



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. PETITION NO. 1261 OF 2016

KENAFRIC PROPERTIES LIMITED.....PETITIONER

VERSUS

RUARAKA CONSTITUENCY

DEVELOPMENT FUND COMMITTEE.....1ST RESPONDENT

CONSTITUENCY DEVELOPMENT FUND BOARD.....2ND RESPONDENT

HON TOM J. KAJWANG.....3RD RESPONDENT

JUDGEMENT

1. The Petitioner is a limited liability company incorporated in Kenya. It is the registered owner and has been in occupation of the parcel of land known as L.R. No. 336/109 situated in Baba Dogo area within Nairobi County (“the Suit Property”).
2. Both the 1st and 2nd Respondents were established under the Constituency Development Act of 2013. The 2nd Respondent was replaced by the National Government Constituencies Development Fund Board established under the National Government Constituencies Development Act enacted in 2015.
3. The 3rd Respondent is the Member of Parliament for Ruaraka Constituency. He was also a member of the 1st Respondent.
4. The Petitioner claims that on or about 16/3/2015 the 1st and 2nd Respondents’ workers led by the 3rd Respondent, descended upon the Suit Property and started erecting a fence around it with the intention of constructing the Ruaraka Constituency Development Fund Office on private land which has not been compulsorily acquired under the law.
5. The Petitioner avers it raised the issue with the Respondents but the Respondents continued to encroach on its land; which the Petitioner claims amounts to a violation of its constitutional right to property safeguarded by Article 40 of the Constitution.
6. The Petitioner had earlier filed **Petition No. 106 of 2015** which the court found was wrongly filed before the Constitutional and Human Rights Division of the High Court. The court had granted conservatory orders on 20/3/2015 which were later vacated when the court delivered its judgement on 16/9/2016.

7. The Petitioner filed the present petition before this Court seeking a conservatory order to restrain the Respondents from encroaching on the Suit Property. It also seeks declarations that the Respondents' unlawful action of encroaching onto the Suit Property violated its constitutional right to property and that it is entitled to damages.

8. Simon Ndweka, the Corporation Secretary of the 2nd Respondent swore the Replying Affidavit in opposition to the Petition. The 2nd Respondent was renamed the National Government Constituencies Development Fund Board ("the Board") under the National Government Constituencies Development Act, which was enacted in 2015 and came into force on 19th February 2016.

9. He avers that the identification of development projects, and the allocation and disbursement of funds for projects is done at the constituency level by the National Government Constituency Development Fund Committee whose membership includes the 1st Respondent. The responsibility of ensuring that the projects submitted for funding comply with the law rests with the National Government Constituency Development Fund Committee.

10. The Board's functions include ensuring timely disbursement of funds to the constituency; ensuring efficient management of the Fund; receipt of annual reports and returns from the constituencies and ensuring proper records and reports are kept by the constituencies.

11. Section 27 of the National Government Constituencies Development Act sets out the procedure for submission and approval of proposed development projects. The 2nd Respondent's Corporation Secretary swears that the development complained of by the Petitioner in these proceedings is yet to undergo the submission procedure and approval stipulated by Section 27 of the Act.

12. He further swears that the 2nd Respondent cannot have violated the Petitioner's rights as the Petitioner alleges since it does not play any role in the implementation of the 1st Respondent's projects since its role is limited to allocation and disbursement of funds.

13. The transitional clause at Section 58 of the National Government Constituencies Development Fund Act states that the powers and liabilities of the 2nd Respondent would be taken over by the Board created under the new law.

14. The 2nd Respondent contends that the Petitioner commenced these proceedings prematurely before exhausting the dispute resolution mechanisms under the law. Both the National Government Constituencies Development Fund Act and the Constituency Development Act of 2013 have a mechanism for dispute resolution which the Petitioner did not pursue.

15. The Petitioner admits in its Written Submissions filed in court on 30/10/2016 that the 1st and 3rd Respondent's had stopped construction on the Suit Property when they were served with the conservatory orders. The Petitioner urges the court to protect the Petitioner's rights and interests in the Suit Property from occupation or attempts by the Respondents to move into it.

16. The 1st and 3rd Respondents did not file their responses to the Petition despite being served as confirmed by the affidavit of service filed in court.

17. The 2nd Respondent submits that it was wrongly sued as a party in these proceedings urging that it does not play any role in the implementation of constituency development projects. It relies on the decision in **Abdul Waheed Sheikh & Others v Commissioner of Lands & 3 Others** [2013] eKLR in which Lenaola J. (as he then was) dismissed an application for adverse possession filed by parties who were aggrieved by the court's earlier judgement. The court agreed with the Plaintiffs that for a party to be joined in existing legal proceedings, it must be demonstrated that the party's presence is necessary to enable the court effectually and completely adjudicate and settle all the questions involved in the suit.

18. The question the court has to determine is whether the Petitioner has proved that its constitutional rights under Article 40 of the Constitution were violated by the Respondents. If the court finds in the affirmative, then the next question is whether the court should grant the orders sought in the Petition.

19. The Petitioner annexed a copy of its grant registered on 7/9/2004. The court has looked at the photographs attached to the Petition. They show an open space, some parts of which are fenced with iron sheets. There are structures made of iron sheets to the far end of the land shown in the photos. Looking at the photographs, it is difficult to tell who put up the fence on the land. The photographs do not show the invasion complained of by the Petitioner. The 2nd Respondent denies that it played any role in invading the Suit Property.

20. The court is inclined to agree with the 2nd Respondent that it was wrongly joined as a party to these proceedings yet it does not play a direct role in the implementation of projects in the constituency. The proposed construction of the construction of the Ruaraka constituency office had not been submitted for approval as stipulated by the National Government Constituencies Development Fund Act. The Petitioner ought to have pursued the dispute resolution mechanism prescribed in the Act before filing this petition.

21. The court finds that the Petitioner has failed to demonstrate that the Respondents invaded the Suit Property and attempted to construct the Ruaraka Constituency Development Office on it.

22. The court dismisses the petition dated 12/10/2016 with costs to the 2nd Respondent.

Dated and delivered at Nairobi this 25th day of January 2018.

K. BOR

JUDGE

In the presence of: -

Mr. Chacha holding brief for Mr. Mogeni for the Petitioner

Mr. Were holding brief for Mr. Otieno for the 2nd Respondent

Mr. J. Oku

mu- Court Assistant