



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

PETITION NO. 33 OF 2015

KARAMORAH IMPEX AND TRANSPORT COMPANY.....PETITIONER

VERSUS

KENYA NATIONAL HIGHWAY AUTHORITY.....1ST RESPONDENT

PRINCIPAL SECRETARY, MINISTRY OF TRANSPORT AND INFRASTRUCTURE,

(DEPARTMENT OF INFRASTRUCTURE).....2ND RESPONDENT

NATIONAL LAND COMMISSION.....3RD RESPONDENT

ATTORNEY GENERAL4TH RESPONDENT

RULING

(Application to reinstate a petition dismissed for the reason that the supporting affidavit was unsigned; applicant seeking to be allowed to file a new affidavit to support the petition; application allowed but subject to payment of thrown away costs)

1. The application before me is that dated 3 May 2017 filed by the petitioner. It seeks the following principal orders which are prayers 3, 4 and 5 of the application, being :-

(a) That the Honourable Court be pleased to review and or set aside its orders of 31 March 2017, dismissing the petitioner's petition with costs.

(b) That the Honourable Court be pleased to reinstate the Petitioner's Petition dated 17 July 2015 and set the same for hearing.

(c) That the petitioner be granted leave to put in a competent petition in the court file.

2. The application is opposed and before I go to the gist of the issues raised in this application, I think it is best that I give a little background on the suit herein, and why this application has been deemed necessary.

3. The suit was commenced on 17 July 2015 by way of a Constitutional Petition vide which the petitioner inter alia averred that he is the legal allottee and owner of a land described as LR No. 30154 in Nakuru County (the suit land) having been allotted the land by the Government of Kenya on 1 March 1997. It was

said that the 1st respondent has illegally entered the land and began the process of constructing a flyover/bypass on it yet no procedure for compulsory acquisition has been undertaken. In the petition, the petitioner sought orders inter alia for a declaration that the petitioner is the rightful owner of the suit land; an order of injunction against the 1st respondent from constructing on the said land; and in the alternative, payment of compensation of Kshs. 350,000,000/=. The petition was said to be supported by an affidavit of Yussuf Suraw Issack which affidavit was not signed by the deponent.

4. The 1st respondent opposed the petition through the replying affidavit of Milcah Ngina Muendo, who is the 1st respondent's surveyor. It was deposed that the suit land occupies, on the ground, the same land as LR No. 30458, which is land owned by the Ministry of Agriculture, and therefore the suit land must have been irregularly acquired. It was averred that the petitioner therefore cannot claim any compensation over the land as it has no proprietary interest.

5. On 8 March 2017, when the matter came up for directions, I found that the suit raises technical issues and makes references to survey maps, ground positioning, among other matters, which I thought were best suited to be explained orally. I therefore directed the petition to proceed partly by way of affidavit evidence and oral evidence and directed the parties to avail their witnesses at the hearing which was scheduled for 31 March 2017.

6. On that day, the petitioner was absent and had no witnesses. Mr. Langat who appeared for the petitioner stated that his client is unwell and therefore only relied on the affidavit evidence, otherwise the matter be adjourned. Ms. Akong'a for the 1st respondent was ready to proceed with her witness. I considered the application made by Mr. Langat and was of opinion that it is fine if the petitioner did not wish to buttress its case by oral evidence and only rely on the affidavit evidence. However I did observe that the affidavit in support of the petition was unsigned and I pointed out the same to Mr. Langat who acknowledged as much. I therefore found that the petition is not supported by any evidence and I proceeded to dismiss it with costs.

7. It is that action of dismissal which has prompted the petitioner to file this application. The application is founded on the following grounds :-

- (a) That the court on 31 March 2017 dismissed the petitioner's petition dated 17 July 2015 with costs on grounds that the petition was defective.*
- (b) That the court reached the said conclusion after perusing the supporting affidavit and found that the same was not signed.*
- (c) That however, all other copies of the petition were duly signed by the deponent and hence were competent.*
- (d) That in fact the 1st respondent's counsel admitted in court that their copy was duly signed by the petitioner's director who was the deponent of the affidavit.*
- (e) That therefore, there is sufficient reason that warrants the order of the court to be reviewed.*
- (f) That the application has been brought without unreasonable delay.*
- (g) That it is only fair and just that his application be allowed as prayed.*

8. The supporting affidavit to the motion is sworn by Yusuf Suraw Issack a director of the petitioner. He has inter alia deposed that save for the court file copy, all other copies of the supporting affidavit were signed. He has also referred to Rule 11 of the Constitution Rules and believes that there is sufficient reason to warrant a review.

9. The 1st respondent has opposed the motion through the replying affidavit of Milcah Ngina Muendo. She has deposed inter alia that the petitioner cannot rely on Rule 11 of the Constitutional Rules. She has

also stated that the construction of the interchange was complete.

10. I have considered the application alongside the submissions of Mr. Ogola for the petitioner and Mr. Makori for the 1st respondent.

11. What is before me is an application for review said to be brought under Order 45 Rule 1 of the Civil Procedure Rules, 2010, and Section 3A of the Civil Procedure Act, and all other enabling provision of the law. The suit is a constitutional petition and strictly speaking the Civil Procedure Rules do not apply since the suit is not one filed pursuant to the Civil Procedure Act. I therefore do not see the place of Order 45 of the Civil Procedure Rules, though there is no bar to a party seeking the same reliefs granted in the Civil Procedure Act in a Constitutional petition, if they are applicable to the circumstances in the petition. I will entertain the application as one for review of the order made on 31 March 2017 under the Court's inherent power, but not necessarily as a strict Order 45 application.

12. From the application, the petitioner avers that it has sufficient reason to be entitled to a review of the orders made on 31 March 2017, principally on the ground that it has other signed copies of the supporting affidavit, and that counsel for the petitioner did state in court that he has the other signed copies. Nothing could be further from the truth, because as the record reflects, Mr. Langat who was in court for the petitioner, affirmed that the affidavit before court has no signature, and he never informed the court of the existence of any signed copies. If he had, that would have gone on record.

13. I dismissed the petition because I was of opinion that if the petitioner wishes to rely on affidavit evidence to support its case, then it has no evidence, since an affidavit that has not been signed cannot pass for any evidence. I was pointed at Rule 11 of the Constitution of Kenya, 2013 Rules by Mr. Ogola. The same provides as follows :-

11. Documents to be annexed to affidavit or petition

(1) The petition filed under these rules may be supported by an affidavit.

(2) If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit.

14. It was submitted that a petition does not need to have an affidavit to be competent. That is indeed true; that it is not a must for a petition to be accompanied by an affidavit, for Rule 11(1) above, uses the words "may" and not "shall". However, I did not dismiss the petition because I thought that it was incompetent for want of an affidavit. I dismissed it because I had no evidence before me to support the petition. Without the affidavit, I had no evidence of ownership of the suit property by the petitioner; I had no evidence of encroachment by the 1st respondent; and I had no evidence that the petitioner would be entitled to compensation in the sum of Kshs. 350,00,000/= if it cannot get back the land that it claimed to own. The petition was indeed not struck out for being incompetent, but dismissed for not having any evidence to support it. It was therefore dismissed on substance and not on a technicality.

15. That being the case, strictly speaking the petitioner is barred from filing any other suit because of the res judicata rule. I would be the last to deny a party an opportunity to be heard on a matter if I feel that such party can be accommodated without prejudice to the opposing party. The petitioner may have thought that it had signed copies in court when there was none and I can excuse the omission by the petitioner. In this instance, if I am to allow the petitioner leave to file a good affidavit to support his petition, I see no prejudice to the 1st respondent which cannot be compensated by an award of costs, being costs of attendance when the petition was dismissed and the costs of this application. In my discretion, I will allow this application and reinstate the petition. I permit the petitioner to file and serve a proper affidavit to support its petition within 14 days. The petitioner will however pay costs to the 1st respondent, which in my own discretion, I assess at Kshs. 25,000/=. These costs must be paid within 14 days or else the orders of 31 March 2017 will stand.

16. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 31st day of October 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of : -

Mr. Ogola for the applicant.

No appearance for the respondents.

Court Assistant: Carlton Toroitich.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU