Singh v Kenya Railways Corporation & 2 others (Environment & Land Petition E009 of 2023) [2024] KEELC 6124 (KLR) (24 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6124 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND PETITION E009 OF 2023

NA MATHEKA, J

SEPTEMBER 24, 2024

BETWEEN

BALJEET SINGH ..... PETITIONER

AND

KENYA RAILWAYS CORPORATION ..... 1ST RESPONDENT

NATIONAL LAND COMMISSION ..... 2ND RESPONDENT

THE LANDS REGISTRAR MOMBASA ..... 3RD RESPONDENT

JUDGMENT

1. The Petitioner pleaded that he is the registered owner of L.R MN/VI/244 measuring approximately 0.7466 hectares hereafter the suit property and that sometime on 18th March 2015, the 1st respondent gazetted a notice no. 1979 Vol. CXVII NO. 30 dated 20th March 2015 of its intention to compulsorily acquire 0.7260 hectares for the construction of the Mombasa Nairobi Standard Gauge Railway (SGR) Project. In furtherance of the above the 1st and 2nd respondent placed an encumbrance through the 3rd Respondent sometime in April 2015. That in another gazette notice no 12828 Vol. CXX-No. 152 dated 14th December 2018, the 1st respondent rescinded its intention to occupy the suit property on compulsory acquisition. The SGR project was completed without use of the suit property, however, the 1st respondent have never lifted the said encumbrance to date. This action has affected the Petitioner negatively as he has been unable to conduct any transactions on his suit land as he has lost potential clients who wanted to rent, lease or purchase the suit property. Despite demand and notice of intention to sue the respondents have failed to comply with the petitioner's demand. As a result, the Petitioner claims for the following summarized prayers:

    a. A declaration that the existing encumbrance placed on 14th April 2015 by the Respondents against the suit property is illegal and unlawful.

b. An order directing the respondents jointly and severally to immediately lift/and or remove the said encumbrance.

c. A declaration that the Petitioner's rights to acquire and own property guaranteed under article 40 of *the constitution* of Kenya and section 111 (1) and 115 (1) of the *Land Act* 2012 have been infringed jointly and severally by the respondents.

d. A declaration that the petitioner's rights to fair administrative action guaranteed article 47 of *the Constitution* of Kenya have been contravened jointly and severally by the respondents.

e. A declaration that the Petitioner is entitled to compensation for general damages for infringement of rights.

f. A declaration that the Petitioner is entitled to mesne profits calculated at Kshs. 3,600,000 per month for the unlawful placement of the encumbrance against the suit property from 14th April 2015 until the date of removal of the same.

g. A declaration that the Petitioner is entitled to interest on mesne profits at the prevailing market interest rate from 14th April 2015 until the date of removal of the encumbrance.

h. Costs of the appeal.

2. In reply, the 1st respondent vide a replying affidavit of Stanley Gitari sworn on 4th July 2023, admitted that the 2nd respondent gazetted the suit property for purposes of compulsory acquisition for construction of the Standard Gauge Railway (SGR) by the 1st respondent but the 2nd respondent was degazetted for reasons that the 1st respondent no longer required the suit property. He was vehemently denied that it is the mandate of the 1st respondent to remove the encumbrance but instead the duty falls on the 2nd respondent. That pursuant to sections 107 (5) and (5B) of the *Land Act*, Section 76 and 78 (1) of the *Land Registration Act* the obligation for removal of the encumbrance lies with the Petitioner, the 2nd respondent and the 3rd respondents. He further stated that the Petitioner had liberty to apply for removal of the encumbrance under section 78 (1) of the *Land Registration Act* since the said degazettment of 14th December 2018 but did not do so. That having tendered no evidence of his efforts to remove the said encumbrance, the petitioner's rights have not been infringed but rather he wants to unjustly enrich himself with taxpayers' money.

3. This court has considered the submissions therein and found that the issues for determination is whether the petition has merit or not?

4. The rights said to be infringed by the respondents are under article 40 and 47 of *the constitution* which is the right to own property anywhere in Kenya and the right to fair administrative action. In Anarita Karimi Njeru vs Republic (1979) eKLR the court stated follows;

> "We would, however, again stress that if a person is seeking redress from the High court on a matter which involves a reference to *the constitution*, it is important (if any to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains the provisions said to be infringed, and the manner in which they are alleged to be infringed."

5. The precis of the suit is that the suit property was encumbered on 14th April 2015 by the 2nd respondent, he however produced a search dated 24th January 2023 which shows an earlier encumbrance of 24th January 2014 vide gazette notice no. 405 of even date. The encumbrance placed on property during compulsory acquisition is a restriction as provided by section 76 of the *Land Registration Act* Cap 300.

The removal of such restriction is clearly stated in section 78 of the above act which states as follows in sub section 1 and 2:

> "(1) The Registrar may, at any time and on application by any person interested or at the Registrar's own motion, and after giving the parties affected by the restriction an opportunity of being heard, order the removal or variation of a restriction.
>
> (2) Upon the application of a proprietor affected by a restriction, and upon notice to the Registrar, the court may order a restriction to be removed, varied, or other order as it deems fit, and may make an order as to costs."

6. The section is clear that the first step before approaching the court is approaching the Registrar for audience in removal of the restriction. From the narrative by the petitioner, the only step was through a letter dated 30th September 2022 by the petitioner's advocates to the 1st respondent. This is contrary to the compliance envisaged by the said section 78 of the *Land Registration Act* Cap 300. The Petitioner in filing this petition has not fully complied and thus offend the doctrine of ripeness and constitutional avoidance.

7. In John Harun Mwau vs Peter Gastrol & 3 others (2014) eKLR, the court discussed the principle of constitutional avoidance as follows-;

> " courts will not normally consider a constitutional question unless the existence of a remedy is dependent on it... It is an established practice that where a matter can be disposed of without recourse to *the constitution*, *the constitution* should not be invoked at all."

8. Further, in I Currie & J De Waal The Bill of Rights Handbook (2013) 72 the author stated that the exceptions to the above doctrine are: The exceptions to the application of the doctrine of constitutional avoidance are: -

   i. where the constitutional violation is so clear and of direct relevance to the matter,

   ii. in the absence of an apparent alternative form of ordinary relief and

   iii. where it is found that it would be a waste of effort to seek a non-constitutional resolution of the dispute.

9. This suit has failed in all three exceptions as the Petitioner did not comply with the first step and secondly this is a claim which can be instituted as a civil suit. Consequently, I find that this petition is not merited and I dismiss it with costs.

   It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24TH DAY OF SEPTEMBER 2024.

N.A. MATHEKA

JUDGE