



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND COURT

ELC. CASE NO. 963 OF 2012

VIPINGO BEACH RESORT LIMITED.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1STRESPONDENT

THE MINISTRY OF ROADS.....2NDRESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY.....3RDRESPONDENT

KENYA RAILWAYS CORPORATION.....4TH RESPONDENT

JUDGMENT

Petitioner's Case

The Petitioner contends that it is the duly registered lessee of the land comprised in Land Reference No. 209/14437 which is situated in the proximity of the Nairobi Southern Bypass (hereinafter referred to as the "suit property") pursuant to Grant Number I.R. 89655. The Petitioner produced its title deed to attest to this assertion. The Petitioner further avers that it has constructed a total of 80 flats on the suit property after obtaining all the necessary approvals from the relevant Government Agencies. The Petitioner estimates that the development is conservatively valued at over Eight Hundred Million (Kshs. 800,000,000/-). The Petitioner further avers that in the course of obtaining the City Council of Nairobi's (as it then was) approval, it was required to obtain a letter from the 3rd and 4th Respondents confirming that its proposed development did not encroach on the Southern Bypass or any intended railway development. The Petitioner stated that indeed, it obtained those confirmations from the said Respondents that the intended development upon the suit property neither encroached upon the Southern Bypass nor any proposed railway development, which information was formally communicated vide the 3rd and 4th Respondents letters dated 15th July 2010 and 9th August 2010 respectively. The Petitioner further indicated that it then proceeded to implement its development upon the suit property in strict compliance with the law and met all the conditions imposed by the relevant authorities. The Petitioner then stated that on 8th October 2010, it was shocked to find that officers of the 3rd Respondent had visited the suit property and emblazoned the walls thereof with the ominous "X" mark which has become associated with impending demolitions by the State or State organs particularly in the course of construction of various bypasses in Nairobi and its environs. The Petitioner further indicated that on 7th February 2012, officers of the 3rd Respondent visited the suit property without informing the Petitioner of their intention and the Petitioner is reasonably apprehensive that the Respondents are poised to taking adverse action against the suit property including the acquisition or demolition of the same.

For this reason, the Petitioner humbly prays that:

1. Spent
2. A declaration do issue that the Petitioner is the lawful owner of the suit property and is entitled to the quiet enjoyment thereof together with the development thereon.
3. A declaration that the intended and/or threatened action by the Respondents to enter upon the suit property and demolish all or part of the development thereon is in breach of the Petitioner's constitutional right to acquire and own property of any description in any part of Kenya and to the quiet enjoyment thereof.
4. A declaration that the intended and/or threatened action by the Respondents to enter upon the suit property and demolish all or part

of the development thereon is in breach of the Petitioner's constitutional right of:

- a. The Legitimate Expectation that the State and every State organ shall observe, respect, promote and fulfill the rights and fundamental freedoms conferred upon the Petitioner by the Constitution of Kenya.
 - b. Its right to Fair Administrative Action.
5. A declaration that the rights of the Petitioner to the suit property are threatened by the imminent acts of the Respondents.
 6. A declaration that the imminent threat by the Respondents to enter upon the suit property and demolish all or part of the development thereon being unconstitutional is therefore null and void.
 7. This Honorable court do issue such orders and give such directions as it may deem mete and just and appropriate in all the circumstances of this matter.

7A. In the alternative to the foregoing, the Petitioner seeks a declaration that:

- a. Pursuant to **Article 40(3)(b)(1) of the Constitution**, the Petitioner is entitled to immediate compensation at the current market value of the suit property and the development that has been erected thereon.
- b. In view of the conduct of the 2nd, 3rd and 4th Respondents, the Petitioner is entitled to special damages in respect of all such expenses and costs as it has incurred or shall incur in connection with this matter and general damages on the footing of aggravated, exemplary and punitive damages.
- h. The costs of the Petition be awarded to the Petitioner.

1st Respondent's Case

The 1st Respondent did not file any response to the Petition.

2nd Respondent's Case

The 2nd Respondent filed the Replying Affidavit of Engineer Michael Sistus Mwaura Kamau, its Principal Secretary, sworn on 4th December 2012 in which he averred that the suit property forms part of the road reserve intended for the Southern Bypass and that the Petitioner's purported title document is dated 22nd August 2002 while there is evidence dating back to the 1980s and 1990s showing that the land was reserved for road and railway infrastructure. In support of that assertion, he annexed a copy of a letter dated 12th July 1990 from the 2nd Respondent to the 4th Respondent on the subject "Railway Reserve Along the Proposed Nairobi Southern By-pass Road". Herebelow is an excerpt from the said letter:

"A transport corridor comprising of a road and railway reserve has been provided in the Nairobi South structure plan a copy of which is enclosed for ease of reference. The corridor is 120m wide, that is a 60m wide road reserve and a 60m wide railway reserve.

The road starts to divert from the A104 Mombasa Road at the Northeast edge of Nairobi National Park, passes over Langata Road, passes through Ngong Road forest and over Ngong Road and after Ondiri Swamp it passes under existing railway and finally connects to the A104 Naivasha Road at Kikuyu junction, representing a dual carriage way of approximately 29km in total length. The Nairobi Southern by-pass road is part of the Trans Africa Highway. The road project is under design by the relevant Ministry following successful completion of the feasibility studies.

On the Structure Plan, the railway reserve runs alongside the road reserve. From Mombasa Road where the bypass road takes off the railway reserve passes through the northern edge of the Nairobi National Park, passes over Langata Road and slightly beyond the "Julia Ojiambo Estate" on the plan and neighborhoods "D" and "E" it curves to join the existing Kibera Line while a continuation of the railway reserve runs along the proposed road reserve at the north eastern edge of Southland estate and beyond.

....

Your early attention to this matter is necessary for co-ordination purposes not only because the road and railway are important means of transport, but also that the corridor affects land belonging to other institutions and private owners and there is need to avoid unco-ordinated development which results in costly mistakes."

He further averred that it is not possible for the Petitioner to prove ownership of the suit property or the validity of his title in view of that and that the only appropriate manner in which the Petitioner would be able to prove the validity of its title deed would be by way of civil proceedings commenced by way of plaint in which the evidence tendered would be subjected to verification.

3rd Respondent's Case

The 3rd Respondent filed the Replying Affidavit of Thomas Gaciri Gacoki, its Manager (Survey), sworn on 5th April 2012 in which he averred that the suit property lies on a road and railway reserve. He added that the railway reserve was granted in 1957 and the road reserve had been reserved as early as 1985. He indicated further that a feasibility study of the Nairobi Southern Bypass was carried out in 1988

which was followed by a mapping of route corridor in 1990 and that a further detailed design of the Nairobi Southern Bypass was carried out by the Japanese Government in 1991. He further stated that the 2nd Respondent opened up the Nairobi Southern Bypass in the year 2003 and put it to murrum status as a motorable road. He stated that at that time, the suit property did not exist. He admitted that the Petitioner wrote to the 3rd Respondent to enquire if its proposed developments would encroach on the road and railway reserve and further stated that at the time of making the reply to the inquiry, the 3rd Respondent did not know that the railway design would fall on, overlie or affect the Southern Bypass design but thought that it would follow the railway reserve which falls on the opposite side of the road reserve as provided for in annexures "TGG1 (b) and (c)". He added that in the said annexures, the road reserve is clearly marked as abutting the residential area while the railway reserve is on the opposite side. He admitted that subsequent to the clearing and upgrading of the Southern Bypass to murrum status, the 2nd Respondent issued residential plots on the reserve abutting the cleared road which was originally a road reserve. He added further that after the clearing of the Southern Bypass, the 4th Respondent came up with a railway line design which overlies and overlaps the Southern Bypass design for some distance. He also pointed out that in their reply to the Petitioner, the 3rd Respondent referred the Petitioner to the 4th Respondent for clarification regarding the proposed railway line in the area. He further added that the 3rd Respondent has held consultative meetings with stakeholders and affected parties with a view to resolving the difficulties being faced and chart the way forward. He also disclosed that the 3rd and 4th Respondents have been engaging in consultations to resolve the positioning of the railway reserve and the possibility of relocation, realignment, shifting and or the modalities of sharing the available reserve are yet to be agreed upon. He further stated that in the event that any legally acquired land would have to be compulsorily acquired, then the due process of law would be followed and any compensation warranted would be duly paid to the affected parties. He also stated that the 3rd Respondent did not have imminent plans to demolish any structures or interfere with any developments that are on private land unless and until it is shown that the same is on illegally acquired land that was meant for a road reserve. He further stated that no conclusion has been reached as yet and that in the circumstances this Petition is premature and should be dismissed with costs.

4th Respondent's Case

The 4th Respondent did not file any response to the Petition.

Emerging Issues for Determination

The following are the issues that arise from this Petition for my determination:

1. Whether the Petitioner is the lawful owner of the suit property
2. Whether the Respondent's intended and/or threatened action to enter into the suit property and demolish all or part of the development thereon is a breach of the Petitioner's rights, constitutional and otherwise.
3. Whether the Petitioner is therefore entitled to immediate compensation and damages.
4. Who shall bear the costs of this Petition.

Determination

1. Whether the Petitioner is the lawful owner of the suit property.

The Petitioner claims to be the duly registered proprietor of the suit property and in support of that assertion, it produced its title document. This is Grant No. I.R. 89655 transferred to the Petitioner on 3rd November 2008. The title is issued under the provisions of the **Registration of Titles Act Cap 281 Laws of Kenya** (now repealed). **Section 23(1)** of the **Registration of Titles Act** (repealed) provides as follows:

"The certificate of title issued by the registrar to a purchaser of land upon a transfer ... 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 ... 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."

The Land Registration Act No. 3 of 2012 under **section 26(1)** more or less reproduces the provisions of **section 23(1)** of the **Registration of Titles Act** (supra) save that it extends the grounds on which a registered title could be challenged to include where the title has been acquired illegally, unprocedurally or through a corrupt scheme.

Section 26(1) of the **Land Registration Act** provides as follows:

"The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner , ... and the title of that proprietor shall not be subject to challenge, except-

- a. **On the ground of fraud or misrepresentation to which the person is proved to be a party; or**
- b. **Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."**

It is the 2nd Respondent's assertion that the Petitioner's purported title document is dated 22nd August 2002 while there is evidence dating back to the 1980s and 1990s showing that the land was reserved for road and railway infrastructure. The letter dated 12th July 1990 from the 2nd Respondent to the 4th Respondent relied upon by the 2nd Respondent itself contains an admission that the lands in the corridor include

land owned by private individuals as follows:

“Your early attention to this matter is necessary for co-ordination purposes not only because the road and railway are important means of transport, but also that the corridor affects land belonging to other institutions and private owners and there is need to avoid unco-ordinated development which results in costly mistakes.”

The 2nd Respondent has not produced any evidence to prove that indeed the Petitioner’s title document is invalid on any of the grounds cited in the laws set out above. Its assertion that the suit property lies within the road and railway reserve remains unproved and unsubstantiated, especially considering that the Nairobi Southern Bypass has already been constructed and is in use without any blockage being caused by the suit property. Further, I must mention that the suit property is not a stand-alone parcel of land in the middle of nowhere. The suit property is contiguous with other privately owned parcels being LR. Nos 209/14435, 209/14436, 209/14438 and others. This buttresses my conviction that the suit property does not lie within the road and railway reserve.

On its part, the 3rd Respondent asserts that when the 2nd Respondent opened up the Nairobi Southern Bypass in the year 2003 and put it to murrum status as a motorable road, the suit property did not exist. This is not true as the title document produced by the Petitioner shows that it was issued on 22nd August 2002. The 3rd Respondent expressly informed the Petitioner that the suit property does not lie within the road reserve marked out for the Nairobi Southern Bypass. This is important, noting that according to annexure “TGG1(b)” annexed to the 3rd Respondent’s Replying Affidavit, the suit property is shown to abut the road reserve while the railway reserve lies on the opposite side. So, if at all the suit property was encroaching in any way, it would be to the road reserve and not to the railway reserve. However, the 3rd Respondent did not explain how come the Nairobi Southern Bypass has already been constructed and is in actual use, yet the suit property is intact.

Overall, the Respondents have not convinced me that the suit property lies on any road or railway reserve. The Respondents have further not succeeded to challenge the Petitioner’s title document in any of the ways prescribed by law. On those grounds, I find that the Petitioner is indeed the lawful and duly registered proprietor of the suit property and that the suit property does not lie within the road or railway reserve.

2. Whether the Respondent’s intended and/or threatened action to enter into the suit property and demolish all or part of the development thereon is a breach of the Petitioner’s rights, constitutional and otherwise.

There is no question in my mind that indeed the Petitioner’s developments on the suit property were threatened with demolition by the Respondents after they marked it with the ominous “X” mark. This action no doubt amounts to a breach of the Petitioner’s proprietary rights over the suit property as the absolute and indefeasible owner thereof. Further to that, this action amounts to a breach of the Petitioner’s constitutional rights. **Article 40(1) of the Constitution of Kenya, 2010** provides as follows:

“40(1) Subject to Article 65, every person has the right either individually or in association with others to acquire and own property:-

- a. Of any description,
- b. In any part of Kenya

(2) Parliament shall not enact a law that permits the State or any person :-

(a) To arbitrarily deprive a person of any property of any description or any interest in or right over any property or any description, or

(b) to limit or in any way restrict the enjoyment of any right under this article on the basis of any of the ground specified or contemplated in Article 27(4)…”

Accordingly, I find that the Respondents’ threatened action to enter upon the suit property and demolish the developments thereon amounts to arbitrarily depriving the Petitioner of his property and is a breach of the Petitioner’s constitutional right to own property in any part of Kenya. It cannot be permitted to happen.

3. Whether the Petitioner is therefore entitled to immediate compensation and damages.

As to whether the Petitioner is entitled to compensation in the event that the Respondents follow through with their threat to enter the suit property and demolish the developments thereon, **Article 40(3) of the Constitution of Kenya, 2010** is instructive. It provides as follows:

“The State shall not deprive a person of property of any description or of any interest in or right over property of any description, unless the deprivation:

- a. Results from an acquisition of land or an interest in land or a conversion of an interest in land or title to land in accordance with chapter five, or
- b. Is for a public purpose or in the public interest and is carried out in accordance with this constitution and any act of parliament that

- i. requires prompt payment in full of just compensation to the person and
- ii. Allows any person who has an interest in, or rights over that property access to a court of law.”

The Constitution is clear as to what is required to be done should the Respondents proceed with their threat to enter into the suit property and demolish the developments thereon which is that they must follow the prescribed procedure for acquisition of the same. This procedure is captured in **Part VIII** of the **Land Act, No. 6 of 2012**. I find that should the Respondents wish to compulsorily acquire the suit property, they are bound to pay the Petitioner just compensation therefor.

Disposition

In light of the foregoing, I therefore make the following orders:

1. Spent
 2. A declaration be and is hereby issued that the Petitioner is the lawful owner of the suit property and is entitled to the quiet enjoyment thereof together with the development thereon.
 3. A declaration be and is hereby issued that the intended and/or threatened action by the Respondents to enter upon the suit property and demolish all or part of the development thereon is in breach of the Petitioner’s constitutional right to acquire and own property of any description in any part of Kenya and to the quiet enjoyment thereof.
 4. A declaration be and is hereby issued that the intended and/or threatened action by the Respondents to enter upon the suit property and demolish all or part of the development thereon is in breach of the Petitioner’s constitutional right of:
 - a. The Legitimate Expectation that the State and every State organ shall observe, respect, promote and fulfill the rights and fundamental freedoms conferred upon the Petitioner by the Constitution of Kenya.
 - b. Its right to Fair Administrative Action.
 5. A declaration be and is hereby issued that the rights of the Petitioner to the suit property are threatened by the imminent acts of the Respondents.
 6. A declaration be and is hereby issued that the imminent threat by the Respondents to enter upon the suit property and demolish all or part of the development thereon without following the laid down law is unconstitutional and therefore null and void.
 7. Nil.
- 7A. A declaration be and is hereby issued that:
- a. Pursuant to **Article 40(3)(b)(1) of the Constitution**, the Petitioner is entitled to just compensation as may be determined by the National Land Commission for the suit property and the development that has been erected thereon should the Respondents proceed with the entry into the suit property and demolition of the development thereon.
 - b. No damages awarded.
 - h. The costs of the Petition are awarded to the Petitioner.

DELIVERED AND DATED AT NAIROBI THIS 20TH DAY OF FEBRUARY 2015.

MARY M. GITUMBI

JUDGE