



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA

AT MILIMANI

ELC CASE NO. 1317 OF 2015

KINYUA MUREITHI.....PLAINTIFF

=VERSUS=

KENYA NATIONAL HIGHWAYS AUTHORITY.....DEFENDANT

JUDGMENT

1. The Plaintiff brought this suit against the Defendant claiming the following reliefs:-

(a) A declaration that the defendants conduct is illegal unlawful and amounts to unconstitutional acquisition of the property without following due process.

(b) The defendant compensates the plaintiff at the current market value of the suit premises.

(c) General damages for trespass

(d) An order prohibiting the defendant from trespassing or continuing to trespass on the plaintiff's parcel of Land LR No. Nairobi/Block 72/3025.

(e) An order requiring the defendant to restore LR No. Nairobi/Block 72/3025.

(f) Costs of this suit.

2. The subject matter of this suit is **LR No. Nairobi/BLOCK 72/3052 (Suit Property)** which is registered in the name of the Plaintiff but that registration has since been recommended for revocation pursuant to Gazette Notice No. 6862 of 17th July, 2017 published by the National Land Commission. The suit property is along the Southern by pass.

3. On or about April 2014, during the construction of the Southern by pass, the Defendant authorised China Road and Bridge Corporation (K) Limited to enter the suit property where it deposited huge rock boulders on the same arguing that the suit property was on land reserved for the transport corridor for the Embakasi – Kibera Railway Line and the Southern By-pass.

4. The Plaintiff demanded that the Defendant ceases the trespass to the suit property but the Defendant remained adamant contending that the suit property was public land. This is what prompted the Plaintiff to file this suit.

5. The Plaintiff stated that he bought the suit property from Fred Ole Pertet at a consideration of Kshs.4,800,000/=. The suit property was duly transferred into his name. He has since been paying rates to the Nairobi City County. In 2014 there was construction of the southern by-pass. The contractor started accumulating huge rock boulders on the suit property. He approached the Defendant and informed it that it was interfering with his property. The officials of the Defendant told him that the suit property did not belong to him as it was part of the land reserved for railway line and the southern by-pass.

6. The Plaintiff thereafter caused a valuation of the suit property which was valued at over Kshs.50,000.000/=. The Plaintiff now seeks to have the land back or he be compensated at market value.

7. The Defendant through its Assistant Director of Survey Thomas Gachoki stated that the suit property falls on land reserved for Embakasi – Kibera Railway line and the Southern by pass. In 1985 the physical Planning Department of Ministry of Lands prepared the Nairobi south structure Plan No. 42-28-85-9 which clearly shows that the suit property falls on land designated as reserve for Embakasi Kibera Railway

line and the Nairobi southern by-pass. The structure plan was the one to guide development in the area. This structure plan has never been amended. The allocation of the suit property to the individual who transferred it to the Plaintiff was therefore illegal. This applies to any other allocations falling within the reserved land.

8. I have considered the evidence adduced by the Plaintiff and the Defendants as well as the submissions filed in support of the respective positions of the parties. The Plaintiff filed the following issues for determination:-

1. Whether the Plaintiff is the proprietor of all that parcel of land known as LR No. Nairobi/Block 72/3052 along Nairobi Southern by-pass.

2. Whether the Defendant trespassed on the Plaintiff's LR. No. Nairobi/Block 72/3052.

3. Whether the Defendant's conduct amounts to constructive, unlawful illegal and unconstitutional acquisition and deprivation of the Plaintiff's property.

4. Whether the Plaintiff is entitled to the prayers in the plaint.

9. The Plaintiff claims to have bought the suit property from Fred N. Karoyia Ole Pertet on 7th March, 2008. The said Pertet is said to have been allotted the suit property on 24th July, 1999. According to the letter of allotment, the allottee was expected to pay stand premium and other charges totalling to Kshs.211400/= within 30 days from the date of the allotment. As at the time the allottee was entering into a Sale Agreement in 2008, he had not made any stand premium, rent or any other charges as clearly indicated the introductory part of the agreement.

10. The allottee who is said to have sold the suit property to the Plaintiff recorded a statement but the Plaintiff never called him as a witness to give evidence on how he was allocated the suit property. The documents produced by the Plaintiff show that the lease documents were prepared in the name of Fred Ole Pertet and transfer effected after the purchase of the suit property by the Plaintiff.

11. As at 1985, the Physical Planning Department of the Ministry of Lands had prepared the Nairobi South Structure Plan No. 42-28-15-9 which clearly showed that the area where the suit property was created from had been reserved for the Embakasi-Kibera Railway and the Southern by-pass. The Defendant produced the structure plan in evidence. There was therefore no way the suit property would have been lawfully created from land which was not available for allocation.

12. The National Land Commission reviewed grants falling within the reserved land. The grants included the one held by the Plaintiff. The National Land Commission recommended revocation of the title held by the Plaintiff. This decision was published in the Kenya Gazette of 17th July, 2017. When the Plaintiff was testifying, he confirmed during cross-examination that he was aware that his title had been recommended for re-vocation.

13. The suit property among others in the same area which are along the Southern by-pass have had their titles recommended for re-vocation. The re-vocation was as a result of the grants being found to have been irregularly obtained. This being the case, the Plaintiff cannot claim that the action of China Road and Bridge Corporation (K) Limited depositing rock boulders on the suit property with the permission of the Defendant constituted illegal acquisition of the suit property.

14. Article 40 of the Constitution is clear that it does not afford protection to a property which is found to have been unlawfully acquired. The suit property had already been designated as a reserve for the Embakasi-Kibera Railway Line and the Southern by-pass. Its allocation and subsequent transfer to the Plaintiff cannot be protected by the Constitution. The Defendant relied on my decision in **Regnol Oil (K) Limited-Vs-National Land Commission & Another (2017)eKLR**. That case had similar facts with this one. The National Land Commission had recommended the revocation of the Petitioner's title on the ground that the subject matter of the suit lay on a road reserve. The Petitioner filed a petition seeking to quash the decision of the National Land Commission. In dismissing the petition, I held that the recommendation for revocation was proper as the suit property was created from land which had been earmarked as road reserve and hence it was not available for allocation.

15. The Plaintiff relied on the case of **Vinenda Ramji Gudka & 3 Others-Vs-Attorney General [2014]eKLR** where Justice Mutungi held that there had been trespass to the Plaintiff's property and awarded damages. That case is distinguishable from the present one. In that case, the Plaintiffs' properties valued at hundreds of millions had been demolished on the ground that they were put up on a road reserve. The Defendant had contended that the property where the buildings had been put up had been compulsorily acquired for the construction of North Airport Road. The Judge found that there was no evidence that the particular land where the Plaintiffs property lay had been compulsorily acquired. He therefore found that there was trespass and he accordingly assessed damages for trespass.

16. In the instant case, the suit property had remained vacant and the Defendant's authorisation to China Road and Bridge Corporation (K) Limited to keep construction material on it did not amount to taking over the property as to amount to compulsory acquisition. The suit property had been illegally created from land reserved for Embakasi-Kibera Railway Line and Southern By-pass. The Defendant did not therefore commit any act of trespass by accumulating construction materials on it. The suit property remained a reserve and no person could lawfully lay claim to it.

17. The suit property having been acquired unlawfully, it follows that the Plaintiff cannot seek either restoration of the same to him or compensation from the Defendant. The upshot of this is that I find that the Plaintiff has failed to prove his case which is hereby dismissed with costs to the Defendant.

Dated, Signed and delivered at Nairobi on this 19th day of March 2018.

E.O.OBAGA

JUDGE

In the presence of ;-

M/s Mochama for Mr Kipkorir for Defendant

Court Assistant: Kevin

E.O.OBAGA

JUDGE