



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC PETITION NO. 10 OF 2019

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ARTICLE 2 (1) (2) (4) (5) (6) ARTICLE 3 @ ARTICLE 20 (1) (2) (3) (4) ARTICLE 21 (1) ARTICLE 22 (1) (3) (4) ARTICLE 23 (1) (3) ARTICLE 24 (1) (2) (3) ARTICLE 40, ARTICLE 50 (1) ARTICLE 60 (1) & ARTICLE 64 (b)

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS OF AN INDIVIDUAL AS ENSHRINED IN ARTICLES 40 & 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE LAND REGISTRATION ACT SECTIONS 24, 25 & 26

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIG COURT PRACTICE RULES, 2006 AS READ WITH CLAUSE 19 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA TRANSITIONAL CLAUSES AND CONSEQUENTIAL PROVISIONS OF THE SCHEDULE TO THE CONSTITUTION

BETWEEN

KATANGI DEVELOPERS LIMITED.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

KENYA RAILWAY CORPORATION.....2ND RESPONDENT

RULING

1. Katangi Developers Limited (*hereinafter referred to as the Petitioner*) have come to court against the Attorney General and Kenya Railway Corporation by way of petition dated 1st September 2019, seeking certain constitutional remedies against the respondents. The petition is accompanied with a notice of motion dated 16th September 2019, seeking *inter-alia* an order of mandatory injunction compelling the Cabinet Secretary for Interior and coordination of National Government, the Cabinet Secretary for Transport, Infrastructure, Housing and Urban Development and the Managing Director Kenya Railways Corporation by themselves, their subordinates, agents, representatives and any other person acting on their instructions or directions to remove all fences, barriers, blockades, blockages, beacons, beacon marks and any other objects hitherto blocking, barring, impeding or interfering with access ingress or egress to or from the properties of the Petitioner registered as Kisumu municipality/Block 7/414, 415, 417, 419, 420, 421, 422, 424, 425, 426, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, and 440.

2. The supporting affidavit reiterates the grounds of the notice of motion which are:

1. The Petitioner is the registered proprietor as Lessee from the Government of Kenya for a term of Ninety Nine (99) years from 1st November 1990 of all those parcels of land or plots known as Kisumu Municipality/Block 7/414, 415, 416, 417, 418, 419, 420, 421, 422, 424, 425, 426, 429, 430, 431, 432, 433, 435, 436, 437, 438, 439, and 440.
2. The Petitioner was issued with certificates of Lease of all the properties by the District Land Registrar, Kisumu on 13th November 1998 and it still holds and is in possession of the certificates of title to date.
3. The Petitioner's said properties are developed with godowns with railway sidings and also shops cum showrooms fronting the major commercial and industrial streets in Kisumu City known as Obote Road and Oginga Odinga Road.
4. The Petitioner has enjoyed open, free, quiet, and peaceable proprietorship, occupation and user of all the twenty-two (22) properties from November 1998 until recently.
5. Most of the properties are leased to tenants who pay rents to the Petitioner while the Petitioner is at various stages of developing, redeveloping or renovating six (6) of the buildings on the properties namely Kisumu municipality/Block 7/419, 420, 421, 422, 433 and 434.
6. The Petitioner's titles to all the twenty-two (22) properties are protected and its right to occupy and use the said properties is protected and guaranteed by Article 40 (1) of the Constitution.
7. Pursuant to Article 40 (2) (b) of the Constitution the Petitioner is entitled to enjoy the ownership, occupation, user and access to the properties without limitation or restrictions.
8. Article 40 (2) prohibits the Parliament from enacting any law that permits the state to deprive the Petitioner of the said properties or to limit or enjoy the rights that go with petitioner's ownership, occupation, user of and access to the said properties.
9. Article 40 (3) prohibits the state from depriving the Petitioner of the said properties or of any interest therein except as provided for in Article 40 (3) (a) & (b).
10. Article 21 (1) binds the state and makes it a fundamental obligation of the state an every state organ to observe, respect, protect, promote, and fulfill the Petitioner's rights to its said properties.
11. Articles 22 (1) confers on the Petitioner the right to institute Court proceedings if its rights to the said properties have been denied, violated or infringed or threatened.
12. Article 23 (1) gives this Honourable court the jurisdiction to entertain the Petitioner's petition while the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 permit the Petitioner to bring this interlocutory application.
13. Sections 24, 25 and 26 of the Land Registration Act No. 3 of 2012 offer guarantee of the petitioner's titles to the said properties.
14. From sometimes on or about the 5th September 2019 state and other officers from the National Youth Service in the Ministries of Interior and Co-ordination of National Government, Transport, Infrastructure, Housing and Urban development and Kenya Railways Corporation have invaded the Petitioner's properties aforesaid and blocked access to thirteen (13) of them. They have dug holes to put fencing posts in front of the other nine (9), which front Obote Road. They have a clear intention and plan to fence and block off those plots in due course.
15. The said officers have informed the Petitioner albeit only verbally and by their manifestly unconstitutional and illegal actions that the said properties belong to Kenya Railways Corporation and that they are in the process of forcibly recovering them for the said Corporation. Full details of those acts are contained in the supporting affidavit filed herewith.
16. The petitioner's titles have not been impugned in any Court of law or competent Tribunal.
17. Rather than protect the Petitioner's right to property as per the Constitution enjoined the state and its organs has turned to the violator of those rights of the Petitioner.
18. Unless interim conservatory and prohibitory orders are forthwith issued by the Honourable Court in this application there is grave danger that the state officers and those of state organs will proceed to deprive the petitioner not only of its occupation, user of and income derived from its properties but of the very properties themselves.
19. Other acts perpetrated by the said officers by demolishing buildings and structures of other residents and business people in Kisumu including those who had valid and running leases with the 2nd Respondent without notice is clear testimony that only interim conservatory and prohibitory orders will secure the petitioner's properties pending the hearing of its petition.
20. Only a mandatory order of this Honourable Court will compel the Respondents to re-open and restore to the Petitioner access to its properties that it is now unable to easily access.

21. This application needs to be heard with expedition and ex-parte in the first instance for reasons elucidated in the supporting affidavit filed herewith.

3. The considerations for granting interlocutory mandatory injunctions were well stated in the case of Kenya Breweries Ltd & Another vs Washington O. Okeyo [2002] eKLR where the Court of Appeal said:-

“The test whether to grant a mandatory injunction or not is correctly stated in Vol.24 Halsbury’s Laws of England 4th Edition paragraph 948 which read:-

‘A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiffs ... a mandatory injunction will be granted on an interlocutory application.’”

4. Principles of law arising from the above decisions is that a court considering an application for interlocutory mandatory injunction must be satisfied that there are not only special and exceptional circumstances, but also that the case is clear.

5. This court finds that this case has special circumstances for grant of mandatory injunction at this stage, because the applicants have been in use of the access road that was closed by the respondents and the applicants on a prima facie basis are the title holders of the suit properties, the respondents had a duty to inform the applicants of the closure of the road of access as it has been used for a long period of time. The applicants are rent and rates payers, therefore they are entitled to the orders sought at this stage.

6. This court made a site visit and found that there are two access roads measuring 1.5 Kilometres each from the properties thus one runs from the Regional Commissioners office to the property and one runs from Oginga Odinga road to the port and turns to the property. The two access roads are not viable for the time as trucks have to meander in the Vast Kenya Railways property before reaching the petitioner’s property.

7. The upshot of the above is that I do grant an order of mandatory injunction compelling the Cabinet Secretary for Interior and /coordination of National Government, the Cabinet Secretary for Transport, Infrastructure, Housing and Urban Development and the Managing Director Kenya Railways Corporation by themselves, their subordinates, agents, representatives and any other person acting on their instructions or directions to remove 20 metres of the fence, barrier, blockade, blockage, beacon, beacon marks and any other objects hitherto blocking, barring, impeding or interfering with access ingress or egress to or from the properties of the Petitioner registered as Kisumu municipality/Block 7/414, 415, 417, 419, 420, 421, 422, 424, 425, 426, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, and 440. Costs in the cause. Orders accordingly.

DATED AND DELIVERED THIS 27TH DAY OF SEPTEMBER, 2019.

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

In the presence of:

Petitioner Mr. Qeu (Advocate)

Respondents Mr. Mbeka (Advocate)

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE