



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 43 OF 2018

IN THE MATTER OF: ARTICLES NO. 22, 23 AND 258 OF THE CONSTITUTION OF KENYA 2010

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF THE BILL OF RIGHTS UNDER ARTICLES 23(1) & (3), 40(3) & 4
AND 47 OF THE CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF THE LAND ACT NO. 6 OF 2012

BETWEEN

CYBER ACCESS LIMITED.....PETITIONER AND

1. NATIONAL LAND COMMISSION

2. CABINET SECRETARY, MINISTRY OF TRANSPORT

& INFRASTRUCTURE DEVELOPMENT

3. THE HON. ATTORNEY-GENERAL

4. THIRD CHINA ENGINEERING COMPANY LTD.....RESPONDENTS

JUDGMENT

1. By petition filed herein dated 22/3/18, the Petitioner seeks that Judgment be entered jointly and severally against the Respondents as follows: -

(a) A declaration that your Humble Petitioner's rights as enshrined under Articles 40(3) and 47(1) of the Constitution of Kenya, 2010 and Part VIII of the Land Act No 6 of 2012, Sections 107, 108, 111 and 112 have been and continue to be infringed by the Respondents in the manner pleaded herein.

(b) An order directing the Respondents to comply with Sections 107, 108, 111 and 112 of the Land Act No. 6 of 2012 forthwith by issuing to the Petitioner the notice of intention to acquire its land as stipulated in the Constitution of Kenya, 2010 and the Land Act No. 6 of 2012 and to accord to the Petitioner an opportunity to be heard on the issue of the intended acquisition of its property in accordance with the law.

(c) A permanent injunction restraining all the Respondents jointly and severally either by themselves, their servants, agents and any other person or entity acting under their directions or instructions from entering upon the Petitioner's property known as L.R. No. MN/V/1706, Mombasa or any part or portion thereof for the purpose of constructing a road thereon or for any other purposes until and unless the Respondents comply with the provisions of the Constitution of Kenya, 2010 and the Land Act, 2012 relating to compulsory acquisition of private land for public use.

(d) An Order restraining the Respondents jointly and severally either by themselves, their servants, agents and any other person or

entity acting under their directions or instructions from entering upon the Petitioner's property known as L.R. No. MN/V/1706, Mombasa or any part or portion thereof for the purpose of constructing a road thereon or for any other purposes pending the hearing and determination of the petition herein.

(e) In the alternative, and without prejudice to Prayers (a) to (d) hereinabove, the 1st, 2nd and 3rd Respondents be ordered to pay to the Petitioner the sum of Kshs. 66,355,000 being the value of the portion of the Petitioner's land known as L.R. No. MN/V/1706, Mombasa, which the said Respondents intend to acquire for the expansion/dualling of the Mombasa – Mariakani Road.

(f) Costs of the petition and interest on (e) above to be borne by the Respondents.

Background facts and Petitioner's Case

2. The Petitioner's Case may be gathered from the Petition as well as the Affidavit by **HEZRON AWITI BOLLO** sworn in support of the Petition on **22/3/18**. The Petitioner's case is that it is the registered owner of **ALL THAT** Parcel of Land known as L.R No. MN/V/1706 measuring 0.571 Hectares situated in the City of Mombasa bordering the Mombasa Mariakani Highway within Jomvu Area. The Petitioner further contends the land is fully developed and has a perimeter wall which runs along the Mombasa-Mariakani Road which secures the entire land which is not part of road reserve. In early 2017 the Petitioner became aware through Kenya Gazette No. 1388 and 1389 of 17th February, 2017 that the Government, through the 1st and 2nd Respondents intended to acquire several pieces of Land within Jomvu/Changamwe areas to facilitate the ongoing expansion/dualling of the Mombasa-Mariakani Road and upon inquiry Petitioner became aware that its land was also earmarked for acquisition.

3. The Petitioner further contends that the 1st and 2nd Respondents have however failed to respect the Petitioner's rights over the said land and have not complied with the law relating to compulsory acquisition of the land for public use, and have attempted to acquire the said land without involving the Petitioner and giving it a notice as stipulated in the law. In this regard the land has not been valued for acquisition purposes and compensation. That notwithstanding, the 1st and 4th Respondent's Officers/Workmen have recently moved onto the Petitioner's land and marked a huge portion thereof which they intend to take over for expanding /dualling the said road.

4. The Petitioner contends that it wrote to the 1st Respondent on 3rd March, 2017 asking for the 1st Respondent to gazette its land for acquisition to no avail and that the said portion of land is valued at Kshs. 66, 355,000/=.

5. The Petitioner avers that the conduct of the Respondents is such as to violate the Petitioner's constitutional right to property, and that it stands to suffer greatly if the Respondents are not stopped from entering the Petitioner's land in contravention of the law.

Provisions of the Law alleged to have been violated

6. The Petitioner states that:

a) Article 40 (1) of the Constitution secures every persons right to acquire property and own property of any description in any part of Kenya.

b) Article 40(3) prohibits the state from depriving a person of any property or an interest in land, or title to land unless the deprivation results from an acquisition in accordance with Chapter 5 of the Constitution or is for public purpose or in the public interest and is carried out in accordance with the constitution and any Act of Parliament that requires prompt and just compensation to the person and most importantly allow any person who has any interest in or right over that property access to court of law.

c) Article 47 of the Constitution stipulates that every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Article 47(2) provides that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given reasons for the action.

d) Article 64 of the Constitution defines private land to be registered land held by any person under any freehold tenure or land held by any person under leasehold tenure.

The Respondents' Case

7. The 1st Respondent filed a Notice of Preliminary Objection dated 27th March, 2018 objecting to the jurisdiction of this court to entertain this petition. However, the court ruled upon it and made a finding that this court does indeed have the jurisdiction to entertain the Petition before court.

8. In opposing the petition the 1st and 2nd Respondents filed a Replying Affidavit of **JOASH MOGAMBI OINDO** (on behalf of the 1st Respondent) and **JULIUS KORIR** (on behalf of the 2nd Respondent).

9. The 1st Respondent avers to be a Registered Valuer and acting Director Land Valuation and Taxation at the 1st Respondent. That the 1st Respondent is an independent commission established under Article 67(1) of the Constitution and operationalized by the National Land Commission Act No. 5 of 2012 whereby under Part 8 of the Land Act it is the only body duly vested with the authority to compulsorily acquire land required for public use on behalf of the National or County Governments.

10. The 1st Respondent avers that it is currently in the process of acquiring various parcels of land on behalf of the Kenya National Highway Authority required for dualling of Mombasa-Mariakani Road Project contained in gazette Notice 1388 of 17/2/2017. The 1st Respondent's case is that any entity seeking to have its land acquired for public purpose has to make a request to respective Cabinet Secretary or County Executive Committee Member. In this case such request has not been made as is envisaged in the law. In any event the 1st Respondent avers that it has not and neither is it in the process of compulsorily acquiring all that parcel of land known as MN/1/1706 allegedly belonging to the Petitioner. However, the 1st Respondent avers that it has commenced inquiry proceedings with regard to certain properties including the suit property and as such the 1st Respondent issued notice dated 10/1/2018 which appeared in various dailies inviting registered proprietors to appear at the inquiry on 15/1/2018 at the Mombasa School of Government. However, the 1st Respondent has since established that the suit property falls within a road reserve, and thus the Petitioner is not entitled to any compensation.

11. On its part, the 2nd Respondent avers that part of the suit property is encroaching on the road reserve by 0.11 Ha, while the neighboring plot of land MN/1/1707 encroaches road reserve by 25m. The 2nd Respondent's case is that the parcels of land required for construction at the road were gazetted vide Gazette Notice numbers 3581 and 3637 of 21st and 28th November, 1969 and the National Lands Commission held inquiries on the 15/1/2018 and 12/2/2018 as to the legality of the suit property but found that part of it is on land acquired by the Government and owners were informed that no compensation would be offered.

12. The 3rd and 4th Respondents did not actively participate in the petition.

The Submissions

13. Parties filed submissions which they relied on. I have carefully considered the submissions and the affidavits of the parties and authorities in support thereof. I raise the following issues for determination:

- i) Whether the Petition discloses a legal interest capable of protection under the law.
- ii) Whether the Petitioner's right to property has been violated contrary to Article 40 of the Constitution.

14. In case of **Kenya Bus Service Ltd & 2 Others –vs- The Attorney General [2005] eKLR Nyamu J** stated as follows:

“... Fundamental rights are contained in the Constitution and are principally against the State because the Constitution's function is to define what constitutes Government and it regulates the relationship between the government and the governed. On the other hand the rights of individual are taken care of in the province of private Law and are invariably addressed as such”

15. The Petitioner states to be sole proprietor of all that Parcel of Land known as Mombasa L.R No. MN/V/1706 and the same is fully developed. The Petitioner's proprietary right has not been challenged in this petition save that the 1st and 2nd Respondents aver that part of the Petitioner's land encroaches the road reserve. That allegation has been denied by the Petitioner, who has produced an official search of title to prove its ownership of the suit property. The constitution protects proprietary rights of any land owner.

Sections 24, 25 and 26 of Land Registration Act stipulates thus:

Section 24:

Subject to this Act: -

- a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- b) The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

Section 25:

1. The rights of a proprietor, whether acquired on first registration

or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever but subject:

- a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register: and
- b) to such liabilities, rights and interest as affect the same and declared by Section 28 not to require noting on the register, unless the

contrary is expressed in the register

2. Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as trustee.

Section 26:

Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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 subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

16. From the foregoing provisions of the law the Petitioner has disclosed a legal interest capable of protection under the law.

17. It was the Petitioner's submission that sometime in 2017 through a Gazette Notice No. 1388 and 1389 of 17/2/2017 the 1st and 2nd Respondents intended to acquire part of the suit property. The Petitioner vide a letter dated 3/3/2017 wrote to the 1st Respondent asking the 1st Respondent to gazette its land for acquisition in compliance, but the same was never done.

18. The documents presented before the Court show clearly that the suit land belongs to the Petitioner. If the 1st Respondent intends to acquire it, the acquisition must be processed through the law. However, this Court has been informed by the 1st Respondent that it has no intention to acquire the Petitioner's land, and that in any event, part of that land is on a road reserve. However, the title to the suit land is shown at page 33 of the Petitioner's bundle of documents through an official search which shows that the Petitioner is the registered proprietor of the suit property. The said suit property is currently charged to Diamond Trust Bank to secure a total loan of Kshs. 130,000,000/=.

19. The allegation by the Respondents that part of the suit property encroaches the road reserve is not proved by any document. In any event it is only a portion of that suit land to be acquired. Even then the 1st Respondent claims it is not interested in acquiring the suit property. That being so, this Court cannot force the 1st Respondent to acquire the Petitioner's property and to pay for it. The only thing this court can do is to ensure that the Petitioner's property is secured from unlawful acquisition. This can be done through appropriate injunction orders.

Article 40 of the Constitution of Kenya provides that: -

“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; and

(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 property of any description or of any interest in, or right over, any property of 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 grounds specified or contemplated in Article 27 (4).

(3) 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 right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

20. In the present case, I find that the Petitioner has annexed a Copy of the Gazette Notice on the impending acquisition. There is evidence proving that the alleged intended trespass has been committed by the Respondents. The Petitioner has also shown that his parcel of land is due for compulsory acquisition by the government and to be precise Kenya National Highway Authority. The Respondents must clearly state the intention they have with the Petitioner’s land. If they intend to compulsorily acquire it, then they must follow the law.

21. *Mutungi J in Eunice Grace Njambi Kambi Kamau and Another –vs- Attorney General and Others. NAIROBI ELC NO. 976 OF 2012 (Unreported)* dealt with the issue of proof of compulsory acquisition. He observed that: -

“In my view and having regard to the provisions of the Land Acquisition Act (now repealed) the Government has an obligation to execute the process of land acquisition. The Commissioner of Land and the Land Registrars have duties and obligations which they are required to execute to ensure land is properly documented and protected. I believed that the intention of the elaborate process and procedure set under the Land Acquisition Act...”

22. The Petitioner has proved, on a balance of probability that it is the registered owner of the property in issue and therefore is entitled to protection by the Court. The petition therefore succeeds and orders made as follows:

(a) A declaration hereby issues that to the extent that the Respondents have moved into the Petitioner’s land being the suit premises herein, and marked portions thereof for purposes which have not been explained to the Petitioner, the Petitioner’s rights under Article 40(3) and 47(1) of the Constitution of Kenya, 2010 and Part VIII of the Land Act No 6 of 2012, Sections 107, 108, 111 and 112 have been and continue to be infringed by the Respondents in the manner pleaded herein.

(b) An order directing the Respondents to comply with Sections 107, 108, 111 and 112 of the Land Act No. 6 of 2012 forthwith by issuing to the Petitioner the notice of intention to acquire its land as stipulated in the Constitution of Kenya, 2010 and the Land Act No. 6 of 2012 and to accord to the Petitioner an opportunity to be heard on the issue of the intended acquisition of its property in accordance with the law.

(c) A permanent injunction restraining all the Respondents jointly and severally either by themselves, their servants, agents and any other person or entity acting under their directions or instructions from entering upon the Petitioner’s property known as L.R. No. MN/V/1706, Mombasa or any part or portion thereof for the purpose of constructing a road thereon or for any other purposes until and unless the Respondents comply with the provisions of the Constitution of Kenya, 2010 and the Land Act, 2012 relating to compulsory acquisition of private land for public use.

(d) Costs of the petition shall be for the Petitioner.

Dated, Signed and Delivered at Mombasa this 23rd day of January, 2020.

E. K. O. OGOLA

JUDGE

In the presence of:

Ms. Waswa for 2nd and 3rd Respondents

Ms. Nduku holding brief Aminga for Petitioner

Ms. Waswa holding brief Murakaru for 1st Respondent

Mr. Kaunda Court Assistant