



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT NAIROBI

ELC PETITION NO. 30 OF 2015

PETRO OIL KENYA LIMITED.....PETITIONER

VERSUS

KENYA URBAN ROADS AUTHORITY.....RESPONDENT

JUDGMENT

Background:

The Petitioner is registered as the proprietor of all that parcel of land known as Land Reference Number 209/15379 which is comprised in Grant Number I.R 95026 (hereinafter referred to as “the suit property”). The Petitioner purchased the suit property from Wangs Investments Limited on 10th February, 2003 at a consideration of Kshs.15,500,000/=. The property was transferred and registered in the name of the Petitioner on 2nd July, 2004 under the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed). The suit property was allocated to Wangs Investments Limited (“Wangs”) by the Commissioner of Lands and a Grant in respect thereof issued and registered in its name on 2nd November, 1995, about eight (8) years before the property was sold to the Petitioner. The Petitioner has put up a Petrol Station on the suit property at a cost estimated at Kshs.47,471,528.59.

On 18th June, 2012, the Daily Nation Newspaper published a story about a project that was to be undertaken by the Respondent at a cost Kshs.3.5 billion. The project according to the story was to involve the construction of 16 kilometres of road, a dual carriage way on Lusaka Road, bridges and connection of missing links to ease traffic congestion in the eastern side of Nairobi. The said Newspaper reported that in order to clear the way for the said project, a number of buildings were going to be demolished which included the Petitioner’s Petrol Station on the suit property. On 13th July, 2012, the Petitioner wrote to the Respondent through its advocates on record following the publication of that story informing the Respondent of its interest in the suit property and the need for due process to be followed in the event that the Respondent wished to acquire the suit property. In the letter, the Petitioner raised its concerns about the Respondent’s reported intention to demolish the suit property.

The Respondent responded to the Petitioner’s letter of 13th July, 2012 on 17th July, 2012. In its letter, the Respondent stated that it could not vouch for the story that was published in the Daily Nation on 18th June, 2012 and that it had no power or authority to unilaterally determine the fate of the suit property in relation to the road project aforesaid. The Respondent contended however that the suit property was hived from a road truncation and that it intended to refer the issue of the legality of the title held by the Petitioner over the suit property to the National Land Commission for determination under Section 14 of the National Land Commission Act, 2012 as read with Articles 67 and 68 of the Constitution of Kenya.

After a lull of over one (1) year, the Respondent served the Petitioner with a notice dated 26th February, 2014 that was said to have been issued pursuant to Sections 10(1) and 49(a) of the Kenya Roads Act, 2007 demanding that the Petitioner removes its Petrol Station and all other structures it had erected on the suit property which the petitioner claimed was standing on a road truncation within 60 days from the date of the notice. The said notice warned the Petitioner that in the event that it failed to remove the said Petrol Station as demanded, the same would be forcibly removed at its cost at the expiry of the notice period and in addition, the Petitioner would be prosecuted for defying the said notice.

The petitioner responded to the said removal notice through its advocate’s letter dated 26th March, 2014 in which it reiterated that it had indefeasible title over the suit property and that the Respondent had no jurisdiction to demolish the developments on the property without following the due process. The Petitioner demanded that the Respondent withdraws the said notice failure to which it would file a suit to safeguard its interest in the suit property. In a letter in response dated 26th March, 2014, the Respondent reiterated that the suit property was hived from a road truncation. The Respondent contended further that the removal notice was issued at the Respondent’s request and that the issue as to whether or not the suit property was hived from a road truncation was the National Land Commission to determine. The Respondent did not however withdraw its removal notice as was demanded by the Petitioner.

The Petition:

On 22nd April, 2014, the Petitioner brought this petition against the Respondent seeking the following reliefs:

- (1) A declaration that the certificate of title held by the Petitioner in respect of the suit property is conclusive evidence of ownership and that the Petitioner is the absolute and indefeasible owner of the suit property.*
- (2) A declaration that the removal notice dated 26th February, 2014 issued by the Respondent was invalid, null, unlawful and/or ultravires the powers of the Respondent and therefore of no purpose or effect.*
- (3) An order of Certiorari to remove into this Honourable court for the purposes of quashing the said removal notice dated 26th February, 2014 by the Respondent to the Petitioner.*
- (4) An injunction to restrain the Respondent from giving effect or implementing in any manner whatsoever the said removal notice dated 26th February, 2014 or from in any other manner interfering with the Petitioner's possession and quiet enjoyment of the said property or from hindering or impeding its business on the suit property or demolishing the developments erected thereon.*
- (5) An order awarding compensatory damages to the petitioner for the breach of its constitutional and statutory rights.*
- (6) The costs of the petition.*

In its petition, the Petitioner challenged the Respondent's removal notice dated 26th February, 2014 on the following grounds:

- (1) The Respondent had no authority or power under the Traffic Act, Chapter 403 Laws of Kenya, Kenya Roads Act, 2007 or any other law to issue the said removal notice or to seek to remove the Petitioner from the suit property;
- (2) In issuing the said removal notice, the Respondent usurped the powers of the National Land Commission;
- (3) The removal notice was issued in disregard of Articles 40, 47 and 64 of the Constitution, Section 22(4) of the Kenya Roads Act, 2007 and Section 23 of the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed);
- (4) The said notice was ultra vires the Respondent's power under the Kenya Roads Act, 2007 and as such the same was invalid, unlawful and a nullity ab initio.

The Petitioner averred that by the said removal notice, the Respondent had expressed an intention of unlawfully demolishing the developments that the Petitioner had put up on the suit property thereby depriving the petitioner of its constitutionally and statutorily protected rights to continue to possess, occupy and quietly enjoy the suit property. The Petitioner contended that the Respondent's threatened action would cause it harm and seriously affect its business reputation and customer base. The Petitioner averred that by threatening to demolish the developments on the suit property, the Respondent was intent on circumventing and flouting the provisions of the law on compulsory acquisition of land and depriving the Petitioner of its right to be compensated for the loss of the suit property as provided for under Article 40(3) of the Constitution of Kenya, Section 23 of the Kenya Roads Act, 2007 and the Land Act, 2012.

The Petition was supported by the affidavit of the Petitioner's Chief Executive Officer, Benjamin Gathura Kingori sworn on 16th April, 2014. In the said affidavit, Mr. Kingori narrated how the Petitioner acquired the suit property and the communication the Petitioner had with the Respondent when it learnt of the Respondent's intention to demolish the developments on the suit property. Mr. Kingori annexed to his affidavit in support of the application among others, the documents of title in respect of the suit property and the correspondence the Petitioner had exchanged with the Respondent prior to instituting the petition.

The Petition was opposed by the Respondent through a replying affidavit sworn by the Respondent's Chief Sociologist, Josiah Mwangi Wandurua on 9th May, 2014. In the said affidavit, the Respondent admitted that it was overseeing the implementation of the then proposed construction of Nairobi Eastern Missing Link Roads. The Respondent stated that it is a State Corporation established under the Kenya Roads Act, 2007 and that its responsibility included the management, development, rehabilitation and maintenance of urban roads within the Republic of Kenya and that it was in that capacity that it was spearheading the implementation of the said project. The Respondent stated that as part of the implementation of the said project, it commenced the process of mapping out the corridor for the proposed road and identifying and enumerating all the parties thereon. The Respondent stated that as part of this exercise, it held numerous stakeholder forums for the affected persons to inform them of the project and to jointly workout a relocation strategy.

The Respondent stated that it identified various categories of people who were on the route of the planned road. These included people who had genuine titles, those with titles deemed irregular and those with temporary occupation permits from the City Council of Nairobi. The Respondent contended that the Petitioner fell in the category of those persons whose titles were deemed to be irregular and whose names were referred to the National Land Commission for review of the titles concerned. The Respondent averred that those who were found to have genuine titles had their names referred to the National Land Commission for compulsory acquisition and compensation.

The Respondent averred that the suit property was created on a road truncation. The Respondent averred that the Petitioner admitted this fact and inquired whether it could still get some form of compensation despite the irregularity in its title. The Respondent averred that in order to pursue compensation for the suit property, the Petitioner persistently requested, demanded and pestered the Respondent for a formal notification to remove the developments it had put up on the suit property. The Respondent averred that the Petitioner participated fully in the public engagement meetings that were organised by the Respondent and was aware that those without valid titles would be given notices

to remove the developments that were lying along the corridor that was mapped out for the road project. The Respondent stated that the Petitioner's representatives approached its officers, Mr. Mwangi Wandurua, Mr. Kiminza, Mr. Cheboi and Mr. Sitienei for a formal notice to enable it remove its developments on the suit property and surrender the property to the Respondent in good time for the road project.

The Respondent contended that this petition is an abuse of the process of the court as it was intended to circumvent or avoid the review of the Petitioner's title by the National Land Commission or other appropriate forum. The Respondent averred that if the reliefs sought by the Petitioner are granted, it would be highly prejudiced as it would be barred from seeking the review of the title held by the Petitioner by the National Land Commission, the High Court or any other competent forum. The Respondent contended that the jurisdiction that has been invoked by the Petitioner is inappropriate for determining the issues arising between the parties since the court is not seized of the necessary tools to delve into an inquiry on the validity or otherwise of the Petitioner's title over the suit property.

The Respondent averred that it had no intention of violating the Petitioner's rights and as such the proceedings before the court were brought for ulterior motives. The Respondent termed the Petitioner's petition premature and presumptuous in that if the review process to which it intended to subject the Petitioner's title returns a verdict favourable to the Petitioner, the Petitioner will be compensated for the suit property.

The Petitioner filed a further affidavit sworn by Sufyan Yusuf and a supplementary affidavit sworn by Benjamin Gathura Kingori in response to the Respondent's affidavit in opposition to the petition. In his affidavit, Sufyan Yusuf denied that he had at any time admitted that the suit property had been hived from a road truncation or demanded that the Petitioner be issued with a removal notice. In his Supplementary Affidavit, Benjamin Gathura Kingori stated that the Respondent having contended that the Petitioner's title had been referred to the National Land Commission for review, that was an admission that the Petitioner had no power to issue the removal notice in contention.

Mr. Kingori admitted that Mr. Sulfyan Yusuf and he had some discussion with the officers of the Respondents regarding the notices that were to be issued to those who were to be affected by the road project. He contended however that his main concern was to ensure that the Petitioner's Petrol Station was not demolished without a warning. He denied that he persistently demanded and pestered the Respondent to be issued with a formal notice of removal of the developments on the suit property.

The Petition was heard by way of written submissions. The Petitioner filed its submissions on 25th July, 2014 while the Respondent filed its submissions on 17th December, 2014. I have considered the Petition together with the affidavits filed in support thereof. I have also considered the Respondent's affidavit in reply to the petition. Finally, I have considered the submissions by the respective advocates for the parties and the authorities that were cited in support thereof. In my view, the following are the issues that arise for determination in this petition:

1. Whether the jurisdiction of this court was properly invoked by the Petitioner.
2. Whether the Respondent violated or threatened to violate the Petitioner's fundamental rights guaranteed under the constitution.
3. Whether the Petitioner is entitled to the reliefs sought.
4. Who is liable for the costs of the petition?

Whether the jurisdiction of this court was properly invoked:

I am in agreement with the Petitioner that under Article 22 of the Constitution of Kenya 2010, it had a right to bring these proceedings. The Petitioner had contended that its right to own property and fair administrative action was threatened by the Respondent. Article 22(1) of the Constitution entitled the Petitioner to come to court for the protection of the said rights. In my view the issue should not have been whether or not the Petitioner had properly invoked the jurisdiction of the court but rather whether the jurisdiction that had been invoked was the most appropriate in the circumstances. On the latter, I do not think so. The Petitioner was aware from the material before the court that what was in issue was the legality of its title over the suit property. Constitutional petitions are normally brought to determine mainly constitutional questions.

A constitutional petition is not an ideal forum for investigating and determining contentious issues of fact as oral evidence is rarely called like in this case. Whether or not the suit property was hived from a road truncation is not an issue which I can determine on the affidavit evidence before me. If it is true that the suit property was hived from a road truncation, the title held by the Petitioner would not be valid since the property was not available for allocation to wangs from whom the Petitioner purchased the suit property. Article 40 (6) of the Constitution provides that the protection accorded to property does not extend to the property which has been acquired unlawfully. Whether or not the Petitioner acquired the suit property lawfully is an issue that can only be determined in a civil suit and not in a Constitutional Petition. The courts have said over and again that the mere fact that constitutional rights are alleged to have been violated or are threatened does not make the dispute a constitutional one calling for the filing of a petition under Article 22 of the Constitution. The court can still uphold constitutional rights in a normal civil suit.

In the case before me, I am of the view that due to the nature of the dispute which turned on whether the Petitioner holds a valid title, the ideal forum should have been a civil suit. In a civil suit, the court would have been better placed to determine all the issues raised by the parties. The court would also have been in a position to grant all the reliefs sought in the petition herein if merited. It is my finding therefore that although the Petitioner had a right to invoke the jurisdiction of the court under Article 22(1) of the Constitution, that jurisdiction was not ideal for the determination of the issues at hand. As aptly put by the Respondent in its replying affidavit, this court in exercise of that jurisdiction is not possessed of the necessary tools to determine the validity or otherwise of the Petitioner's title to the suit property. I am persuaded by the decision in the case of Republic v County Government of Tana River & 2 others [2018] eKLR, where the court (Cherono J.) while dealing with an application for judicial review stated as follows:

“Having said that, I note that the underlying dispute in this proceedings is ownership of trust land. Judicial Review

proceedings in my understanding is not a forum where such a dispute can be adjudicated and determined as there would be need for viva voce evidence to be adduced on how the land was acquired and came to be registered in the name of the applicant and whether some laid down procedures were followed or not. While faced with a similar issue in Republic –Vs- Exparte Karia Misc. Application No. 534/03, Justice Nyamu, Justice Ibrahim and Justice Makhanda held as follows; “In cases where the subject matter or the question to be determined involves ownership of land and the rights to occupy land, namely occupation and disposition, there would be need to allow viva voce evidence and cross examination of witnesses which is not available in judicial review proceedings. Even if the respondents had filed documents they would be copies that would not be sufficient to establish authenticity of title. The original documents would need to be produced at a full hearing where oral evidence would be adduced.”

In the case of Livingstone Kunini Ntutu v Minister of Land and 4 others (2014) eKLR, the court stated that:

“We would align ourselves with the school of thought which holds that judicial review is not efficacious remedy where the process under which a title is obtained is in dispute. In such a situation, a civil suit in which the parties can call witnesses and adduce evidence is the most appropriate remedy.”

Although in the cases that I have cited, the courts were dealing with judicial review applications strictly so called, the cases are relevant to this petition as some of the reliefs sought in the present petition are for judicial review. That said, the mere fact that the Petitioner invoked inappropriate jurisdiction does not render the petition defective or irregular. The only setback for the Petitioner is that the court would not be able to grant some of the reliefs sought in the petition which cannot be granted in a petition of this nature.

Whether the Respondent violated or threatened to violate the Petitioner’s constitutional rights:

As I had stated at the beginning of this judgment, the Respondent is established under the Kenya Roads Act, 2007 with the objectives of among others, managing, developing, rehabilitating and maintaining of Urban roads in Kenya. Section 49(1) of the Roads Act forbids among others erection, construction, laying or establishing any structure or other thing, on or over or below the surface of a road reserve without the permission of the Respondent. Section 49 (4) of the Roads Act gives the Respondent power to give a notice in writing directing any person who has without the permission of the Respondent erected or constructed a structure or other thing to remove the unauthorized structure within a reasonable period which may not be shorter than 30 days from date of the notice.

Section 49(5) gives the Respondent power to remove such structures at the cost of whoever erected the same in the event that he fails to comply with the notice. Section 49(6) of the Roads Act provides that anyone who puts up such structures without the permission of the Respondent commits an offence and is liable on conviction to serve a term of imprisonment.

It is not in dispute that the Respondent was at all material times preparing to undertake a project that involved the construction of Nairobi Eastern Missing Link Roads which was financed through a joint venture arrangement between the Government of Kenya and the European Commission. The roads included Landhies Road – Ngara Market and Accra Road Extension (Ngara Market–Kirinyaga Road). The Respondent had contended that during the process of mapping the corridor for the envisaged roads and the identification of the persons who would be affected by the project, the Petitioner’s Petrol Station on the suit property was found to be on a road truncation. The Respondent contended that the suit property was hived from the said road truncation and as such the title held by the Petitioner in respect thereof was irregular. The Petitioner’s title was issued on 14th May, 2004 under the Registration of Titles Act, (Cap 281) (now repealed). Section 23 of that Act provides as follows;

“(1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.

(2) A certified copy of any registered instrument, signed by the registrar and sealed with his seal of office, shall be received in evidence in the same manner as the original.”

From the material before me, there is no doubt that the Respondent was aware that the Petitioner had a title to the suit property. Under section 23 of the Registration titles Act that I have set out above, the title held by the Petitioner was conclusive proof that the Petitioner was the absolute and indefeasible owner of the suit property and that the Petitioner’s title was not subject to challenge save on account of fraud or misrepresentation to which it was proved to have been a party. I am of the view that until it was established that the suit property was hived from a road truncation and as such the title was acquired illegally, the Petitioner’s title enjoyed the protection accorded under section 23 of the Registration of Titles Act and Article 40 of the Constitution.

The removal notice dated 26th February, 2014 was issued by the Respondent on the premise that the Petitioner’s Petrol Station was erected on a road truncation. The Respondent had no jurisdiction to declare that the Petitioner’s title was irregularly acquired from a road truncation. From the correspondence exchanged with the Petitioner, the Respondent was alive to the fact that it was only the National Land Commission or the court that had the mandate to declare the Petitioner’s title to the suit property to have been irregularly acquired. The Respondent had even intimated that it had referred the Petitioner’s title to the National Land Commission for review under Section 14 of the National Land Commission Act, 2012. It is not clear to me why the Respondent decided to issue the Petitioner with a removal notice before a determination was made on the validity of the Petitioner’s title to the suit property. From the correspondence exchanged between the parties, I am not persuaded that the Respondent issued the Petitioner with a removal notice at the request of the Petitioner. It is my finding that until the Petitioner’s title was reviewed by the National Land Commission and found to have been acquired irregularly or was found irregular by the court and cancelled or revoked, the Petitioner prima facie had absolute and indefeasible title over the suit property. It was therefore a violation of the Petitioner’s constitutional right to property for the Respondent to demand that the Petitioner removes the developments on

the suit property within 60 days or risk having the said developments removed forcefully.

I am also in agreement with the Petitioner that its right to fair administrative action guaranteed under Article 47(1) of the Constitution was violated by the Respondent. There is no evidence that the Petitioner was given an opportunity to be heard before a decision was made to issue it with a removal notice. Due to the foregoing, it is my finding that the removal notice dated 26th February, 2014 violated the Petitioner's right to property and fair administrative action.

Whether the Petitioner is entitled to the relief sought:

I am satisfied that the Petitioner is entitled to prayers (b),(c), (d) and (e) of the petition. For the reasons that I have given earlier, the Petitioner is not entitled to prayer (a) of the Petition. The certificate of title held by the Petitioner in respect of the suit property is only a prima facie proof that it is the absolute and indefeasible owner of the property. The Respondent has challenged the title on the ground that it was irregularly issued since the suit property was hived from a road truncation. Since I am not in a position in these proceedings to determine the issue of the validity of the Petitioner's title, I am unable to make the declaration sought in prayer (a) of the application. The issue will have to be determined in another forum. With regard to the award of damages, the Petitioner has not established that it suffered any loss or damage as a result of the Respondent's notice. In the circumstances, I decline to award any damages to the Petitioner. On the issue of costs, it is not contested that the removal notice was issued by the Respondent in the course of discharge of its statutory mandate. There is no evidence that the notice was issued out of malice or for ulterior motives. In the circumstances, it would not be fair to condemn the Respondent to pay the costs of the petition.

In conclusion, I hereby enter judgment for the Petitioner against the Respondent as prayed in prayers (b), (c), (d) and (e) of the petition dated 17th April, 2014. Each party shall bear its own costs of the petition.

Delivered and Dated at Nairobi this 25th day of October 2018

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Odaga h/b for Mr. Inamdar for the Petitioner

No appearance for the Respondent

Catherine - Court Assistant