



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 73 OF 2018**

**STEPHEN NJUGUNA KIRAGU.....1<sup>ST</sup> PLAINTIFF**

**HERMAN NGARI KIRIKA .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....DEFENDANT**

**JUDGMENT**

***(Suit by the plaintiffs claiming that the defendant has unlawfully demolished their properties; defendant raising a defence and counterclaim that the properties are within a road reserve, evidence tendered demonstrating that the plaintiffs are on a road reserve; action of demolition thus permissible; plaintiffs however were entitled to fair administrative action and reasonable notice which was not given; plaintiffs' suit dismissed but no orders on costs).***

1. This suit was commenced through a plaint which was filed on 12 February 2018 and amended on 16 May 2018. The 1<sup>st</sup> plaintiff is pleaded to be the owner of the land parcels Njoro Ngata Block 1/ 3141 and 3142 which were subdivided. Out of the subdivisions, the 1<sup>st</sup> plaintiff retained the land parcels Njoro Ngata Block 1/6906, 6909, 6911, 6912, and 6913, whereas the 2<sup>nd</sup> plaintiff is the registered owner of the land parcel Njoro Ngata Block 1/6910. On these parcels of land are built some maisonettes with servants quarters, the design of the development being that the servants quarters are nearest to the road. The road here is the Nakuru-Kabarak road. What prompted this suit is that on 8 February 2018, the defendant, demolished the wall and servants quarters erected in the suit properties, claiming that they were on the road reserve. The plaintiffs contend that this was done illegally for reasons that they were not served with any statutory notice of demolition; that the properties were not marked "X" and that this was an intrusion into private property. In the suit, they have asked for orders that the demolition be declared illegal and unlawful, an order of permanent injunction to restrain the defendant from any further interference with the suit properties, special damages, general damages for trespass, costs and interest.

2. The defendant filed a defence and counterclaim and asserted that the plaintiffs have assumed a road reserve of 36.58 metres (120 feet) hence have illegally encroached into a road reserve. It was pleaded that the plaintiffs could not therefore claim to have good titles to the suit properties. It was averred that the defendant has mandate to grant approvals to a person to carry out works on road reserves and that the plaintiffs never sought the defendant's approval before constructing on the road reserve. The defendant claimed that the suit properties are on the road reserve and that it was within its mandate to demolish any structures that encroach on a road reserve. In the counterclaim the defendant averred that the plaintiffs have encroached and trespassed into the B4 road reserve and unprocedurally carved out titles therein. It pleaded that the road reserve is of 60 metres. The defendant has sought a declaration that the plaintiffs have encroached into the road reserve, a mandatory injunction asking the plaintiffs to vacate the road reserve, a permanent injunction against the plaintiffs, mesne profits for trespass since April 2015, costs and interest.

3. PW-1 was the 1<sup>st</sup> plaintiff. He testified that he owned the land parcels No. 3141 and 3142 and that he subdivided these two parcels of land into 8 plots. The resultant titles were the plot numbers 6906 to 6913. He developed these subdivided plots by building maisonettes of 4 bedrooms and servants quarters after getting approval from the National Construction Authority (NCA). He sold some of the plots and remained with the plot numbers 6908, 6909, 6911 and 6912. He testified that he rents out his units at a rent of Kshs. 45,000/=. On 8 February 2018, KENHA destroyed his houses, and he stated that he had not been given any prior notice and no mark was placed on them. He testified that they only placed a mark 3 days after the demolition. He testified that he has now suffered loss as all his tenants have moved out. He did a valuation which revealed the costs of damage at Kshs. 3,762,000/= and paid Kshs. 20,000/= for the report. He testified that he lives on the next plot which was not destroyed and that he has neighbours who have also developed their plots but their houses were not destroyed. He stated that all the way from the Showground to Mti Moja, only these units were affected. He denied that his buildings were on the road reserve and stated that they are 20 metres away from the road.

4. Cross-examined, he stated that he bought the plots in the year 2014. He built the houses in the year 2015. He also employed a surveyor when he subdivided the parcels of land into the smaller plots. He stated that from the middle of the road to his plots is a distance of 20 metres

but the claim by KENHA is that it should be 30 metres.

5. PW-2 was one Walter Otieno Ndeda, a survey field assistant working with M/s Olweny & Associates surveyors. He confirmed that the firm was instructed to subdivide the land parcels No. 3141 and 3142 and they did the subdivision. He produced the mutation forms as exhibits. He testified that they used the Registry Index Map (RIM) which has a scale to determine the areas of the plots. He testified that the mutation was drawn to scale and if it was not, the District Surveyor would have rejected it. According to him the road reserve is 40 metres on the ground although in his mutation form, he did indicate 36.5 metres. He testified that from the Show Ground to the end of Block 1 (New Kiambu), the road reserve is 40 metres but from new Kiambu to Zaburi, is 36.5 metres. He also said that there was a KENHA beacon. Cross-examined, he asserted that the RIM shows 36.5 metres road reserve, and he thus measured 17.8 metres from the centre of the road, to provide the edge of the disputed plots.

6. PW-3 was Herman Ngari Kirika, the second plaintiff. He is a registered civil engineer and a developer. He is the owner of the plot No. 6910. He testified that it was him who developed the suit properties and he obtained approval from the County Government of Nakuru and from NCA. He stated that before the demolition, he never got any notice that the properties were on a road reserve. He testified that since the demolition, he has suffered loss of rent, suffered anguish, and financial loss. He testified that from the Showground to Mercy Njeri, the road reserve is between 36 and 43 metres, and this is from what he has measured himself. He mentioned that from their wall to the opposite end of the road is 39 metres, and that from their side to the middle of the road is 17 metres. He contended that there was a beacon placed by KENHA.

7. Cross-examined, he stated that he used to get Kshs. 35,000/= per month from the main house and Kshs. 7,000/= per month from the servant quarter. He stated that from the map, the road reserve is 40 metres from Mti Moja to Mercy Njeri and from Mti Moja to the Showground, the map shows a 60 metre road reserve. He confirmed that their properties are in the area showing a 60 metre road reserve as their plot is between Mti Moja and the Showground. He contended that this map was amended without measurements being taken on the ground, thus on the ground, the reserve is 40 metres, but on the map, the reserve is 60 metres.

8. PW-4 was one Kelvin Gakuhi Mutheki. He testified that he witnessed the demolition which was done by a bulldozer or grader. He stated that there was no mark on the wall before the demolition.

9. With the above evidence, the plaintiffs closed their case.

The defendant called only one witness, Mr. Thomas Gicira Gacoki, a surveyor working with KENHA. He is a graduate of the University of Nairobi, holding a Bachelors Degree in Survey and Photogrammetry. He has worked with KENHA since its inception in the year 2009, and before that, he was working with the Ministry of Roads and Public Works. He testified that the mandate of KENHA is to develop and maintain Class S, A and B roads. Along the suit property is the road B4 which is the Nakuru-Kabarak road. He produced an RIM to show the boundaries of the properties in relation to the road reserve. He stated that where the suit properties are situated, is a road reserve of 60 metres, which he could measure from the scale of the RIM. He also had a cadastral map which was prepared in the year 1953. He did state that the cadastral map is more advanced as it shows the coordinates of the plots and the road, and it is this cadastral map that was used to prepare the RIM. He produced a google map that showed the extent of the encroachment following the coordinates in the cadastral map. He testified that the plaintiffs are wrong to assume that the road reserve is 40 metres, and not 60 metres, and that they had encroached by about 10 metres into the road reserve. He asserted that KENHA only demolished what had encroached into the road reserve. He testified that KENHA did not receive any inquiries on the extent of the road reserve and that whoever did the mutation should have confined himself to the 60 metre road reserve. He refuted the allegation that there is a KENHA beacon and testified that KENHA beacons are usually about 0.5 metres off the ground and are not laid flat on the ground. Their beacons are also marked with the words "KENHA". He asked that the plaintiffs be made to shoulder the costs of demolition.

10. Cross-examined, he testified that towards Kabarak, the road reserve reduces to 36.58 metres. He testified that the suit properties were created using general boundaries without coordinates, and these are based on approximations. He did state that KENHA usually issues notices, but was not aware whether in this instance, any notice was issued. He agreed that there were some plots which have developments in the road reserve but which were not demolished. He denied that there was any malice in the demolition but did not know why the other properties were not demolished.

11. With his evidence, the defence closed its case.

12. I invited both Mrs. Mukira, learned counsel for the plaintiffs, and Mrs. Njiri, learned counsel for the defendant, to file written submissions, and they both did. 13. I have taken these submissions into account in arriving at my decision. I however note that a lot of the submissions dwelt on the interpretation of the case of ***Giella vs Cassman Brown (1973) EA 358***, which is a case that deals with interlocutory injunctions and not permanent or mandatory injunctions. Those submissions are thus irrelevant when you are dealing with a case which is not at the interlocutory stages.

14. The plaintiffs' main complaint in this case is that KENHA had no right to demolish their properties as it is their case that their properties are not on the road reserve. According to them, the road reserve is 40 metres and not 60 metres. What I have before me is actually a boundary dispute, the dispute being, where the actual boundary of the road and of the suit properties is situated. The manner in which to determine such dispute is contained in the Land Registration Act, Act No. 3 of 2012 and Sections 18 and 22 are operative. They provide as follows :-

#### *18. Boundaries*

*(1) Except where, in accordance with [section 20](#), it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.*

*(2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless*

*the boundaries have been determined in accordance with this section.*

*(3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:*

*Provided that where all the boundaries are defined under [section 19\(3\)](#), the determination of the position of any uncertain boundary shall be done as stipulated in the Survey Act, ([Cap. 299](#)).*

## *22. Combinations and subdivisions*

*(1) Subject to authentication of the cadastral map, if contiguous parcels are owned by the same proprietor and are subject in all respects to the same rights and obligations, the Registrar, on application by the proprietor, may combine these parcels by closing the registers relating to them and opening a new register or registers in respect of the parcel or parcels resulting from the combination.*

*(2) Upon the application of a proprietor of a parcel for the division of that parcel into two or more parcels, and authentication of the cadastral map, the Registrar shall effect the division by closing the register relating to the parcel and opening new registers in respect of the new parcels resulting from the division, and recording in the new registers all subsisting entries appearing in the closed register:*

*Provided that nothing shall be done under this section that would be inconsistent with the provisions of this Act or any other written law.*

15. From Section 18 above, it will be seen that it is the cadastral map which is used to indicate the approximate position of the boundaries. Under Section 22 (2) above, when a land owner moves to subdivide his land, he needs to authenticate his subdivisions by use of the cadastral map. Now, the 1<sup>st</sup> plaintiff does not pretend that he used the cadastral map when he proceeded to commission the subdivision of his original two parcels of land. In fact, the surveyor, who he employed, used the RIM. It follows that when the subdivision was done, it was done without the benefit of the actual coordinates which set out the boundaries of the road and of contiguous land. That aside, and even without the benefit of the cadastral map, the RIM clearly shows that the road reserve is of 60 metres. When the surveyor did the subdivision of the land of the 1<sup>st</sup> plaintiff, he ought to have measured this road reserve, which was clear in the RIM, and what he would have discovered is that the road reserve is 60 metres. I indeed wonder where PW-2 got the idea that the road reserve is 40 metres. It is nowhere in either the RIM or the Cadastral map, which are the only two authentic maps that could have pointed out the extent of the road reserve. PW-3 himself confirmed that the RIM shows that the road reserve is 60 metres. He however lamented that when the RIM was drawn, it did not follow the actual ground measurements, which according to him would have shown a reserve of 40 metres. I am afraid that I am unable to buy this argument. The cadastral plan was drawn in the year 1953, and has not been changed. The RIM simply followed what was in the cadastral plan; it did not change anything. Now, does PW-2 seek to say that in the year 1953, the suit properties had already been developed and thus the cadastral map did not take these into account? Clearly not. His argument that the RIM does not follow the ground position falls flat on its face. The plaintiffs have in fact not tendered before me any evidence that the road reserve is 40 metres as they allege. All the evidence I have point only to one conclusion; that the road reserve is 60 metres and not 40 metres. It is thus apparent that the developments in issue have encroached by about 10 metres into the road reserve. The plaintiffs cannot therefore get any declaration in their favour for the developments that they have made in the road reserve.

16. I have little sympathy for the plaintiffs. They built on a road reserve and they cannot now claim damages for a problem of their own making. In fact, the 2<sup>nd</sup> plaintiff should have known better. He is an engineer by profession. He said that his own measure of the RIM showed a road reserve of 60 metres. Why didn't he seek clarification from KENHA on the actual boundaries before proceeding to develop within the 60 metre mark? He cannot claim ignorance, for he is a professional.

17. So was it legal for KENHA to proceed and demolish the plaintiff's properties? The answer is found in Section 91 of the Traffic Act, Cap 403, Laws of Kenya, which is drawn as follows :-

### *91. Encroachment on and damage to roads*

*(1) Every person who, without the written permission of the highway authority—*

*(a) encroaches on a road or on any land reserved therefore at the side or sides thereof by making or erecting any building, fence, ditch, advertisement sign or other obstacle, or by digging thereon or by planting or sowing any tree, shrub or seeds thereon; or*

*(b) deposits or causes to be deposited in any manner whatever on a road any material or matter, other than road-making materials deposited for the purpose of making up or repairing the road; or*

*(c) digs up, removes or alters in any way the soil or surface of a road, or of any land reserved therefore at the side or sides thereof, or if done for the purpose of moving a vehicle without immediately thereafter making good the damage; or*

*(d) wilfully fills up, alters or obstructs any ditch or drain, whether on a road or contiguous thereto, made by or under the control of the highway authority, to carry water off the road or to keep it from flowing on to the road; or*

*(e) allows any sludge or any filthy or noisome matter to flow from any building or land in his occupation on to a road or into any ditch or drain made by the highway authority; or*

*(f) causes or allows any timber, sledge, plough or other heavy material, vehicle or implement not wholly raised above the ground on wheels to be dragged on a road; or*

*(g) pitches any tent, booth or stall on a road; or*

*(h) makes any fire on any road, shall be guilty of an offence.*

*(2) It shall be lawful for the highway authority to remove anything whatsoever which has been placed or erected on a road or land reserved therefore in contravention of this section.*

18. It will be seen from the above, particularly Section 91 (2), that KENHA are authorized to remove anything that has been placed or erected on a road reserve. There was therefore nothing illegal in KENHA demolishing the developments that the plaintiffs placed on the road reserve.

19. The above law does not make any provision for giving of notice, but I think that it is only fair, for the proper exercise of administrative power, for notice to have been given to the plaintiffs before KENHA proceeded to demolish their developments. What KENHA did was an exercise within their administrative powers as given by Section 91 (2) of the Traffic Act, and thus constitutes an administrative action as defined by the Fair Administrative Act, Act No. 4 of 2015.

20. According to the said statute an “administrative action” includes—

*(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or*

*(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;*

21. The act of demolition was thus an administrative action. The theme that runs through the Fair Administration Act, is that a person needs to be given notice, and also be given an opportunity to be heard before the action is taken. I am not persuaded from the evidence, that the plaintiffs were given any notice by the defendant before the defendant proceeded to demolish the plaintiffs’ developments. I have not been shown any notice in writing, and from the evidence, I am persuaded that the mark “X” was placed after the demolition and not before. I have also not been told why other persons who have encroached into the road reserve, including the immediate neighbour to the plaintiffs, who have also undertaken a massive development, were not affected. Thus, in as much as the defendant was entitled to demolish the plaintiffs’ structures, it did not act fairly and also acted in a discriminatory manner by singling out the plaintiffs. Their conduct make me deny them the benefit of costs in this matter.

22. I am alive to the fact that the defendant has claimed general damages for trespass. Taking all circumstances into consideration, I will award only a token amount, a sum of Kshs. 10,000/= against each plaintiff, in appreciation of the fact that the plaintiffs did indeed trespass into the road reserve when simple due diligence would have informed them that they wish to develop on a road reserve. There is a claim for mesne profits but I have not been informed what actual pecuniary loss the defendant suffered and I am unable to make any award under this head. The defendant is however entitled to the order of permanent injunction as prayed.

23. In all the plaintiffs’ suit is dismissed and I will enter judgment as noted above in favour of the defendant.

24. I think I have dealt with all issues and now make the following final orders :

**(a) It is hereby declared that the road reserve where the plaintiffs’ properties are located, is a road reserve measuring 60 metres and not 40 metres.**

**(b) It is hereby declared that the plaintiffs have encroached into the B4 road reserve by approximately 10 metres and that part of their developments in the suit properties is situated on the B4 road reserve.**

**(c) The plaintiffs are hereby given 14 days to remove all the developments that are located within the road reserve, and if they do not do so, the defendant is at liberty to do so, and pass the costs to the plaintiffs.**

**(d) There is issued a permanent injunction restraining the plaintiffs from developing, or interfering with the road reserve.**

**(e) I make an award in favour of the defendant of Kshs. 10,000/= as general damages for trespass against each plaintiff with interest at court rates from the date of this judgment.**

**(f) I make no orders as to costs.**

25. Judgment accordingly.

**Dated, signed and delivered in open court at Nakuru this 15<sup>th</sup> day of November 2018.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of: -**

Ms. Ngugi holding brief for Mrs. Mukira for the plaintiffs.

Mr. Manyange present for the defendant.

Court Assistants: Carlton Toroitich

Nelima Janepher

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**