



**Registered Trustees of Markaz - Ur – Rashad Trust v Kenya Urban
Roads Authority (KURA) & another (Environment & Land Case
1243 of 2015) [2023] KEELC 343 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 343 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1243 OF 2015
LN MBUGUA, J
JANUARY 26, 2023**

BETWEEN

REGISTERED TRUSTEES OF MARKAZ - UR – RASHAD TRUST . PLAINTIFF

AND

KENYA URBAN ROADS AUTHORITY (KURA) 1ST DEFENDANT

WAK CONSTRUCTION LIMITED 2ND DEFENDANT

JUDGMENT

1. This suit was filed through a plaint dated December 3, 2015 and amended on July 1, 2022, where the plaintiff claims to be the registered proprietor of the parcel of land known as LR No. 36/VII/4 situated in Eastleigh, Nairobi. It is the plaintiff's case that on or about September 2015, the 2nd defendant on the instructions of the 1st defendant entered the suit premises and constructed a public road on plaintiff's land without compensation. The plaintiff therefore prays that judgment be entered against the defendants for;
 - a) A declaration that the conduct of the 1st defendant was a blatant violation of the plaintiff's right to own property as enshrined under article 40 of the Constitution of Kenya.
 - b) A declaration that the 1st and 2nd defendants unlawfully entered upon the plaintiff's land known as LR No.36/VII/4 to carry out construction works.
 - c) An order that the 1st defendant compensates the plaintiff the sum of kshs. 304, 002,500/= for the part of the land measuring 0.681 acres compulsorily acquired for the construction of the road.
 - d) General damages for breach of the plaintiff's right as enshrined under article 40 of the Constitution of Kenya, 2010.



- e) Costs of this suit.
2. On July 25, 2019, the plaintiffs' counsel informed the court that "the 2nd defendant was served but never enter appearance". However, I have perused the record and I have not seen any copies of summons to enter appearance in this file. Equally, there is no affidavit of service of such summons. There is an affidavit of service of the plaint filed in court on December 15, 2015, but it only makes reference to service upon 1st defendant. I am therefore not convinced that the 2nd defendant was invited to defend this suit through the process of service of summons and the relevant pleadings herein.
 3. The Hon. Attorney General who represented the 1st defendant throughout the trial did not file any pleadings, but went ahead to file a witness statement and even adduced evidence during the trial.
 4. PW1, Abdul Qadir Hussein introduced himself as one of the trustees of the plaintiff. He adopted his witness statement dated 3rd december 2015 as his evidence. He also produced as exhibits the 4 documents in the plaintiff's bundle filed on May 15, 2017. The same includes the deed of indenture of the suit plot, Photographs depicting construction and dumping, survey maps of the property and a valuation report.
 5. Pw1's evidence is that the defendants entered the suit land and started building a road which was eventually completed. In the process, there was dumping of black cotton soil amongst other waste upon the suit land of the plaintiff.
 6. PW1 further stated that the land surveys and development plans prepared by Nairobi City Council and the Ministry of lands for the area clearly shows that the plaintiff's property was private land and not a public utility or a road reserve. Thus the 1st defendants actions were in complete contravention of the law and an arbitral deprivation of private property.
 7. On cross-examination, pw1 stated that at page 8 of the plaintiff's bundle, the truck does not depict actual dumping as that photograph was taken after the actual dumping. He also stated that the undated plan at page 20 of the same bundle was prepared by their architect and it shows that there was a future road planned through the suit property, while at page 26, there is a survey map showing an 18 meter road reserve. He further stated that the plan at page 22 is not certified and reads "redrawn" by J.N Kadenja whom he does not know whether he was a licensed surveyor.
 8. PW1 also stated that the photos attached do not have dates, that the property originally had black cotton soil and that the Plaintiff did not initiate any proceedings at NET.
 9. On re-examination, Pw1 stated that the drawings at pages 20, 21 and 26 of the Plaintiff's bundle are not registered documents since they were prepared by their architect and they show the road which KURA built.
 10. PW2 Cyprian Omoro introduced himself as a licensed surveyor and he adopted his witness statement dated July 15, 2022 as his evidence. He also produced a valuation report in the plaintiff's supplementary documents as an exhibit. He contends that he conducted a site visit on April 21, 2022, then he proceeded to do valuation and compiled a report thereof.
 11. Upon cross-examination, Pw2 stated that he valued the section which was hived off from the suit property. He further stated that a road construction is supposed to enhance the value of the property but in this case, the land was negatively affected. He stated that after the road was built, it was not maintained and there was garbage all over, thus the plaintiff built walls on both sides of the road to protect themselves. He was not aware that there was an existing road before the upgrading.



12. DW1, a deputy director of the 1st defendant in charge of survey adduced evidence for the defence. However, that evidence is anchored on nothing as the foundational pleading, the statement of defence is missing-see [Gideon Sitelu Konchellab v Julius Lekakeny Ole Sunkuli & 2 others](#) [2018] eKLR.
13. I have considered the submissions of the plaintiff dated September 16, 2022 where the formulated issues for determination are; a) Whether the suit property is private property b) Whether the actions of the 1st defendant to construct a road on the plaintiff's property is tantamount to constructive compulsory acquisition; and (d) Whether the plaintiff is entitled to compensation for the acquisition of its property. I have given due regard to the case law cited thereof, the same being; *R v Chief Immigration Officer* [1976] 3 ALL ER 843, [Patrick Musimba v National Land Commission & 4 others](#) [2016] eKLR, [Attorney General v Zinj Limited](#) (Petition 1 of 2020) [2021] kesc 23(KLR), [Commissioner of lands & another v Coastal Aqualture Ltd](#) Civil Appeal No.252 of 1996 KLR, [Arnacherry Limited v Attorney General](#) [2014] eKLR and [Rookes v Barnard](#) [1964] 1 ALL ER 367.
14. Having regard to all the material presented before me (excluding the evidence of 1st defendant), I find that the issue falling for determination is whether the road was constructed upon the land of the plaintiff, whether such construction was unlawful and whether the plaintiff is entitled to compensation.
15. The plaintiff's claim is that the defendants constructed a road cutting through their land parcel no LR 36/VII/4.
16. The [Constitution](#) of Kenya protects ownership of land as stipulated under article 40 (3). The Supreme Court of Kenya had this to say on the issue in the case of [Rutongot Farm Ltd v Kenya Forest Service & 3 others](#) [2018] eKLR;

“Once proprietary interest has been lawfully acquired, the guarantee to protection of the right to property under article 40 of the [Constitution](#) is then expressed in the terms that no person shall be arbitrarily deprived of property. The same guarantee existed in section 75 of the Repealed Constitution.”
17. There appears to be no controversy that the road in question was completed and is even tarmacked. The bone of contention is whether the said road was hived off from the private land of the plaintiff.
18. The provisions of section 107 of the [Evidence Act](#) stipulate that;

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”.
19. While section 109 thereof further provides that:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.



20. In the case of *Gichinga Kibutha v Caroline Nduku* [2018] eKLR, the court held that;
- “It is not automatic that in instances where the evidence is not controverted, the claimant’s claim shall have his way in court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.”
21. What resonates from the above analysis is that he who alleges bears the burden of proving, see - *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi* [2013] eKLR. And in the case at hand it behooves the plaintiff to prove first and foremost that the road was constructed on their land even though no defence has been advanced by the 1st defendant through pleadings.
22. In support of its case, the plaintiff produced the deed of Indenture dated June 16, 1999 between them and Bait-Ul Mal Committee, Nairobi Registered trustees. The suit property is described therein as “the land ... on the plan annexed to the indenture of conveyance dated May 5, 1906 registered in the Government Land Registry at Nairobi as No.135 of A 1906 and more particularly on survey plan No.4 deposited in the survey records at Nairobi.”
23. Further at paragraph 17 of his recorded statement, pw1 states that: “The land surveys and development plans prepared by Nairobi City Council and the Ministry of Lands for this particular area of land clearly shows the plaintiff’s property was at material times private land suitable for development and was neither a public utility nor a road reserve.”
24. However, no relevant survey plans fitting the aforementioned description of the property were placed in evidence for consideration before this court. Instead, the plaintiff produced undated and unregistered plans (at page 20, 21, and 26 of their bundle) apparently prepared by their own architect. To make matters worse, pw1 stated that: “I do not know why he prepared. They show the road which KURA built”. As for the map at page 22 of plaintiff’s bundle, equally, the same is not certified, Pw1 stated that it reads “redrawn plan” but he knows not the person who redrew the plan, though it bears the name of one J.N.Kadenja.
25. Pw2 produced a valuation report in which at page 7 there of, he stated that; “We have examined the relevant survey plans relating to the subject property and confirmed that it is represented on the ground as it is on the map”. He went on to state that the said survey plan was at page 13 of his report. However, a perusal of the said plan indicates that it is the same document availed by the plaintiff at page 22 of their bundle. It happens to be one of the documents which are undated and unregistered.
26. Further at page 7 of the aforementioned valuation report, Pw2 has stated that they did not obtain an official search of the suit property and the encumbrances are yet to be ascertained.
27. This far, the evidence of Pw1 and pw2 does not in any way provide any tangible evidence to prove that the road was built on private land.
28. In *Samson S. Maitai & another v African Safari Club Limited & another* [2010] eKLR, the court had this to say in relation to proof.
- “Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute.”
29. Having failed to avail the relevant survey maps from the Government survey departments to show the layout plans on the ground before the road was built, then I find that the case of the plaintiff must fail. This suit is therefore dismissed with no orders as to costs.



**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JANUARY, 2023
THROUGH MICROSOFT TEAMS.**

LUCY N. MBUGUA

JUDGE

In the presence of:-

Asli for plaintiff

A.Kamau for 1st Defendant

Court assistant: Eddel

