



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 306 OF 2015

MICAH A. ORIEDOPLAINTIFF

VERSUS

COUNTY GOVERNMENT OF VIHIGA

THE CDF COMMITTEE OF LUANDA CONSTITUENCY.....DEFENDANTS

JUDGEMENT

The plaintiff avers that he is the registered owner of all that parcel of land known as BUNYORE/IBOONA/1237 which is in amalgamation of parcel Nos. 467 and 468. The plaintiff states that on the stated parcel of land which is equally his ancestral land he has constructed his family's permanent residential and retirement home on which he stays with his family having retired from 37 years of services at Shaw University, Raleigh, North Carolina, USA and at State of Wisconsin's Department of Natural Resources, Madison, Wisconsin, USA, where he worked as a Professor of Physics and a Strategist for Environmental Pollution Control, respectively. After many years of working in the United States of America as above indicated the plaintiff retired and established the subject home in the year 2009. Running against the plaintiff's parcel of land are two earth roads, one running North and another one running East on both sides of the home. The plaintiff states that both roads have from the time of his birth 74 years ago, served as access roads for the villagers to their respective homes. The road running North from the main Majengo Highway is a little larger road of about 6 meters wide which for all the years has been scarcely motorized and has remained the main access road into Iboona location. For purposes of this case the said road will be referred to as the "Iboona Road".

The plaintiff state that at all times material to this case there has never been cause for any interference with the dimensions of the said road which dimensions were surveyed and fixed many years ago upon the excavation of the stated road. Most importantly all homes adjacent to the said road including the plaintiff's home have been and have remained in establishment for all the years. It is important to note that part of the plaintiff's home is the plaintiff's father's home which has been in place from times pre-colonial. The road running East from the aforesaid "Iboona Road" is a small village road of about 4 meters wide meant only to serve the few village residents down past the plaintiff's house. In fact the stated road is a close and ends a few hundred meters down the plaintiff's home just after serving the last home on the stated stretch. For purposes of this case the said road will be called the "Village Road". This "village road" which can equally accommodate vehicles going down the stretch must have equally been surveyed and established as such many years ago for throughout the plaintiff's life, the said road has remained in that state and no villager has ever raised any complaint about its size and usage. The plaintiff avers that before he commenced the construction of his home he did present his building and site plans to the Luanda Town Council (LTC) who dully approved the same after undertaking the necessary site visits on the land. LTC did not establish that the fences obstructed onto or caused any obstructions to the expansions of the Iboona and Village Roads. The plaintiff avers that upon setting up of his home, he undertook other developments there upon including the putting up of a fence against both the "Iboona Road" side and the "Village Road" side and around the whole home.

The plaintiff avers that on or about December 23, 2014 in his absence and without any prior notice or Governmental process, he was called by his workers who informed him that Bull Dozers working on the road were demolishing his fence on the Iboona Road side allegedly in expansion of the stated road. The plaintiff avers that while constructing his fence and home he had reconfirmed his beacons and put the fence about 3 meters right inside his land. In any event the boundaries between the plaintiff's home which partly was his father's home had long and over all the years been known and there was no question on the boundary positions visa-a-vis the roads. The plaintiff states that by the time he managed to travel to his home from where he was, he found the entire side of his fence on the "Iboona Road" side completely broken down and destroyed and his entire home completely exposed to the road in a very humiliating and messy exercise. The plaintiff avers that he immediately called the Area Chief who came with the village elders and all confirmed that they had not been notified and no meeting was ever held to inform the public of any impending demolitions and expansion of the road. When the plaintiff confronted the workers carrying out the road excavation and specifically the caterpillar operator, he stated that they were working for the County Government of Vihiga and they had been sent on the instructions of the Roads Minister with specifications to expand the said road. They could not explain the reason for the demolitions and why they were carried out without notice and/or the plaintiff's involvement. The plaintiff avers that on June 25th, 2015 he went to the Vihiga County Headquarters where he met the Minister of Roads who dispatched his assistant to accompany a survey crew from Ministry of Lands. The assistant disclosed that Iboona Road was not surveyed by a qualified surveyor before it was expanded. Upon the plaintiff's demand for an explanation as to why his home had been destroyed the officer stated that though they had authorized the road reconstruction they did not

know that people's homes and developments were being destroyed. Even though they promised to attend to the site and carry out remedial measures no action has ever been undertaken to date. The plaintiff states that after a few days of waiting with no action on the part of the County Government he opted to use iron sheets to fence off his home to avoid the dangerous exposure. The plaintiff avers that once again to his surprise on about March 29, 2015 another squad of construction workers and excavators again without notice and reason appeared and started digging out the Village Road. The plaintiff avers that to make matters worse, once again, they uprooted the drugout the drive way the power cables and all development there entire fence on the Village Roadside and pulled down all trees adjacent thereto and drove them right into the compound causing untold destruction and aesthetic embarrassment. The destruction was immense and reckless. The plaintiff avers that when he confronted the machine operator the said operator claimed that he had instructions from the Luanda CDF Committee to expand the said road. The operator did not possess any specifications on the expansion and the survey. The plaintiff avers that the destruction of his entire fencing on both sides of his home left his home completely exposed, humiliated, traumatized and insecure.

The plaintiff states that when he confronted the CDF Manager, Luanda Constituency he faked ignorance of the destruction just confirming that the CDF Committee was clearing the Village Roads and expanding some of the roads. The plaintiff avers further that he asked the CDF Manager, Luanda whether the Village Road had been professionally surveyed to determine proper legal lines of demarcation and therefore how much expansion was necessary on my side of the fence. The Manager played ignorant and promised to followup on the matters to date no actions to remedy the situation has been taken by both authorities. As a result of the destruction, which was undertaken without proper surveying the roads to discover proper lines of property demarcation and which therefore was not only illegal but one undertaken with extreme arrogance, malice and impunity, without consultation and notice, I suffered both direct and quantifiable losses, and general damages which included humiliation, trauma and insecurity. The plaintiff avers that a Government Survey report showed that the County Government encroached 2.5 meters into the plaintiff parcel while the CDF encroached 1 meter into the plaintiff's land. Further the plaintiff avers that as a result of the destruction of the fence on Iboona Road which necessitated removal of exotic whispering pine trees which acted as water catchment, the bore hole has insufficient water. The plaintiff avers that he was forced to carryout immediate remedial measures to protect his home including a temporary mabati fencing and repair of electrical fittings

PW2, a valuer Mr. Wycliffe Ongonge of Dansal Associates Limited who carried out the valuation of the loss suffered which he totaled to Kshs. 1, 322, 500/= the plaintiff adopted the valuation report as evince of the special loss. The valuer did not include general damages. Neither did he include the loss of water due to malfunction of the borehole. The specific losses included;

Item	valued at
i. Acquired land	- Ksh. 172,500/=
ii. Barbed wire on wooden posts	- Ksh. 138,000/=
iii. Barbed wire, chain Link on steel posts	- Ksh. 230,000/=
iv. Gate Brick Wall 2m high and 6m length	- Ksh. 35,500/=
v. Harl height wall damages correction	- Ksh. 23,000/=
v. Live fence with Exotic plants	- Ksh. 276,000/=
vii. Trees -5ono pines	- Ksh. 115,000/=
viii. Royal parlm Trees -2ono	- Ksh. 46,000/=
ix. Electrical disruptions	- Ksh. 57,500/=
x. Landscaping	- Ksh. 115,000/=
xi. Drive way, part murrum	- Ksh. 86,250/=
xii. Labour for growth and maintenance of the Fence for about 10 years	- Ksh. 250,000/=
xiii. GCI Fencing sheets	- Ksh. 28,750/=

The plaintiff avers that he has suffered extremely in trauma, inconvenience, fear for his family security and most importantly the agony and frustration of seeing a home and a fence nurtured over a period of more than 10 years completely destroyed and brought down and all the security and aesthetic beauty it brought destroyed on account day of recklessness and abandon on the part of the defendants. The Plaintiff prays for judgment against the Defendants jointly and severally for:-

- i. A declaration that the defendants unlawfully encroached and trespassed into the plaintiff's parcel of land EAST BUNYORE/IBOONA/1237 and the excavations and roads expansions made therein were illegal and without the sanction of the Law Procedure and without the consent of the plaintiff.
- ii. The defendants to be ordered jointly and severally to pay Damages to the plaintiff on account of the illegal and malicious trespass

into his parcel of land.

iii. The defendants be ordered jointly and severally to pay General damages to the plaintiff on account of the trauma, inconvenience, anxiety over insecurity and exposure of his home as a result of the destruction of his fence and property.

iv. The defendants be ordered to pay to the plaintiff special damages amounting to Ksh. 1,572,500/= with interest at court rates from the time of filling of this case.

v. The defendants do pay the plaintiff's costs of this case.

The 2nd defendant statement of defence is a mere denial he prays that the plaintiff's suit be dismissed with costs.

This court has carefully considered the evidence and submissions in this case. The defendants failed to attend court to give oral evidence. Article 40 of the Constitution of Kenya provides that every person has the right to acquire and own property and Article 40 (2) observes that no one should be arbitrarily deprived of property or in any way restricted from the enjoying their own property. The Plaintiff has a right to own his land and he should not be deprived or even restricted from enjoying his right. The defendant restricted and deprived the Plaintiff from enjoying his land by acquiring portions of his land without following the due process which is illegal. In the case of Everlyn College of Design vs Director of Children's Department & AG Constitution Petition no. 228 of 2013, the Learned Judge Majanja stated in his judgment that,

"I would once again emphasise that a finding of "unlawful acquisition" referred to in article 40(6) of the constitution must be through a legally established process and not by forcefully occupation of the property by the state institutions or by preventing a person from enjoying the incidents of ownership of property".

Article 47 of the Constitution states that every person has a right to fair administrative action that is expeditious, effective, lawful, reasonable and procedurally fair. The Respondent ought to under Section 112 of the Land Act conduct a hearing and make full inquiry into and determine who are the persons interested in the land. The Respondent didn't do that and they also did accrue the Petitioners a fair administrative action by making an inquiry and conducting a hearing for that purpose in the Judicial Review Miscellaneous Application no. 36 of 2016, Republic vs National Police Service Commission, the learned judge C. V Odunga stated that;

"Procedural fairness is therefore now a constitutional requirement in administrative action and the requirement goes further than the traditional meaning of duty to afford one an opportunity of being heard. it is now dear that even in cases where there is no express requirement that a person be heard before a decision is made, the tribunal or authority entrusted with the mandate of making the decision must act fairly"

The Defendants' action further violate the provisions of Article 42 and Section 8 of the Section 8 of the Environmental Management and Coordination Act 2015. The Respondents did not conduct a full Environment Impact Assessment before marking the various parcels of land for expansion. The constitution under article 42 provides that every person has a right to a clean and healthy environment. In the ELC case of Moffat Kamau and 9 others vs Aelous Kenya Ltd Constitutional Petition No. 13 of 2015 at Nakuru, learned Judge, Munyao Sila stated that,

"It has been my view which I still hold that, where the procedures for the protection of the environment are not followed, then an assumption may be drawn that the right to a clean and healthy environment is under threat. 'Section 8 of the Environmental Management and Coordination Act 2015 observes that notwithstanding any approval, license, permit granted under any law in Kenya, before, financing, commencing, proceeding with, carrying out, executing or conducting a specified project, the project proponent must apply for and obtain an environmental impact assessment license".

The Plaintiff produced the title deed of the suit land to prove ownership. It is only fair to appropriately and adequately compensate him for compulsory acquiring portions of the land. Section 8 of the Land Acquisition Act observes that,

"Where land is acquired compulsorily under this Part, full compensation shall be paid promptly to all persons interested in the land"

Compulsory acquisition is provided by the law and also compensation for the compulsory acquisition is provided by the law, the Defendants ought to respect the law and follow the due process set out by the law under Section 115 of the Land Act. The Law provides the plaintiffs may be compensated in form of monetary terms. Hon. Justice J.L Onguto in the case of Patrick Musimba vs. The National Land Commission and 5 others Petition No. 613 of 2014 stated in the judgment that;

"If land is so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined; see section III of the Land Act. This is in line with the constitutional requirement under Article 40 (3) of the constitution that no person shall be deprived of his property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation".

The process of Compulsory Acquisition is set out in the Land Acquisition Act Cap 295. Section 3 of the Act states that,

"Whenever the Minister is satisfied that the need is likely to arise for the acquisition of some particular land under section 6, the Commissioner may cause notice thereof to be published in the Gazette, and shall deliver a copy of the notice to every person who appears to him to be interested in the land."

Section 4 of the Act provides that,

"The Commissioner may in writing authorize any person, together with servants and workmen, to enter upon any land specified in a notice published under section 3 and to survey the land and to do all things which may be reasonably necessary to ascertain whether the land is suitable for the purpose for which it may be required. Section 4(2), An authorization under subsection (1) shall not empower a person to enter a building, or an enclosed court or garden attached to a dwelling house, unless— (a) he has first obtained the consent of the occupier; or (b) failing consent, he has served on the occupier not less than seven days' notice in writing of his intention so to enter."

Section 5 of the Act provides that,

"As soon as practicable after entry has been made under section 4, the Commissioner shall make good or pay full compensation for any damage resulting from the entry."

Section 6 of the Act provides that,

"Where the Minister is satisfied that any land is required for the purposes of a public body, and that— (a) the acquisition of the land is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of any property in such manner as to promote the public benefit; and (b) the necessity therefore is such as to afford reasonable justification for the causing of any hardship that may result to any person interested in the land, and so certifies in writing to the Commissioner, he may in writing direct the Commissioner to acquire the land compulsorily under this Part." Section 6 (2) states that "On receiving a direction under subsection (1). The Commissioner shall cause a notice that the Government intends to acquire the land to be published in the Gazette, and shall serve a copy of the notice on every person who appears to him to be interested in the land".

The Land Acquisition act provides for the procedure for entry with the intent of compulsory acquiring the land. The Defendants trespassed thought the Plaintiff's land without permission hence illegally and went as far as constructing a road, they ought to compensate the Plaintiff for the damages caused.

The process of Compulsory Acquisition is summarized by Hon. Justice J.L Onguto in the case of Patrick Musimba vs The National Land Commission and & others Petition no. 613 of 2014 as follows;

"Under Section 107 of the Land Act, the National Land Commission...is ordinarily promoted by the national or county government through the Cabinet Secretary or County Executive member respectively. The land must be acquired for a public purpose or in public interest as dictated by Article 40(3) of the Constitution, in our view, the threshold must be met: the reason for the acquisition must not be remote or fanciful. The National Land Commission needs to be satisfied in these respects and this it can do by undertaking the necessary diligent inquiries including interviewing the body intending to acquire the property.

"Under Sections 107 and 110 of the Land Act the National Land Commission must then publish in the gazette a notice of the intention to acquire the land. The notice is also to be delivered to the Registrar as well as every person who appears to have an interest in the land. As part of the National Land Commission's due diligence strategy, the National Land Commission must also ensure that the land to be acquired is authenticated by the survey department for the rather obvious reason that the owner be identified, in the course of such inquiries, the National Land Commission is also to inspect the land and do all things as may be necessary to ascertain whether the land is suitable for the intended purpose".

The foregoing process constitutes the preliminary or pre-inquiry stage of the acquisition. The burden at this stage is then cast upon the National Land Commission and as can be apparent from a methodical reading of Sections 107 through 110 of the Land Act, the land owners role is limited to that of a distant bystander with substantial interest.

Section 112 of the Land Act then involves the land owner directly for purposes of determining proprietary interest and compensation. The section has an elaborate procedure with the National Land Commission enjoined to gazette an intended inquiry and the service of the notice of inquiry on every person attached. The inquiry hearing determines the persons interested and who are to be compensated. The National Land Commission exercises quasi-judicial powers at this stage.

On completion of the inquiry the National Land Commission makes a separate award of compensation for every person determined to be interested in the land and then offers compensation. The compensation may take either of the two forms prescribed, it could be a monetary award, it could also be land in lieu of the monetary award, if land of equivalent value, is available. Once the award is accepted, it must be promptly paid by the National Land Commission. Where it is not accepted then the payment is to be made into a special compensation account held by the National Land Commission.

The process is completed by the possession of the land in question being taken by the National Land Commission once payment is made even though the possession may actually be taken before all the procedures are followed through and no compensation has been made. The property is then deemed to have vested in the National or County Government as the case may be with both the proprietor and the land registrar being duly notified.

If land is so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined. This is in line with the Constitutional requirement under Article 40(3) of the Constitution that no person shall be deprived of his property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation.

In the present case, the Defendants clearly have not projected the proper procedure with their intention to acquire the land parcel. There were agents who trespassed into the Plaintiffs land parcel without consent which is also illegal. The Defendants' actions prove that they did not follow the due process in fact their action further are in contravention with the law by trespassing through the land parcels without permission which in fact is an offence. The Defendants clearly is on the wrong as they ought to compensate the Plaintiff and also the intended compulsory acquisition is also illegal. I find that the Plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. A declaration that the defendants unlawfully encroached and trespassed into the plaintiff's parcel of land EAST BUNYORE/IBOONA/1237 and the excavations and roads expansions made therein were illegal and without the sanction of the Law, Procedure and without the consent of the plaintiff.
2. The defendants be ordered to pay to the plaintiff special damages amounting to Ksh. 1,572,500/= with interest at court rates from the time of filling of this case.
3. The defendants do pay the plaintiff's costs of this case.

The Plaintiff prayed for general damages under prayers (iii) of the plaint but it was not demonstrated that any damages are payable and I will consequently not grant that prayer.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 25TH DAY OF SEPTEMBER 2018.

N.A. MATHEKA

JUDGE