IN THE COURT OF APPEAL

AT MOMBASA

CORAM: VISRAM, KARANJA & KIAGE, JJ.A

CIVIL APPEAL NO. 114 OF 2018

BETWEEN

ABDALLA MOHAMED ABDALLA.....APPELLANT

VERSUS

THE COUNTY GOVERNMENT OF MOMBASA...RESPONDENT

(An appeal from the Judgment and Decision of the Environment and Land Court at Mombasa (Yano, J.) dated 24th April, 2018

in

E.L.C. No. 285 of 2015)

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JUDGMENT OF THE COURT

1. **Abdalla Mohamed Abdalla (the appellant)** is the undisputed registered owner of properties described as **Mombasa/Block/XVI/583, Mombasa/Block/XVI/598, Mombasa/Block/XVI/606, Mombasa/ Block/XVI/607, Mombasa/Block/XVI/608** and **Mombasa/Block/ XVI/609** situated in Kingorani area Mombasa, whose "open market" value he states is Kshs. 56,000,000.00 He has been in quiet possession and use of the same until 8th September, 2015 when he says the respondent, County Government of Mombasa, invaded the said properties, cleared some structures and placed cabro blocks on the pavement apparently claiming that the property was a road reserve. To his mind, the act of paving part of the property with cabro blocks translates to compulsory acquisition of the paved portion.

2. The appellant therefore moved to the Environment & Land Court (ELC) and sued the respondent claiming reliefs as follows:

(a) An order that the action of the defendant is trespass on the plaintiff's properties;

(b) An order that the acquisition of the suit properties and construction of the road on the said properties is illegal;

(c) An order against the defendant to remove all the road and materials from the suit property and restore the suit properties to its previous state;

(d) In the alternative that the defendant pays Kshs. 56,000,000 to the plaintiff and acquire the suit properties for the "existence of a road".

3. He produced before the trial court copies of his Title documents for the said properties along with valuation reports for the same. As stated earlier, he is the undisputed owner of the said properties, and the monetary value he attaches to the same is also not an issue here. We shall not therefore delve into those issues. The appellant maintains that the respondent is a trespasser on the properties.

4. In a statement of defence filed on 25th November, 2015, the respondent lays no claim to the suit properties. According to the defendant, if

any structures were demolished, which action is not admitted, then it was because the said structures were themselves on the road reserve and they had been constructed without the appellant obtaining the necessary approvals from the respondent as required under the Physical Planning Act. The respondent posited that it only improved the pavement as it did other pavements in the City of Mombasa, as part of its beatification exercise and also to reduce congestion within the city. It was the respondent's case that the appellant's suit disclosed no cause of action and urged the court to dismiss it.

5. In his reply to defence, the appellant asserted his exclusive rights over the properties and further denied having constructed any structures without approval from the respondent or its predecessor. He denied that the properties are situated on a road reserve.

6. The appellant gave *viva voce* evidence before the trial court but the respondent called no witness. Both parties nonetheless filed written submissions in support of their case. In the said submissions, the respondent claimed the properties were illegally acquired; that the appellant had failed to pay land rates; and further that there was a public access road before the said properties were registered. The respondent also posited that it cannot be forced to compulsorily acquire the property from the appellant for the Kshs. 56,000,000 as claimed; and further denied any claim for trespass. It is worth of note that the respondent never filed any counterclaim against the appellant for revocation of the said Titles.

7. After hearing the parties and considering the rival submissions of counsel, the court (Yano, J) found there was no proof of fraudulent acquisition of the properties by the appellant as alleged by the respondent and affirmed the appellant's title to the same. The court however found from the evidence before it that part of the property was being used as a public access road. There was however an access road which the appellant appears to have made for purposes of accessing his other business and residential properties. This could be the access road that the respondent paved.

8. The court made a finding that the respondent was a trespasser on the appellant's land and made a declaration to that effect. The learned Judge also made a finding that from the valuation reports presented to court, it was evident that there were no structural improvements on the plots before the paving of the access road; and hence no structures had been demolished as claimed. The court declined the appellant's prayer for restoration of the access road to its previous status by ordering removal of the cabro blocks. The court further declined the prayer of compulsory acquisition a the cost of Kshs. 56,000,000, stating that the court had no power to compel the respondent to acquire the properties in question. The suit was consequently dismissed with each party being ordered to bear its own costs.

9. That is the decision the appellant challenges before this Court by his memorandum of appeal dated 3rd September, 2018 in which he faults the learned Judge for failing to consider the entire evidence placed before the court thereby arriving at the wrong decision; relying on valuation reports that were not part of the case; failing to order removal of the cabro even after making a finding that the respondent was a trespasser on the said property an failing to make the order for compensation for compulsory acquisition of the property.

10. Parties filed written submissions as directed by the Deputy Registrar during case management conference. Learned counsel for the appellant, Mr. Ngonze, relied on his written submissions but made brief highlights. He submitted that the court had rightly found that the properties belonged to the appellant, but by refusing to order restoration of the access road to its former status, the court had denied the appellant exclusive use of the same. Counsel also posited that having found that the respondent was trespasser on the property, it should have been ordered to remove the cabro materials it had put on the road. He also urged that the value of the property had been reduced, this notwithstanding the fact that the same had been charged to the bank prior to the placing of the cabro and the bank had not asked for enhancement of the security. He urged court to allow the appeal and grant the order of compensation to the tune of Kshs. 56,000,000 as claimed in the plaint. His written submissions were principally on the issue of compulsory acquisition. With respect, we don't find the same relevant as they do not address this peculiar issue where the respondent is being forced to acquire property that it does not want.

11. In response, Mr. Kithi learned counsel for the respondent opposed the appeal. He maintained that the trial court had considered all the evidence placed before it in entirety. According to counsel, the court was bound to consider the valuation reports as they formed part of the evidence adduced before it. He emphasised that it was in the said reports, that evidence came out to the effect that the said road had always been used as an access road by the appellant to access his other properties. Furthermore, the appellant has always utilised the said properties to secure loans from banks and he cannot therefore be said to have suffered prejudice as a result of the improved access road. He urged the Court not to interfere with the trial courts findings of fact. In support of this proposition, he called in aid the case of **Kenya Power & Lighting Company Limited – vs – Margaret Akoth Olang [2017] eKLR**. He urged us to dismiss this appeal with costs to the respondent.

12. This being a first appeal we are enjoined to re-consider and re-appraise the evidence adduced before the trial court and arrive at our own independent conclusion. (See **Selle & another vs Associated Motor Boat Co. Ltd & others (1968) EA 123.** This much was rehashed in the case of **Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR;** where this Court stated as follows regarding the duty of first appellate court:-

> ***"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."***

Concomitant to this requirement is the equally important duty to defer to the findings of fact made by the trial court unless there is good reason for our interference. **See Peters - V – Sunday Post Ltd (1958) E.A. 425**

13. We have carefully reconsidered the evidence as analysed above, the grounds of appeal, rival submissions of counsel and the law, which includes the relevant authorities cited to us by counsel. We find two important issues for our decision. First is whether the respondent having been found to be a trespasser on the property, ought to have been ordered to remove the cabro from the access road; and secondly, whether the respondent can be ordered to compulsorily acquire part of the appellant's property against its will.

14. As stated earlier, ownership of the property is question is settled. We note there was no counterclaim by the respondent to claim the property in question, nor has it filed a cross-appeal to contest the court's findings on ownership of the properties in question. There is also no cross appeal in respect of the court's finding that the respondent is a trespasser on the property. Does that finding however require the respondent to remove the cabro? In our view, there is nothing for the respondent to be ordered to remove. In point of fact, what the respondent did was to improve the appellant's property. Evidence available showed that the access road used to be there even before the cabro and it was the only way the appellant was able to access his other properties.

15. As submitted by learned counsel for the respondent the appellant has not shown what prejudice this improvement has caused him. **Article 40 (iii) of the Constitution of Kenya 2010** provides that the "*State shall not deprive a person of property of any description, or of any interest in , or right over, property of any description …*" In this case, the property has not been taken away from the appellant. There is no evidence either that the property's value has dissipated, and the Court cannot speculate what might happen in future. The learned Judge found from the evidence before the Court that the removal of the cabro would be superfluous as the access road would still remain the way it was before, only this time in a worse state. We agree with her finding and cannot fault the Judge for failing to order the removal of the cabro. The appellant should sit back and enjoy the improvements made on his access road instead of fighting to have it reverted to its former dusty dilapidated state.

16. On whether the respondent can be ordered to compulsorily acquire the property. No law was cited to us in support of that proposition. The law on compulsory acquisition is clear. It is upto the Government/County government to determine what property it needs to acquire for purposes of public use and then initiate the process. It cannot be the other way round. This is a peculiar case for which we find no precedent. We find no reason whatsoever to interfere with the decision of the trial court. We find this appeal devoid of merit and dismiss it with no order as to costs.

Dated and delivered at Mombasa this 7th day of March, 2019

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR