



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO 675 OF 2017

CENTRAL AUTO HARDWARE LIMITED.....PLAINTIFF

-VERSUS-

KENYA URBAN ROADS AUTHORITY.....1 ST DEFENDANT

REYNOLDS CONSTRUCTION COMPANY.....2ND DEFENDANT

EGIS INTERNATIONAL.....3 RD DEFENDANT

RULING

1. The plaintiff brought this suit through a plaint dated 24th October 2017. It contended that it owned Land Reference Numbers 209/20558 and 209/20559, both situated along a slip road running parallel to Enterprise Road. Enterprise Road is a dual carriageway serving Nairobi's Industrial Area. The Kenya Urban Roads Authority (**the 1st defendant**) contracted the 2nd and 3rd defendants to execute construction works in implementation of the Nairobi Eastern Missing Link Road Project (**the NML Project**). Among the works to be executed was the construction of the said slip road.

2. The plaintiff's case was that originally the slip road was designed to be 300 mm below the ground level of its properties. The defendants subsequently changed the plans and raised the level of the slip road to more than 500 mm above the ground level, meaning that run-off (storm) water would drain into the plaintiff's properties. They further contended that the defendants had placed road construction materials to the level of approximately 1.1 metres above the ground level, thereby completely blocking the plaintiff's access into and exit from the suit properties. Consequently, the plaintiff sought the following orders:

a) That the defendants their servants or agents be restrained from constructing the slip road adjacent to the plaintiff's properties situate on Enterprise Road to such level as such construction would deny the plaintiff's employees/directors access/exist to the plaintiff's properties known as LR Nos 209/20559 and 209/20559 AND that such level be 300 milimetres below the surface of plaintiff's said properties.

b) That the defendants their servants or agents be directed to construct the slip road as originally planned that is the finished road level and original ground level be 300 milimeteres below the plaintiff's properties ground level.

c) Such further or other relief as this honourble court may deem fit

3. The case of the 1st and 2nd defendants was that there was no legal stricture that fixed the road level or elevation at 300mm below the ground level of adjacent properties and that road levels and elevations were determined by physical, technical and functional factors. They further contended that the area where the slip road was being constructed was low and the plaintiff's properties were on a riparian and abutted a river. Consequently, constructing the slip road 300 mm below the ground level would turn the road into a drainage for the plaintiff's properties. The project works were being implemented within the road reserve and utmost care was being taken to ensure all adjacent properties had access irrespective of the elevation of the road. The road works under implementation were carefully designed with their own drainage system discharging into Nairobi River and at no time did they discharge the run-off water onto any of the adjacent properties. Contrary to the allegations by the plaintiff, they had made provision for the plaintiff's access onto its properties.

4. Together with the plaint, the plaintiff brought a notice of motion dated 24/10/2012 seeking an interlocutory order restraining the defendants against constructing the slip road to levels that would deny the plaintiff access to its properties. On 7/11/2017, this court issued the following interim order:

" In the interim, the 1st and 2nd defendants shall, while executing construction works, ensure that there is reasonable provision for accessing the plaintiff's property"

5. Between November 2017 and July 2019, parties held discussions and conducted joint inspection visits to the slip road with a view to

amicably resolving the dispute. Whenever the matter came up for *inter-partes* disposal of the interlocutory application, parties intimated to the court that they were having discussions and the dispute was receiving mutual attention with a view to reaching an amicable settlement of the dispute.

6. Subsequently, on 2/7/2019, the plaintiff brought a notice of motion dated 2/7/2019 seeking the following orders:

- a) The 1st defendant by itself and or its agents do forthwith execute the works as per the designs agreed upon among all the parties herein so that the plaintiff's properties may be accessible.*
- b) The 1st defendant by itself and or its agents do complete the said works within two (2) months or within such time that the honourable court may direct.*
- c) If the 1st defendant is not able to get the 2nd defendant to complete the works as agreed, let the 1st defendant to employ another contractor to carry out the works.*
- d) The defendants do pay the costs of this application.*

7. The said application was supported by the affidavit of Mukesh Velji Shah sworn on 26/6/2019 and was premised upon the following grounds:

- (a) This honourable court had ordered the parties to resolve this dispute amongst themselves.*
- (b) On the 14/3/2019 representatives of all the parties herein agreed that the 2nd defendant would start constructing a missing link road to enable the plaintiff's lorries to enter and exit from the suit properties.*
- (c) The 2nd defendant was to commence the construction within two weeks from the date of the meeting i.e from 14/3/2019.*
- (d) That the 2nd defendant has not started the construction as had been agreed.*
- (e) That the default by the 2nd defendant causes the plaintiff great losses and deprives the plaintiff of the use of its properties.*
- (f) That it is in the interest of justice that the court allows this application.*

8. The applicant contended that the parties met and mutually agreed to find an amicable settlement to the dispute in this suit. In that regard, it was resolved that within two weeks from 14/3/2019, the 2nd defendant would start constructing a missing link road to enable the plaintiff's lorries to enter and exit the suit properties. The 2nd defendant had however failed to implement the said mutual settlement.

9. The application came up for hearing on 1/10/2019. The defendants did not oppose the application. Ms Fatma who held Mr Eredi's brief submitted that the 1st defendant had agreed to redesign the entrance to the plaintiff's properties. Mr A B Shah, counsel for the plaintiff, submitted that there was no opposition to the notice of motion dated 2/7/2009 and urged the court to grant the orders sought in the application, contending that the issue in the application revolved around access to the suit properties.

10. I have considered the application. It is not contested that what the plaintiff seeks is what was mutually agreed upon by the parties to this suit. Consequently, in the absence of any opposition to the notice of motion dated 2/7/2019, I will grant prayers 1 and 2 of the application. The two months period shall run from today. The plaintiff shall have costs of the application.

11. Lastly, it is noted that the parties' decision to find an amicable settlement of the dispute was not pursuant to any court order compelling them to do so as contended by the applicant in the grounds set out in the application. It was a voluntary decision of the parties.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF OCTOBER 2019.

B M EBOSO

JUDGE

In the presence of:-

Mr. Kamau holding brief for Mr. A B Shah for the plaintiff

Ms Fatma holding brief for Mr Eredi for the 1st defendant

No appearance for the 2nd and 3rd defendants

Court Clerk - June Nafula