



Kajina Holdings Limited v Kenya National Highways Authority (Environment & Land Case 263 of 2016) [2024] KEELC 1282 (KLR) (7 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1282 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 263 OF 2016**

E ASATI, J

MARCH 7, 2024

BETWEEN

KAJINA HOLDINGS LIMITED PLAINTIFF

AND

KENYA NATIONAL HIGHWAYS AUTHORITY DEFENDANT

JUDGMENT

Introduction

1. Kajina Holdings Ltd, the Plaintiff herein, sued Kenya National Highway Authority, the Defendant, vide the Plaint dated 3rd October, 2016 seeking for;
 - a. a declaration that the shopping mall housing Ukwala Supermarket Limited and Family Bank Ltd, is properly constructed within Land parcel No.Kisumu/Kanyakwar “A”/1659 and does not encroach on the Road Reserve at all.
 - b. an order of permanent injunction directed at the Defendant restraining it by either itself, its agents, servants, employees or any other person acting under its direction and order from entering onto or interfering in any way with land parcel NO.Kisumu/Kanyakwar “A”/1659 and demolishing either part or the whole of the shopping mall housing Ukwala Supermarket Ltd and Family Bank Ltd.
 - c. costs of the suit.
2. In response to the Plaintiff’s claim, the Defendant filed a defence dated 11th November, 2015 and filed in court on 14th November, 2016 denying the Plaintiff’s claim and stating that the Plaintiff had encroached onto the road reserve.



The Evidence

3. The evidence adduced on behalf of the Plaintiff comprised of the testimony of two witnesses and the documents they produced.

PW1, Joseph Juma Osewe testified that he was a director of the Plaintiff Company. He stated through his witness statement dated 3rd October, 2016 that the Plaintiff Company is the registered proprietor of all that interests registered and known as title No. Kisumu/Kanyakwar “A”/1659 (the suit land herein) situated along Kisumu – Kakamega road at Kondele area in Kisumu City.

That on the suit land is built a Shopping Mall which was housing Ukwala Supermarket Ltd on one side and Family Bank on the other side.

4. PW1 stated further that on 1st July, 2016 persons claiming to be agents of the Defendant invaded the Shopping Mall claiming that it was built on the road reserve and placed marks with orange paint on both the exterior and interior walls of the Supermarket and the Bank, which marks they claimed, gave the Plaintiff notice to either demolish the Shopping Mall or have it demolished by the said agents to clear the way for road construction.
5. That following the incident, the Plaintiff resolved to take legal action, appointed PW1 to execute all pleadings and plead on behalf of the Plaintiff Company and appointed the firm of Maxwell O. Ogonda Advocate to file the suit.
6. PW1 further testified that he is aware that the Shopping Mall has properly been constructed within the confines of the suit land and that the same does not encroach onto the road reserve and that due process was followed by the Plaintiff in constructing the Shopping Mall as the Plaintiff obtained all the necessary permits and authorization for the construction and occupation of the Shopping Mall. That if the Defendant demolishes the Shopping Mall, the plaintiff will suffer irreparable loss as construction of the Shopping Mall was financed by various loans still being serviced.
7. PW1 produced exhibits P.1 to P.9. On cross-examination, PW1 stated that the plaintiff’s building was not on a road reserve. That construction of the road was not over. That the building was currently occupied by Shivling Supermarket and a private hospital.
8. PW2, Patrick Opiyo Adero was a Surveyor. He produced a Surveyor’s report as exhibit P.10 and testified that he confirmed that the suit land was outside the road reserve. On cross-examination, he stated that he visited the site in the year 2016 and that the building was not destroyed. That the road was in use.
9. The Defendant’s evidence comprised of the testimony of David Omondi Okuthe who testified as DW1 and the exhibits he produced. He testified that he was employed by the Defendant in the capacity of Regional Surveyor-Nyanza. He stated vide his earlier recorded and filed witness statement dated 25th May, 2020 that Kisumu-Kakamega A1 is a classified road reserve with the section of the road between Kisumu Boys High School roundabout to Mamboleo having three different road reserve widths. That the suit land falls under the Kondele – Migosi Section of the Kisumu-Kakamega road where the width of the road reserve is 40m (131ft) wide as shown in the Preliminary Index Map. That during construction of the Shopping Mall due diligence was not carried out to establish the extent of the road reserve boundary.
10. DW1 testified further that the illegal encroachment of the subject building belonging to the Plaintiff prompted the Defendant’s officers to enter the suit land and mark off the section of the building that encroached onto the road reserve. That the entry of the Defendant’s officers onto the suit land



was in accordance with the law. That notices were issued to the Plaintiff through Kenya Gazette Notice number 3622 and the Standard and Daily Nation of 22nd December, 2003 and 17th June, 2014 respectively as required by law but that the Plaintiff ignored them.

11. DW1 stated further that the Preliminary Index Map clearly shows the width of the road reserve and the Plaintiff ought to have guarded against encroachment accordingly before commencing the construction.
12. That the marking of the building was a quiet exercise done with minimal disruption and customers did not complain but kept streaming in and out of the mall as usual. That the Plaintiff's building done between the year 2013 and 2015 was done when the Notices had already been issued and were in the public domain. That the Plaintiff did not go to the Defendant's offices in Kisumu to confirm the extent of the road reserve before construction. That the Defendant's officers were legally executing the Defendant's mandate in accordance with the law and cannot be held responsible for loss of business. That the Plaintiff is the author of its own misfortune.
13. On cross-examination, DW1 stated that construction of the road project was now completed. That the he did not prepare a report but the conclusion of his witness statement was as per the land records. He stated that part of the building was on the road reserve. DW1 produced Preliminary Index Map, copy Kenya Gazette Notice No.3622 of 6th June, 2003, Standard Newspaper cutting of 22nd February, 2003 and Daily Nation of 17th June, 2014 as exhibits in the case.

Submissions

14. At the close of the evidence, parties filed written submissions in support of their respective arguments.
15. Vide the written submissions dated 2nd October, 2023 filed by the firm of Maxwell O. Ogonda on behalf of the Plaintiff, it was submitted that it was not contested that the Plaintiff is the registered owner of the suit land and that the Defendant commenced markings of the buildings earmarked for demolition including the Plaintiff's premises on the suit land. That the issues for determination in the suit were;
 - a. whether the part of the Plaintiff's premises earmarked for demolition as at 1st July, 2016 was located on a road reserve.
 - b. Whether the Defendant's actions as at 1st July, 2016 caused imminent danger to the Plaintiff and whether the prayers prayed for are justified.
 - c. Who pays the costs.
16. On the issue of whether the part of the Plaintiff's premises earmarked for demolition as at 1st July, 2016 was located on a road reserve, Counsel submitted that the Plaintiff averred that it commenced the construction in the year 2013 and completed it in 2015 having followed all the processes of law and complying with all the architectural requirements, City Physical Planning Rules and the laid down procedures by the City Council of Kisumu which eventually gave the plaintiff a permit of occupation on 22nd June, 2016. That PW2 a Surveyor prepared a report and found that the boundary was outside the road reserve. That the Defendant was not able to state the extent of encroachment onto the road reserve and that the Plaintiff proved that the building including all developments therein are outside the road reserve.
17. On whether or not the Defendant's action as at 1st July, 2016 caused imminent danger to the Plaintiff and whether the prayers sought are justified, it was submitted that seeking for restraining orders was the only way that the Plaintiff could have saved its property. That even if the Defendant eventually completed the construction of the road, the court would deter the Defendant should the Defendant



want to revisit the road later hence the prayer for a declaration that the suit parcel of land and the premises thereon are not on a road reserve.

18. Counsel for the Plaintiff relied on the case of Mistry Premji Ganji (Investment) Limited –vs- Kenya National Highway Authority [2021]eKLR to support the submissions. Counsel prayed that the suit be allowed and the costs be awarded to the Plaintiff.
19. Vide the written submission dated 16th November, 2023 filed by KTK Advocates on behalf of the Defendant, it was submitted that the applicable law in this matter is firstly the Kenya Roads Act, No.2 of 2007 (Revised edition 2012) in which KENHA (the Defendant) is established under section 3 thereof. That section 49(i) thereof provides that;

“except as provided in sub-section (2), no person or body may do any of the following things without the responsible authority’s written permission or contrary to such permission: -
 - a. erect, construct, lay or establish any structure or any other thing on or over or below the surface of the road reserve on land in a building restricted area.
 - b. make any structural alteration or addition to a structure or that other thing situated on or over or below the surface of the road reserve of land in a building restriction area or
 - c. give permission for erecting, constructing, laying or establishing any structure or that other thing on or over or below the surface of the road or road reserve or land in a building restriction area, or for any structural alteration or addition to any structure of other thing so situated.
 - d. Any authority may in its discretion give or refuse to give permission under this section.
20. Secondly, the Traffic Act Cap 403 Section 91 whereof provides that;
 - (1) Every person who without the written permission of the Highway Authority;
 - a. encroaches on a road or on any land reserved side or sides of therefor 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-marking 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 purposes of moving a vehicle without immediately thereafter making good damage
 - d. willfully 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 onto 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. 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.
21. Counsel also relied on article 24 of *the Constitution* of Kenya on limitation of rights and fundamental freedoms and article 40(3) of *the Constitution* of Kenya which provides for protection of rights to property. Counsel further relied on Section 107 and 108 of the *Evidence Act* Cap.80 Laws of Kenya on the burden of proof.
22. Reliance was also placed on case law, inter alia, the case of Samuel Maina Kabiru & Another –vs- Kenya National Highway Authority Nakuru ELC Case No.149 of 2008 (unreported) where the court upheld KENHA’s statutory power on road reserves and further held that building approvals don’t waive the said statutory powers.
- Stephen Njuguna Kiragu –vs- Kenya National Highway Authority Nakuru ELC Case No.37 of 2018 (unreported) where the trial Judge re-affirmed KENHA’s statutory powers and authority in respect of land adjacent to public roads marked as road reserves and Nairobi H.C. Pet. No.63 of 2018 Wesley Mdamba Charo –vs- University of Nairobi.
23. Counsel framed the issues for determination to be;
- a. whether the Defendant’s actions on road reserved for road expansion are illegal, unconstitutional and actuated by malice.
 - b. Whether the Plaintiff is entitled to the relief sought
 - c. Who is to bear the costs of the suit.
24. Counsel submitted further that the Plaintiff’s claim is for dismissal because;
- a. the Plaintiff alleged that the Defendant’s actions are unconstitutional without pleading the article of *the Constitution* violated;
 - b. the Plaintiff failed to prove that KENHA’s actions pursuant to the applicable statutes aforesaid violated its rights;
 - c. the Plaintiff failed to prove that the road reserve that affected the entire material road was discriminatory;
 - d. the Plaintiff failed to prove that its building or perimeter wall was in any way affected by the road construction that is now completed;
 - e. the Plaintiff’s claim was based on speculation and fear and not the law;
 - f. declaring road reserve affects all properties adjacent to public road and is statutory power.
- Counsel urged the court to dismiss the suit with costs.

Issues for Determination

25. From the pleadings filed, the evidence adduced and submissions made by both parties, I find that the issues that emerge for determination are: -



- a. whether or not the Plaintiff's building on the suit land encroaches on the road reserve.
- b. whether or not the Defendant's actions of placing marks on the Plaintiff's building to earmark the part of it that was due for demolition was lawful.
- c. whether or not the Plaintiff is entitled to the relief sought.
- d. who pay the costs of the suit?

Analysis and Determination

26. The first issue for determination is whether or not the Plaintiff's building on the suit land encroached on the road serve.

The Plaintiff's case is that the building on the suit land is within the confines of the suit land and does not encroach on the road or road reserve. The Defendant on the other hand contends that the building encroached onto the road reserve. Each of the parties called a surveyor to testify.

27. PW1 testified that the plaintiff obtained the requisite approvals and occupation permit from the relevant government agencies. Among the documents he produced was outline approval from the County Council of Kisumu for the development plan produced as exhibit P. 4. Exhibit P. 5 was occupation permit given to the plaintiff by the county government of Kisumu which stated in part that

“the building erected on plot No. Ksm/Kanyakwar “A”/1659 within the County of Kisumu has been inspected and found satisfactorily constructed and in accordance with approval plans. The premises may now be occupied for the purpose for which they were designed.”

28. PW2 testified and produced a surveyor's report as exhibit P.10. He stated in the report that the suit land is depicted on Registry Index Map (RIM) sheet No.25 of Kanyakwar “A” registration section which is a general boundary area where the limit of a parcel is determined by the physical boundary. He concluded his report that from his visit and survey, the building line is generally along the original physical boundary hence the building was outside the road reserve.

29. The evidence of the defence on this issue as adduced by DW1, also a surveyor, was that the width of the road was 40m (131ft) and that the Preliminary Index Map clearly showed the width of the road. That during construction due diligence was not done hence the encroachment. DW1 produced no report to show the encroachment. He did not know the extent of the encroachment.

30. I find that the evidence placed before the court by the Defence is not sufficient to discount the Plaintiff's evidence that there was no encroachment. There was no evidence that what was in the Preliminary Index Map was not what was on the ground. On the other hand, PW2 an expert testified that he visited the site and did survey and found that the building was outside the road reserve. I find that in respect of this issue, the Plaintiff has discharged the burden of proof under Section 107 and 108 of the [Evidence Act](#), Cap.80.

31. The next issue is whether or not the Defendant action of placing marks on the Plaintiff's building to earmark the part of demolition was lawful. The Plaintiff pleaded in paragraph 6 of the plaint that on 1st July, 2016 the Defendant through its authorized agents invaded the premises developed on the suit property, placed ugly markings on both the exterior and the interior walls of the Shopping Mall hence defacing the mall severely. That this implied that the Shopping Mall had been built on a road reserve, which is not true. That the Defendant's actions are illegal, unconstitutional, accentuated by malice and are baseless as a result of which the Plaintiff has suffered public embarrassment. PW1 and PW2 testified that the building was outside the road reserve.



32. The Defendant on its part pleaded in paragraph 8(iii) of the Defence that the illegal encroachment of the material structure made the Defendant enter the plot and mark the section of the building that encroached on the road reserve. That the officers of the Defendant entered the suit land and the building in accordance with the law. The Defendant pleaded further that notices had been issued requiring individuals whose structures illegally encroached onto the road reserve to have them removed and make good those sections after their removal and that the notices were in force at the time but were ignored. That the notices were circulated through the Kenya Gazette No.3622, of 6th June, 2003 and 17th June, 2014 respectively.
33. The existence of the notices was not disputed. They were notices to the general public and applied to persons whose building encroached the road reserve. In this case, the Defendant has not demonstrated that Plaintiff's building encroached onto the road reserve and the extent of the encroachment.
34. Though the Defendant has statutory mandate to preserve the road reserve and to demolish structures encroaching thereon, in this case encroachment has not been proved. The actions of the Defendant to enter the suit land and place marks on the building were therefore unlawful.
35. The next issue is whether or not the Plaintiff is entitled to the relief sought. The Plaintiff pleaded that in case the building is demolished it will suffer irreparable loss and that due to the actions of the Defendant, it suffered public embarrassment. The Defendant on the other hand contended that the road project is complete and that the building has not been interfered with.
- To safeguard the premises, the Plaintiff is entitled to an order restraining further interference with the suit land. The plaintiff is the registered owner of the suit land whose right to land is protected under article 40 of *the constitution*.
36. As regards costs of the suit, under the provisions of section 27 of the *Civil Procedure Act*, costs of any action, cause or other matter or issue follow the event.

Conclusion

37. Having held that there is no evidence that the Plaintiff's building developed on the suit land encroached on the road or road reserve, that the Defendant's action of entry onto the suit land and placing marks on the building thereon and thereby threatening demolition were unlawful and that the Plaintiff is entitled to an order restraining further interference by the Defendant, this court finds that the Plaintiff has proved its case on a balance of probabilities. This court enters judgement in favour of the Plaintiff for: -
- i. an order of permanent injunction directed at the Defendant restraining it by either itself, its agents, servants, employees or any other person acting under its direction and order from entering onto or interfering in any way with land parcel NO. Kisumu/Kanyakwar "A"/1659 and demolishing either part or the whole of the Shopping Mall building thereon.
 - ii. Costs of the suit.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 7TH DAY OF MARCH 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:



Maureen: Court Assistant.

No appearance for the Plaintiff.

No appearance for the Defendant.

