



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC PETITION NO. 2 OF 2017

(Formerly Nairobi HC Petition No. 232 of 2016)

IN THE MATTER OF ARTICLE 22(1), 23, 64, 165(3) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF THE RIGHT TO PROPERTY UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE CONSTITUTION

OF KENYA

(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)

PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

DETER KARUORO MWANGI PETER.....PETITIONER

-VERSUS-

THE HON. ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

1. The petitioner herein, who has described himself as one of the administrators of the estate of Esther Nyandia Mwangi (deceased), filed the suit herein claiming that the fundamental rights of the beneficiaries of the estate of Esther Nyandia Mwangi (hereinafter referred to as the deceased person) have been contravened and grossly violated by the Ministry of Transport and Infrastructure (MO & TI) and the Kenya Rural Roads Authority (KeRRA) by hiving off approximately 2 acres of land from the parcel of land known as **LR No.2278** (hereinafter referred to as the suit property) without due process.
2. It is contended that the MO & TI and KeRRA, contracted Aegis Construction Company (hereinafter referred to as the Contractor) through Contract No. RWC 061 to construct Mweiga-Brookside D449 road, part of which traverses over the suit property and hived off approximately 2 acres of land from the suit property without due process.
3. It is further contended that on 3rd July, 2015 the Contractor wrongfully moved machinery, equipment and personnel onto the suit property and dug up a road measuring 40 by 300 metres on the suit property.
4. According to the petitioner, a portion of Mweiga-Brookside Road (D449) passes through a portion of the suit property which has not been set apart as a road reserve.
5. Arguing that unless they are restrained from carrying out the impugned activities on the suit property the estate of the deceased person herein and the beneficiaries of the estate will be deprived of their right to property in contravention of **Article 40** of the Constitution of

Kenya 2010, the petitioner who claims that neither he nor the administrators or the beneficiaries of the estate of the deceased person was issued with any notice in relation to the compulsory acquisition of the portion of the suit property in question by the state as by law required (in particular as required under part VIII of the Land Act No.6 of 2012), seeks judgment against the respondent for:-

a. A declaration that the beneficiaries of the estate of Esther Nyandia Mwangi (deceased) have the right to property No. LR No. 2278 measuring a total of 170 acres, save for 8 acres comprising a road reserve 200 feet wide;

b. A permanent injunction restraining the Respondent, his servants, employees from unconstitutionally depriving the Estate of Esther Nyandia Mwangi (deceased) of its property, interest and/or right over L.R No. 2278 or any part thereof and an order that respondent, his servants, employees and/or agents forthwith restore the same to its original state.

c. An order for compensation, costs of the petition and interest.

6. The petition is supported by the affidavit of the petitioner in which the averments on the face of the petition are reiterated. In support of the averments contained in the petition and the affidavit, the petitioner has annexed the following documents to the affidavit:-

- i. Copy of certificate of confirmation of grant issued to the Petitioner and 2 others namely Karige Erastus Mwangi and James Njogu Mwangi in Nairobi High Court Succession Cause No.1423 of 1993 in respect of the estate of the deceased person herein;
- ii. Copy of title in respect of the suit property;
- iii. Photograph of a road sign on the suit property with information concerning the impugned works;
- iv. Photographs/pictures showing the activities and equipment of the contractor on the ground;
- v. Demand letter dated 6th July, 2015;
- vi. Demand letter dated 31st July, 2015
- vii. Letter from the office of the MO & TI state department of Infrastructure dated 18th August, 2015 acknowledging receipt of the petitioner's demand letter dated 6th July, 2015 and advising the petitioner that the risks referred to in the letter under reference were to be borne by the contractor and not KeRRA.
- viii. Letter from the Contractor to the Petitioner dated 16th September, 2015 advising the petitioner to take up the issues concerning their activities on the suit property with KeRRA;
- ix. Letter from the Contractor to the General Manager KeRRA dated 10th August 2015, requesting him to address the issues raised in the petitioner's demand letters;
- x. Letter from the petitioner's advocate to KeRRA dated 8th December, 2015 urging it to urgently resolve the issues raised in their demand letter;
- xi. Notice of intention to institute the proceedings herein dated 29th February, 2016;
- xii. Letter from the office of the A.G dated 7th March, 2015 to the Principal Secretary MO & TI forwarding the notice referred to in (xi) above and requesting for information required by the office in order to defend any claim filed by the petitioner.

7. The petition is opposed on the grounds that the petitioner has not demonstrated how the respondent has violated his constitutional rights; that construction of the road has not entered any portion of the petitioner's land; that Mweiga-Brookside road is being constructed on the parcel of land set aside as a road reserve and that the beneficiaries of the estate of the deceased person herein will not be deprived of their right to property by construction of the road. Further that there was no need to give any notice to compulsorily acquire a portion of the suit property as the road in question, Mweiga-Brookside road, does not pass through the petitioner's parcel of land.

8. It is admitted that the MO & TI through KeRRA, contracted the contractor herein to construct Mweiga-Brookside D449 road but contended that the Ministry did not authorize and permit the contractor to enter into the petitioner's land.

9. Terming the petition frivolous, vexatious, incompetent and an abuse of the court process, the respondent contends that there are no constitutional issues raised in the petition which can be determined by this court. In this regard, see the grounds of opposition dated 11th July, 2016 and the replying affidavit of Philip Waweru Kuria filed on 16th September, 2016.

10. According to the affidavit of Philip Waweru Kuria referred to in paragraph 9 above, there is no encroachment to the suit property and therefore no compulsory acquisition will occur as survey work in respect thereof reviewed that the horizontal alignment is within the existing road reserve.

11. It is admitted that the contractor had created a diversion on the suit property without the consent of the owner and explained that upon realizing that the diversion was created on private land, the contractor's machinery and personnel were removed from the suit property.

12. Maintaining that the contractor is to blame for the trespass to the suit property, it is contended that any damage that resulted from the trespass ought to be forwarded to the contractor.

13. Annexed to the affidavit sworn in response to the petition are; copies of maps for the area in question, marked PWK-1 and 2 and a copy of a section of the contract executed between KeRRA and the Contractor, marked PWK-3.

14. In a rejoinder, the petitioner filed a further affidavit sworn on 23rd September, 2016 in which he maintains that there is no road reserve on the suit property for construction of Mweiga Brookside road (D449) and that 2.085 acres of land are to be excised from the suit property to accommodate the construction of the road; that the averments contained in paragraphs 9 to 14 of the replying affidavit herein constitutes admissions of the averments contained in paragraphs 9 to 15 of the petition and that he was justified in filing the petition herein as the respondent had the intention of depriving the estate of the deceased 2.085 acres of land without observing due process of the law.

15. The petition was disposed of by way of written submissions.

Petitioner's submissions

16. On behalf of the petitioner, it is submitted:-

a. That the approximately 2.085 acres further hived off the suit property in the construction of Mweiga Brookside D449 do not comprise a road reserve and were not acquired by the respondent as provided for in law;

b. That the beneficiaries of the estate of the deceased have been deprived of their right to property contrary to **Article 40** of the constitution. In this regard, it is contended that the act of entering and constructing a road over the suit property amounts to violation of the beneficiary's constitutionally protected right to property. The alleged acquisition of approximately 2.085 acres of land belonging to the estate of the deceased person herein for construction of Mweiga Brookside D449 without due process or proper administrative process as required under **Article 40** of the constitution is said to constitute illegal acquisition of private property.

17. Based on the provisions of part VIII of the Land Act No. 6 of 2012, in particular **Sections 107 and 111** thereof and the decisions in the cases of **Patrick Musimba v. National Land Commission & 4 Others (2016) e KLR** and **Commissioner of Lands & Another v. Coastal Aquaculture Ltd Civil Appeal No. 252 of 1996**, to the effect that the procedures provided by law must be strictly adhered to before compulsory acquisition can be effected, the petitioner maintains that neither he nor the other beneficiaries of the estate of the deceased person were served with a notice of the respondent's intention to compulsorily acquire a portion of the deceased land for construction of Mweiga Brookside D449 which traverses onto the suit property, LR No.2278.

18. Maintaining that the respondent through the MO & TI and KeRRA violated the deceased persons' constitutional right to property, the petitioner submits that the beneficiaries of the estate of the deceased person herein are entitled to the prayers sought in the petition.

Respondent's submissions

19. On behalf of the respondent, a brief background of the cases urged by the parties to this suit is given and submitted that the respondent's conduct complained about does not constitute a violation and/or contravention of the petitioner's fundamental rights and freedoms. The petitioner is said to have failed to state and identify the rights infringed or threatened with precision as espoused in the case of **Anarita Karimi Njeru v. Republic (1976-1980) KLR 1272**.

20. According to the respondent, an area of 2.085 acres was excised from LR. No.2278 in 1920 before the parcel of land was subdivided to create the suit property, 2278. The map attached to the respondent's replying affidavit and marked PWK-2 is said to lay bare that fact. The map relied on by the petitioner is said not to be helpful in determination of this suit.

21. The deponent of the replying affidavit relied on by the respondent, who is a surveyor with KeRRA is said to have through locating the boundaries of the suit property, confirmed that there is no encroachment into the suit property and that the proposed horizontal alignment of the road lies within the authentic road reserve.

22. Maintaining that no land acquisition was done, the respondent contends that because the petition contends that land belonging to the deceased person was compulsorily acquired, he ought to have made the National Land Commission a party to the suit.

23. On whether the petitioner has made a case for being granted the orders sought, it is explained that the projects in question are an initiative of the Government of Kenya aimed at developing and maintaining existing road networks in order to improve access and spur movement of people and goods in line with vision 2030 and as such the project is being done in public interest.

24. Arguing that the petition herein has been brought in bad faith and that granting the orders sought will be prejudicial to the public interest and the Government's agenda of achieving vision 2030; based on the decision in the case of **Veronica Njeri Waweru & 4 others V. The City Council of Nairobi & 2 Others (2012) e KLR** the court is urged to uphold the public interest by refusing to grant the orders sought.

25. Concerning the petitioner's plea for compensation, it is pointed out that no valuation has been attached to guide the court in the event it is inclined to grant the prayer for compensation and submitted that the petitioner has failed to prove his claim for damages which ought to have been specifically pleaded and strictly proved by say attaching a valuation report showing the damage occasioned on the suit property as the damages allegedly suffered are in the nature of special damages.

26. In reply to the issues raised in the respondent's submissions, the petitioner filed further submissions dated 3rd May, 2017 in which he maintains that 2.085 acres were excised from LR No. 2278 to create Mweiga Brookside Road (D449).

27. According to the petitioner, if the 2.085 acres hived from the suit property comprise a road reserve, the same was done in total disregard of the law. The respondent is said to have failed to show how the suit land became a road reserve.

28. Since no notice was served on the petitioner communicating the respondent's intention to acquire the suit land, construction of the road in question through the suit land is said to be trespass to land for which the National Land Commission is not answerable.

29. The petitioner's claim is said to be for restitution of the suit property to its original state and an order of compensation for trespass to land and not compensation for compulsory acquisition.

30. From the pleadings and the submissions, this court finds the issues for the court's determination to be;

- i. Who is responsible for the admitted trespass to the deceased person's land by the contractor by construction of a road for diverting traffic; the contractor or the respondents?
- ii. Whether or not there is a road reserve for construction of Mweiga brookside Road D449 curved out of the suit property?
- iii. Subject to the outcome of (ii) above, whether the road reserve, if it exists, was un- procedurally created?
- iv. Whether the petitioner has made up a case for being granted the orders sought or any of them?
- v. What orders should the court make?

31. With regard to the first question, given the respondent's contention that it was not responsible for the damage occasioned on the petitioner by construction of a diversion for road traffic on the suit property, it behooved the petitioner to prove that it was the respondent as opposed to the contractor or KeRRA who were responsible for the contractor's wrongful action. There being no evidence to show that the wrongful actions of the contractor were sanctioned by the respondent or that the respondent was responsible for the wrongful actions of the contractor, I find and hold that the petitioner has not proved that the respondent was the one to shoulder the responsibility of the contractor or the contractor's employer, KeRRA. In this regard, see the case of Laban M. Kimondo v. Attorney General (2016)e KLR where it was stated:

“Section 2 of the State Corporations Act defines a state corporation as follows:-

“state corporation” means— (a) a state corporation established under section 3;

(b) a body corporate established before or after the commencement of this Act by or under an Act of Parliament or other written law.

11. The provisions of Section 3 of the State Corporations Act are as follows: -

(1) The President may, by order, establish a state corporation as a body corporate to perform the functions specified in that order.

(2) A state corporation established under this section shall—

(a) have perpetual succession;

(b) in its corporate name be capable of suing and being sued;

(c) subject to this Act, be capable of holding and alienating movable and immovable property.

12. Yuken Textiles Limited from all accounts was a state corporation also known as a parastatal. It was a body corporate, it had a perpetual succession. In such character, it had the capacity to sue and be sued. The Claimant averred that the defendant was sued on behalf of the Ministry of Industrial Development in accordance with the Government Proceedings Act. In the claim before me, the Claimant sued the Respondent on behalf of Government. His claim should have been mounted against Yuken Textiles Limited and upon liquidation, upon the Liquidator. In the Court's view, the Claimant was non-suited against the Respondent.

32. It cannot be in contention that by dint of the above cited provisions of the law, a state corporation is the same as the ministry having been established as such under the Kenya Roads Act, No. 2 of 2007.

33. Because the respondent in its pleadings denied liability for the wrongful actions of the contractor, the petitioner ought to have enjoined the contractor and/or KeRRA to the suit for determination of that issue as between the contractor and the respondent or as between the contractor and its employer, KeRRA. As things stand now, it is not possible to determine who between the contractor, the contractor's employer and the respondent was to blame for the impugned works of the contractor.

34. Given the averments in the further affidavit sworn by the petitioner on 23rd September, 2016 as read with the submissions by the petitioner to the effect that his claim is not based on compulsory acquisition but trespass to the suit property, it cannot reasonably be said that the petitioner has discharged the burden placed on him of whether there was compulsory acquisition of a portion of the suit property or a threat to compulsorily acquire a portion of the suit property.

35. The averments in the said affidavit suggest that there was no compulsory acquisition but a threat to compulsorily acquire a portion of the suit property.

36. For this court to disregard the evidence of the expert (surveyor) to the effect that there was no compulsory acquisition and that the impugned road construction project will not result in encroachment of the petitioner's land, there must be evidence from another expert controverting that of the surveyor and not mere allegations or assertions by the petitioner.

37. The upshot of the foregoing is that the petitioner has not proved that there is a road reserve which was unlawfully curved out of the suit property or that the impugned activities of the respondent would result in encroachment of a portion of the suit property. As pointed out above, the issue as to whether or not there was unlawful acquisition of a portion of the petitioner's parcel of land appears to have been abandoned, as in his supplementary submissions, the petitioner is categorical that his claim is not based on compulsory acquisition but trespass to land.

38. Whilst it is admitted that there was unlawful trespass to the petitioner's land in respect of which the petitioner would ordinarily be entitled for damages for trespass to land, as pointed out herein above, the respondent having denied that it was responsible for the wrongful actions of the contractor, it behooved the petitioner to either lead evidence capable of proving that the respondent was indeed responsible for the wrongful actions of the contractor or to enjoin the contractor and his employer, KeRRA in this suit for the court to determine that issue not only between the petitioner and the respondent but also between the respondent, the contractor and the contractor's employer.

39. With regard to the plea of restitution of the suit property, the court was at a loss as to what kind of relief is sought, as it may not be possible for the respondent or the contractor to return the land to the status it was before the contractor trespassed into the suit land and constructed an access road thereon. Given that it may not be possible to restore the land to the status it was before the unlawful encroachment, to ameliorate the loss caused by the damage, the court can only award damages for trespass to land.

40. As the petitioner did not specifically plead and strictly prove the damages suffered, as by law required, in the circumstances of this case, had the petitioner proved that the respondent is responsible for the damage occasioned on the estate of the deceased person herein, I would have assessed the damage payable to the estate at Kshs. 500,000/= . This would be so given that other than providing the area encroached on, the petitioner did not provide the court with any evidence which it could rely on in assessing the actual loss suffered or caused.

41. My overall analysis of the petitioner's case is that he had a genuine and legitimate claim against the contractor and/or KeRRA but failed to sue those entities and instead chose to sue an entity he could not prove his case against. Consequently, his case must fail for being bad in law.

42. Having determined that the petitioner had a genuine claim against the contractor and/or KeRRA which claim he lost for suing the wrong entity, I will excuse him from meeting the costs of the petition and order that each party meets its own costs of the suit.

43. The upshot of the foregoing is that the petitioner's suit is found to be bad in law and dismissed with no orders as to costs.

44. Orders accordingly.

Dated, signed and delivered in open court at Nyeri this 19th day of December, 2018.

L N WAITHAKA

JUDGE

Coram:

Mr. Gitonga for the petitioner

Mr. Nderitu for the respondent

Court assistant - Esther