



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 378 OF 2017

PRISCILLA NDUNGE KILUU PLAINTIFF

VERSUS

MACHAKOS COUNTY GOVERNMENT 1ST DEFENDANT

KENYA RURAL ROADS AUTHORITY(KERRA) 2ND DEFENDANT

NYORO CONSTRUCTIONS CO. LIMITED 3RD DEFENDANT

RULING

1. According to the Plaintiff's Affidavit, she is the legal and beneficial owner of land known as Plot Number 68 Mitaboni Market; that the land was transferred to her by her husband in 1996; that the buildings on the suit land were earmarked for demolition by the 3rd Defendant on the ground that they are on a road reserve and that if the Defendants intend to acquire the suit land, then they should compensate her.
2. The 2nd Defendant filed Grounds of Opposition in which it averred that the orders sought cannot be granted because the same have not been sought in the Plaintiff; that the Plaintiff has not produced evidence of ownership of the suit land; that the suit is meant to blackmail the 2nd Defendant into compensating the Plaintiff and that the grant of the orders is against the public interest.
3. In the Replying Affidavit, the 2nd Defendant's site surveyor deponed that they informed all the people who had encroached on the road reserve of Kenol-Mitaboni road of the intended removal of structures on the road reserve; that they physically marked such structures in April, 2017 and that it is not clear how the Plaintiff's husband acquired the suit land.
4. It is the 2nd Defendant's case that the suit property is only 6.5 metres from the existing centre line of the road and that the Plaintiff's structure has encroached on the suit land.
5. The Plaintiff's advocate submitted that if indeed the suit land is on a road reserve, then the same would not have been allocated by the 1st Defendant to the Plaintiff's husband; that the construction of the building on the suit land was on the basis of approvals that were given by the 1st Defendant and that the Applicant would suffer irreparable loss if the Application is not allowed.
6. The 2nd Defendant's advocate submitted that the Plaintiff has not exhibited a Title Deed to support her claim of ownership; that in any event, the Plaintiff will still be compensated if her claim succeeds and that the construction of the Kenol-Mitaboni-Kathiani Road has been halted because of the injunctive orders. Counsel submitted that since the value of the property is ascertainable, damages would be adequate compensation.
7. The Plaintiff is seeking to restrain the 2nd and 3rd Defendants from demolishing buildings erected on plot number 68 Mitaboni Market pending the hearing of the suit. The Plaintiff has exhibited a letter dated 31st August, 2017 by the 1st Defendant in which the 1st Defendant confirmed that the plot measuring 37 feet by 100 belongs to the Plaintiff. The said letter did not address the issue of whether the building erected on the suit land encroaches on a road reserve of Kenol-Mitaboni-Kathiani road which is under construction or not.
8. The Plaintiff has also annexed on her Affidavit a letter of allotment that was issued to her husband on 25th April, 1996 by the then Masaku County Council. The letter of allotment shows that the size of the land to be 37 feet by 100 feet.
9. Although the Plaintiff has exhibited the approved drawings of the building standing on the suit land, she has not exhibited any report by a surveyor to show the position of the building viz-a-viz the road reserve. Indeed, a surveyor's report would have gone a long way to establish or disapprove the 2nd Defendant's assertion that the building is within 6.5 metres from the middle of the existing road.

10. Having not produced a surveyor's report to dispute the Defendant's assertion that the building on the suit land has encroached on a road reserve, I am not satisfied that the Plaintiff has established a prima facie case with chances.

11. It is true that the demolition of the building that has allegedly encroached on the road reserve will occasion the Plaintiff immense damages. However, the 2nd Defendant can compensate the Plaintiff for the demolitions of the building if she proves that the building was not on a road reserve.

12. I say so because in the Plaint dated 13th September, 2017, the Plaintiff has sought for the compensation of the value of the suit land amounting to Kshs.22,000,000/-. Considering that the Plaintiff has already valued the suit land, then adequate compensation will be adequate in the event she succeeds to convince the court that the building to be demolished to pave way for the construction of the road was not on a road reserve.

13. In the circumstances and in view of the fact that the construction of a road is in the public interest, the Plaintiff's recourse is to pursue damages and not to stall the construction of a public road. For those reasons, the Application dated 13th September, 2017 is dismissed with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 21st DAY OF MAY, 2018.

O.A. ANGOTE

JUDGE