



**Shagwambo (Suing on his behalf and on behalf of 31 others) v Mwatate
Constituency Development Fund Board (Environment & Land Petition
6 of 2017) [2023] KEELC 19117 (KLR) (25 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19117 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION 6 OF 2017**

NA MATHEKA, J

JULY 25, 2023

BETWEEN

**LUCAS MKONJI SHAGWAMBO (SUING ON HIS BEHALF AND ON BEHALF
OF 31 OTHERS) PETITIONER**

AND

MWATATE CONSTITUENCY DEVELOPMENT FUND BOARD RESPONDENT

JUDGMENT

1. The Petitioners herein aver that, at all material times, the Petitioners are the legal owners of the suit land. The Respondent has acquired the Petitioners land on which it has already commenced building a polytechnic in the constituency. The Petitioners own the said parcels of land by way of allotment numbers assigned to them by the Mwatate Adjudication Land office sometimes in 1972. That sometimes in April, 2016 the Area Chief Chawia location and representatives from Mwatate Constituency Development Fund, called for a public meeting and informed the public that, the Mwatate Constituency Development Fund, intended to build a polytechnic in the area of Mwatate, but before the commencement of the project, the team promised to come back to the public for their full participation and ideas on where actually the building was to be constructed and the modalities on how compensation would be effected on those who their parcel of lands would have been affected.
2. The Petitioner avers that, after the meeting, the promises and pleas made, the residents were happy with the noble idea, as the polytechnic project would benefit the public and at large, wherefore the sub county will hopefully grow in terms of socioeconomic development and cultural diversity. The Petitioners herein states that, since the aforesaid meeting, they have not in any way been involved or consulted as to where the project would be constructed as well compensation of the land owners who will be affected by the said project. The Respondent herein, went ahead and commenced the project on the Petitioners' land without their consent. The Respondent has never offered any modalities on how compensation would have been made, neither causing the public to participate in any way in



airing their independent ideas and opinion. The Respondent is proceeding with the construction and related works including but not limited to demarcating the roads, without involving the public or offering any mode of compensation on the Petitioners' land. The Petitioners argue that the following provisions of the Constitution have been violated Article 40 on their right to own land, Article 22 of the Constitution vests Petitioners with powers to institute this Petition and their rights have been threatened and infringed. Article 23 read '*pari pasu*' with Article 165(2)(b) of the Constitution vest jurisdiction to the High Court of Kenya and Environment and Land Court of Kenya to hear this Petition.

3. The Petitioners submit that they were never consulted on the proposed location of the project as per the provisions of Article 10 of the Constitution. This provision clearly stipulates the need for public participation as a main canon for governance in Kenya. Additionally, the Petitioners aver that the Respondents infringed Article 196 of the Constitution which provides for public access and participation. The Petitioners also aver that the Respondents infringed Article 56 of the Constitution which provides for the rights of the minority and marginalized groups in Kenya. The Petitioner prays that the Respondent is in contravention of Article 40 of the Constitution and be compelled to compensate the Petitioners and Costs of this Petition.
4. This Court has considered the Petition and the submissions therein. The protection of private property as guaranteed in the retired Constitution was carried over under Article 40 of the 2010 Constitution which provides in sub – Articles (1) (2) (3) and (4) that: -

- "(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 or 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 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. In the case of *Commissioner of Lands & Another vs Coastal Aquaculture Ltd* Civil Appeal No 252 of 1996 KLR (E&L 264) the Court of Appeal held that in cases of compulsory acquisition the government is required to strictly adhere to the provisions of the *Constitution* and the *Land Acquisition Act* (now repealed). In *Arnacherry Limited vs Attorney General* (2014) eKLR the Court held that;

“This is indeed a sad and distressing Petition. It is not expected that the State, in this age and time and with a robust Constitution such as ours, can actively participate in acts of impunity such as the forceful take-over of personal property without due compensation. The take-over has lasted 30 years and that makes the said action all the more disturbing.”

6. If land is so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined. This is in line with the Constitutional requirement under Article 40(3) of the *Constitution* that no person shall be deprived of his property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation.

7. The Petitioners own the said parcels of land, by way of allotment numbers assigned to them by the Mwatate Adjudication Land office sometimes in 1972. Sometimes in April, 2016 the Area Chief Chawia location and representatives from Mwatate Constituency Development Fund, called for a public meeting and informed the public that, the Mwatate Constituency Development Fund, intended to build a polytechnic in the area of Mwatate, but before the commencement of the project, the team promised to come back to the public for their full participation and ideas on where actually the building was to be constructed and the modalities on how compensation would be effected on those who their parcel of lands would have been affected.

8. In this matter the Petitioner avers that, after the meeting, the promises and pleas made, the residents were happy with the noble idea, as the polytechnic project would benefit the public and at large, wherefore the sub county will hopefully grow in terms of socioeconomic development and cultural diversity. . . The Petitioners thereafter have not in any way been involved or consulted. The Respondent herein, ahead and commenced the project on the Petitioners' lands without their consent to release the land for the project. The Petitioners aver that they are the legal owners of the suit land.

9. From my above observations, the Respondent has not proved in any way how their actions are in accordance with the law hence their actions are illegal. The Respondent's actions are in contradiction with Sections 2, 2(4), 3, 10, 40 and 47 of the *Constitution of Kenya*. The Respondents did not provide any evidence to prove that their actions do not infringe the rights of the Petitioners accrued under article 42 of the *Constitution of Kenya*. The law as discussed above, provides for compensation in cases of compulsory acquisition hence they have a right to compensation. Hon Justice JL Onguto in the case of *Patrick Musimba vs The National Land Commission and 5 Others* Petition No 613 of 2014 stated in the judgment that;

“If land is so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined; see section III of the Land Act. This is in line with the Constitutional requirement under Article 40 (3) of the Constitution that no person shall



be deprived of his property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation”.

10. The valuer’s report on record has ascertained that there has been encroachment on properties within Kirugurunyi Village of Chawia location in Taita Taveta County belonging to the Petitioners. The land is unregistered and Mwatate Technical Training Institute has been developed within their properties. The Petitioners have a right to be compensated and the orders below will apply once they establish proof of ownership of the exact portions of land said to be compulsorily acquired. I find that the Petition is merited and I grant the following orders;
- i. A declaration that the Petitioners’ protected right to property has been violated by the Respondent acts of encroachment onto and trespass upon the Petitioners’ properties.
 - ii. A declaration that the encroachment onto, trespass upon and expropriation of the Petitioner’s property without consultation of the Petitioners is illegal and unConstitutional.
 - iii. The Respondent is ordered to adequately compensate the Petitioners for compulsorily acquiring their parcels.
 - iv. Cost of the Petition to be borne by the Respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF JULY 2023.

N.A. MATHEKA

JUDGE

