the facts in this suit. In this matter, the court already made a finding that the Plaintiff had a right to the Suit Property. That remains a valid order of the court which has not been appealed against or set aside. The court is called upon to render justice without undue regard to technicalities.

The Plaintiff has a good claim asserting its right to the Suit Property in which it is challenging the construction of a road on its land. It is only just and meet that the court affords it an opportunity to be heard, guided by Article 159 of the Constitution. The 1st Defendant will have an opportunity to put forth its defence at the hearing. The issue of whether or not the suit land constitutes public property will be determined at the hearing of this suit.

The court dismisses the 1st Defendant's preliminary objection dated 3/6/2017. The costs of the objection shall be in the cause.

Dated and delivered at Nairobi this 8th day of July 2019

K.BOR

JUDGE

In the presence of:-

Ms. C. Serem holding brief for Mr. K. Kimani for the Plaintiffs

Mr. M. Omari holding brief for Mr. Obok for the 1st Defendant

Ms. Mwalizi holding brief for Mr. A. Kamau for the 2nd to 4th Defendants

Mr. V. Owuor- Court Assistant