



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

CONSTITUTIONAL PETITION NO. 20 OF 2014

JOSPEH KABERIA KUMARI.....PETITIONER

VERSUS

COUNTY GOVERNMENT OF MERU.....RESPONDENT

JUDGMENT

BACKGROUND

[1] The Petitioner, Joseph Kaberia Kumari filed this petition on 6th August 2014 seeking the following orders:

(a) A declaration that he has a right to acquire, own, utilize and develop land parcel No. ARIWATHI/MAUA/3976 without interference from the respondent or in the alternative the respondent do compensate the petitioner for the land and building thereon.

(b) A permanent injunction restraining the respondent, assignees, agents, servants from demolishing or interfering with the petitioner's right to own L.R AMWATHI/MAUA/3976.

(c) Costs and interests.

[2] The Petitioner filed this petition contemporary with a Notice of Motion under certificate of urgency under **Rules 20 & 21 of the Constitution of Kenya** (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of Individuals) High Court Practice and Procedure Rules 2006 and Articles 22, 23 and 40 of the Constitution of Kenya.

[3] In that Notice of Motion, the Petitioner is seeking an order of injunction to restrain the Respondent, its agents, servants, employees from demolishing his building or in any way interfering with his rights to land parcel No. AMWATHI/MAUA/3976.

[4] On 13th August 2014, the said application was placed before the duty Court who upon considering the materials and averments contained therein, granted a temporary injunction order pending inter-partes hearing.

[5] On 27th August 2014, the Respondent filed a replying affidavit where she deponed as follows:

“4. That the issue for determination is not whether the plaintiff got the approval of the building plan by the Municipal Council of Maua or not but whether he encroached on the road reserve howsoever”.

[5] The Respondent also deponed that the Petitioner/Applicant illegally extended his building to the road reserve. The Respondent further contends that the Petitioner's building was marked for demolition at an earlier stage of the construction process but the Petitioner/Applicant maliciously ignored the same and instead he proceeded to do away with the mark and continued with the illegal construction.

[6] The Respondent also stated that they are not interested with the Petitioner's parcel of land but only the part that the Petitioner has illegally encroached on which is a road reserve.

[7] In a supplementary affidavit filed with the leave of the Court and sworn on 8th September 2014, the Petitioner/Applicant deponed that he contacted one Archstudio services to do a report on the matter and that it came out very clearly from the report that his plot and building are at the right place and not on a public road. He attached a copy of the said report to the supplementary affidavit.

[8] The Petitioner/Applicant contends that he has not encroached on any road reserve.

PETITIONER'S/APPLICANT'S CASE

[9] The Petitioner filed a statement in Court on 11th June 2018 in which he stated that the suit plot is fully developed after all the necessary approvals from the County Council of Maua (definite). The Petitioner also stated that before commencing the construction, the Municipal Council of Maua (definite) through his instructions vide a notice of the Daily Nation on 19th March 2013 invited members of the public of his intention of change of user of the plot from agricultural use to multi-dwelling units. After the notice was issued, he then embarked on constructing the plot as per the approved plan.

[10] In the month of July 2014 or thereabout, the Respondent illegally marked part of his building for demolition without any justiciable reason and without giving him a right to be heard.

[11] The Petitioner therefore contends that the intended demolition by the Respondent contravenes the infringement of his right to property under Article 40 of the Constitution of Kenya.

RESPONDENT'S CASE

[11] The Respondent by way of a rejoinder contend that the issue for determination is the encroachment by the Petitioner on a road reserve. It is contended that the Petitioner illegally extended his building to the road reserve. The Respondent stated that the Petitioner's building was marked at an early stage of the construction but the Petitioner failed and/or ignored to address the matter with the relevant department and instead, he proceeded to ignore such a warning and proceeded with the construction process.

PETITIONER'S SUBMSISIONS

[12] The Petitioner submitted that he is the owner of L.R AMWATHI/MAUA/3976. He submitted that his ownership as proprietor of the plot is confirmed vide a letter from the District Land Adjudication and Settlement Office, Igembe District dated 10th October 2014. The Petitioner stated that the suit land was originally an agricultural land but later changed to commercial-cum- residential multi-dwelling units through a notice of change of user in the Daily Nation Newspaper on 19th March 2013. The Petitioner further submitted that upon change of user, he commenced construction of a storied building worth over Ksh. 20,000,000/= with the approval of all the relevant authorities. The Petitioner further contends that the Respondent's officials came to his land and marked part of the plot in red paint for purposes of destruction on allegation that part of the building stood on a public land. It is further submitted that officials from the Respondent have on numerous occasions threatened to use earth movers to bring down part of the building. The Petitioner contends that in view of the building being storied, if any of part of the building is demolished, it will be affected. The Petitioner submitted that he has not constructed on a public road.

RESPONDENT'S SUBMISSIONS

[13] The Respondent submitted that the Petitioner has not shown that he should be granted injunction orders. He submitted that for the Petitioner to succeed in an application for orders of injunction, he must satisfy the principles as set out in celebrated case of ***GIELLA VS CASSMAN BROWN & CO. LTD (1973) EA 358***. The Respondent stated that the Petitioner has not established a prima facie case with chances of success. The Respondent also stated that the Petitioner must demonstrate that he will suffer irreparable loss.

Lastly, the Respondent argued that the Petitioner has not shown that even if the matter was to be decided on the third principle, the balance of convenience will tilt in his favour. The Respondent cited the case of ***AMERICAN CYNAMO CO. VS ETHICAN LTD C.A No. 5 of 1979 reported in 1975 (ALL E.R 504)***.

ANALYSIS AND DECISION

[14] The issue for determination is whether or not the Petitioner has satisfied the principles for the grant of injunction orders. The Respondents in the response have stated that they have no dispute with the Petitioner's property being land parcel No. AMWATHI/MAUA/3976 but only to the extent that the Petitioner has encroached on a road reserve which is a public land. The Respondents arguments is that the Petitioner is entitled to his properties to the extent that such properties have not encroached upon land that was acquired and set aside for a public purpose. The Respondents further argued that the Petitioner's right must be exercised within and in accordance with the frame work of the law.

[15] I have considered the affidavit evidence and the materials annexed thereto in support and in opposition to the petition herein. The Petitioner has deponed in his evidence that the Respondent marked a portion of his building for demolition. The Petitioner has produced a provisional record of ownership of the plot which is under Adjudication indicating that the land has been recorded in his name. He has also attached a building plan prepared by J.N. Njoroge Arch. studio services. From the totality of the evidence by the parties, it is true that the Petitioner has a right to own property and are entitled to his property and developments thereto only to the extent that such properties have not encroached upon land that is for public purpose. When the Petitioner moved the Court for the orders now before me for determination, he must not only prove that he is entitled to the land but also demonstrate that the buildings constructed therein have not encroached a public road. That can only be demonstrated by way of a survey map drawn by a qualified surveyor or a Land Registrar. In this case, the Petitioner has not produced any survey map or report by a qualified land surveyor or Land Registrar showing the Petitioner's building plan in paper and on the ground. It was incumbent upon the Petitioner to demonstrate that he is entitled to the orders by showing that he has not encroached on the road reserve. In the case of ***KENYA NATIONAL HIGHWAY AUTHORITY VS SHALIEN MUGHAL & 5 OTHERS (2017) E K.L.R***, the Court of Appeal held:

“With that finding, the answer to the first issue becomes clear that there was an 80 metre road reserve and a 30 metre buffer zone on the Nairobi/Mombasa Highway at the interchange with the Southern Bypass and the disputed plot was within it. It was

scientifically proved by the survey report filed with the Court. Needless to say, it was the disputed plot that encroached on the road reserve.

In answer to the 2nd issue, I do not find that Mughal's rights were violated by the entry onto the road reserve by Kenha since Kenha had the right to so enter and carry out the road works. Mughal was entitled to his property to the extent that such property did not encroach upon land that was acquired and set aside for public purpose. It would otherwise be unlawful to superimpose a grant/certificate of title on land which is already lawfully alienated for public purpose"

In another case of CYCAD PROPERTIES LIMITED & ANOTHER VS ATTORNEY GENERAL & 4 OTHERS (2013) e K.L.R., the Court held:

"..... the Respondents, are not, from their submissions before me, challenging the Petitioners title entirely. The argument is that to the extent it has encroached on 20 metres of the road reserve, it is unlawful.

It is true that the Petitioners have a right to own property and they are entitled to their properties to the extent that such properties have not encroached upon land that was acquired and set aside for a public purpose. Their right to property must be exercised within and in accordance with the frame work of the land. Public lands acquired through compulsory acquisition are amongst the overriding interest stipulated under Section 30 of the Registered Land Act which qualify the indefeasibility of title acquired under the Act as provided in Section 28 (b) above. The Petitioners title to the extent that they comprise land which forms part of the Northern Bypass, are defeasible to that extent"

In conclusion therefore, I find that the Petitioner has not proved the principles for the grant of the orders of injunction as set out in the celebrated case of GIELLA VS CASSMAN BROWN CO. LTD (1973) 358. I am not also persuaded that the Petitioner's fundamental right to property have been infringed and/or violated under the Constitution. For these reasons, I decline to grant the prayers sought and dismiss this petition with no order as to costs.

READ, DELIVERED AND SIGNED BY E. C. CHERONO, ENVIRONMENT AND LAND COURT JUDGE KERUGOYA AT MERU THIS 14TH DAY OF NOVEMBER, 2018.

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In the presence of:

C/A: Janet

No appearance for the parties