



Munyao v Inspector General of Police & 3 others (Environment & Land Petition E007 of 2020) [2023] KEELC 20174 (KLR) (27 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20174 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT & LAND PETITION E007 OF 2020

A NYUKURI, J

SEPTEMBER 27, 2023

**IN THE MATTER OF ARTICLES 21, 22 (1), 23, 60, 64, 165 AND
ARTICLE 258 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF THE
FUNDAMENTAL RIGHT TO PROTECTION OF PROPERTY
UNDER ARTICLE 40 (3) OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF THE RIGHT TO FAIR
ADMINISTRATIVE ACTION UNDER ARTICLE 47 OF THE CONSTITUTION**

AND

**IN THE MATTER OF THE PROPERTY KNOWN AS MACHAKOS/MATUU 9127
(ORIGINALLY MACHAKOS/MATUU/6742 AND PREVIOUSLY MACHAKOS/MATUU/650)**

AND

IN THE MATTER OF THE LAND ACT & LAND ACQUISITION ACT CAP 295 (REPEALED)

BETWEEN

COSMAS MAKAU MUNYAO PETITIONER

AND

INSPECTOR GENERAL OF POLICE 1ST RESPONDENT

**THE CABINET SECRETARY, MINISTRY OF INTERIOR & COORDINATION
OF NATIONAL GOVERNMENT 2ND RESPONDENT**

NATIONAL LAND COMMISSION 3RD RESPONDENT

HON. ATTORNEY GENERAL 4TH RESPONDENT



JUDGMENT

Introduction

1. Vide a Petition dated 21st October 2020, the Petitioner sought the following orders;
 - a. A declaration that the acquisition of the occupied part of Title No Machakos/Matuu 8301 (Originally Machakos/Matuu/6742 and previously Machakos/Matuu/650) by the Government was unlawful, tantamount to an arbitral deprivation of land and was a violation of the Estate of Munyao Nzeki Ikuku's Constitutionally guaranteed right under Article 40 (3) (a) & (b).
 - b. A declaration that the said occupation, retention and detention of the occupied part Title No Machakos/Matuu 8301 (Originally Machakos/Matuu/6742 & previously Machakos/Matuu/650) amounts to compulsory acquisition.
 - c. A declaration that any continued occupation of the said portion of the suit land without compensation amounts to unlawful acquisition contrary to Article 40(3) of the *Constitution*.
 - d. An order for the payment of the current value of the occupied part of Title No Machakos/Matuu 8301 (Originally Machakos/Matuu/6742 & Previously Machakos/Matuu/650) with interest thereon at prevailing bank rates from the date hereof till payment in full or in the alternative, the Estate Munyao Nzeki Ikuku be restored possession of its land in the same condition as it was when it was unlawfully acquired by the Government.
 - e. An order that the Respondent do pay it mesne profits from the date of occupation until restoration or in the alternative, the Respondent to pay interests at commercial rates on the prevailing market value from 1990 to date of payment.
 - f. The court award to the Petitioner the costs of this petition.
2. The Petition is supported by the affidavit sworn by the Petitioner on 21st October 2020. It was the Petitioner's case that he was the administrator of the estate of the late Munyao Nzeki Ikuku who died on 29th July 2016 (hereinafter referred to as deceased). He averred that the deceased was the registered proprietor of land known as Machakos/Matuu/6742 (originally Machakos/Matuu/650 measuring 11.47 Hectares (suit property).
3. The Petitioner's grievance was that in the year 1990, the then Commissioner of Police one Philip Kilonzo acting on behalf of the Kenya Police force arbitrarily took possession of part of the suit property measuring 2.2 Hectares, erected police post thereon which was later Gazetted to a police station in 1992 without the deceased's consent and failed to ensure that the deceased was duly compensated as the said property was compulsorily acquired. He stated that in 2018, the deceased's estate sold part of Machakos/Matuu/6742, resulting in a new title Machakos/Matuu/830.
4. He averred that the estate of the deceased was deprived of the use of the compulsorily acquired property for 30 years which it would have utilized for a commercial purpose for agriculture or lease to earn a sum of Kshs 50,000/- per a month and sought for compensation of that amount form 1990 to the date of full compensation. He stated that he filed Constitution Petition Number 15 of 2015 against the Attorney General, but the same was struck out for failure to join the National Land Commission, and that therefore this petition was not res judicata.



5. He attached grant of letters of administration issued on 2nd August 2017 and confirmed on 26th June 2018; deceased's death certificate; limited grant of letters of administration Ad Litem dated 29th May 2018; Title deeds for Machakos/Matuu/650, Machakos/Matuu/6742; search certificate for Machakos/Matuu/6742 dated 21st September 2020; Title for Machakos/Matuu/8301; power of attorney dated 26th January 2015; and demand letters.
6. The Petitioner also filed a further affidavit sworn on 20th September 2022 wherein he deposed that Matuu police station occupies title No 9127 measuring 1.70 Hectares. He attached a copy of a valuation report prepared by Ultimate Valuers Limited dated 19th September 2022, showing that the land on which Matuu Police Station is situated measures 1.70 Hectares valued at Kshs 65,000.000/-.
7. Despite service, all the Respondents did not enter appearance or file any response to the petition. The petition was disposed of by way of written submissions. On record are the Petitioner's submissions dated 2nd November 2022. Although the Petitioner filed an amended petition dated 20th September 2022 and filed on 7th October 2022, there is no evidence that the same was filed pursuant to leave of court or served on the Respondents and the Petitioner did not inform court of filing it as the same was only referred to in the submissions. Therefore this court will proceed as if the said amended petition was not filed at all. Although they indicate that they were filed the amended petition pursuant to leave granted on 26th May 2022, the record does not show that such leave was sought or granted on that date.

Petitioner's submissions

8. Counsel for the Petitioner submitted that this matter raised three issues namely;
 - a. Whether Matuu Police Station was built on private land belonging to the deceased.
 - b. Whether the deceased's fundamental rights were infringed by the construction of the police station.
 - c. Whether the Petitioner is entitled to the orders sought and to what extent.
9. On the first issue, counsel submitted that the deceased's estate was at all material times the registered proprietor of LR No Machakos/Matuu/650 as per the title deed produced, issued on 5th April 1993. He submitted that the said parcel was subdivided into parcel 6742 and later 8301 and finally 9127 as per the valuation report dated 19th September 2022.
10. Counsel relied on Section 26 of the [Land Registration Act](#) to argue that a title is conclusive evidence of proprietorship. Reliance was further placed on the case of [Elijah Makeri Nyangara v Stephen Mungau Njuguna & another](#) [2013] eKLR, for the proposition that the law is extremely protective of title and title can only be challenged where it is shown that it was obtained by fraud, misrepresentation or through a corrupt scheme. Counsel argued that the Petitioner's title to the suit property has not been challenged and that therefore the evidence of ownership thereof is conclusive.
11. It was further submitted for the Petitioner that the encroachment on the suit property by the then Commissioner of Police, Philip Kilonzo was arbitrary and done without compliance with the requirement of compulsory acquisition, a fact not disputed by the Respondents. Counsel argued that when the Respondents were served with letters dated 10th July 2014 and 3rd July 2014, they promised to confirm details but no explanation was forthcoming from them.
12. On whether the Petitioner's right was infringed upon, counsel argued that although the Government compulsorily acquired the suit property, it did not issue prior notice of its intention to the Petitioner and that the oral notice by the Commissioner of Police was contrary to Sections 3 and 8 of the [Land](#)



Acquisition Act (repealed). Counsel argued that the deceased was deprived of his land without being given a hearing, contrary to his right to a Fair Administration Action.

13. It was also contended for the Petitioner that the Respondents actions contravened Section 75 of the Repealed Constitution as well as Article 40(3) of the Constitution of Kenya 2010 as the Respondents deprived the deceased of his property without full and prompt compensation. Counsel referred the court to the cases of Isaiab Otiato & 6 others v County Government of Vibiga [2018] eKLR and Commissioner of Lands & another v Coastal Aquaculture Limited [1996] KLR, for the proposition that in compulsory acquisition, the Government must follow the procedures provided in law and fully and promptly compensate the owner of the land compulsorily acquired.
14. Counsel took the view that in compulsory acquisition, the Government must not violate the principles of natural justice. To buttress this position, reliance was placed on the case of Republic v National Police Service Commission Ex Parte Daniel Chacha Chacha [2016] eKLR.
15. On the question of quantum of compensation, counsel argued that the deceased's property was compulsorily acquired without compensation. Counsel contended that the deceased would have utilized the suit property for agriculture or leasing to a business enterprise which would have earned him Kshs 50,000/- per month and that therefore the estate is entitled to that sum from the date of the encroachment which is 1990 upto the date of full payment.
16. In that regard, counsel submitted that the deceased's estate was entitled to mesne profits. Reliance was placed on Section 2 of the Civil Procedure Act and the cases of Rajan Shah t/a Rajan S. Shah & Partners v Bipin P. Shah [2016] eKLR, Lucy Kochuvareed v P. Mariappa Gounder AIR 1979 SC 1214, Patrick Musimba v National Land Commission & 5 others (Petition No 613 of 2014) and Attorney General v Zinj Limited (Petition 1 of 2020) [2021] KESC 23 (KLR) (Civ) (3 December 2021) (Judgment) for the proposition that where land is acquired compulsorily there must be full and prompt compensation by the state.

Analysis and Determination

17. I have carefully considered the Petition and the affidavits in support thereof together with the Petitioner's submissions. In my considered view, the issues that arise for determination are;
 - a. Whether the land upon which Matuu Police Station is situated was arbitrary and compulsorily acquired from the late Munyao Nzeki Ikuku.
 - b. Whether the rights of the late Munyao Nzeki Ikuku were violated.
 - c. Whether the Petitioner is entitled to the orders sought
18. Section 75 (1) and (2) of the Repealed Constitution of Kenya provided for compulsory acquisition as follows;

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- (1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied -
 - a. the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and



- country planning or the development or utilization of property so as to promote the public benefit; and
 - b. the necessity therefor is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and
 - c. provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.
- (2) Every person having an interest or right in or over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the High Court for -
- a. the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled; and
 - b. the purpose of obtaining prompt payment of that compensation.

Provided that if Parliament so provides in relation to a matter referred to in paragraph (a) the right of access shall be by way of appeal (exercisable as of right at the instance of the person having the right or interest in the property) from a tribunal or authority, other than the High Court, having jurisdiction under any law to determine that matter.

19. Therefore a person could not be deprived of their property by the state without being fully and promptly compensated. In the *Constitution* of Kenya 2010, Article 40 (3) thereof, makes a similar provision as follows;

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 interest in land or 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 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.

20. It is therefore clear that the state cannot deprive a person of their property without full, prompt and just compensation.



21. In the instant suit, the Petitioner states that in 1990, the Government of Kenya through the Commissioner of Police one Philip Kilonzo encroached on Parcel No Machakos/Matuu/6742 originally Machakos/Matuu/650 registered in the name of the late Munyao Nzeki Ikuku and put up Matuu Police Post. That Matuu Police Post was later Gazetted vide Gazette Notice No 5958 of 1992 into Matuu Police Station. To prove these allegations, the Petitioner produced title deeds for Machakos/Matuu/650, Machakos/Matuu/6742, Machakos/Matuu/8301 and Machakos/Matuu/9127. I have considered the above titles and title Machakos/Matuu/650 which the Petitioner says was the original title belonging to the deceased and which gave rise to the above titles upon subdivision. That original title was registered on 5th April 1993 in the name of the deceased Munyao Nzeki Ikuku. The other titles were registered on 7th April 2015; 8th November 2019 and 10th August 2021 respectively. These dates are crucial because the Petitioner maintains that the Respondents' encroachment occurred in 1990 by construction of Matuu Police Post which was later Gazetted as Matuu Police Station vide Gazette Notice No 5958 of 1992.
22. Therefore, the question that arise is on what parcel of land was Matuu Police Post constructed on in 1990? The register of the deceased's original parcel No Machakos/Matuu/650 was first opened on 5th April 1993, three years after Matuu Police Station was already occupying the land upon which it was established. It is clear therefore that as at the time Matuu Police Post was established on the disputed land, the deceased did not own that land and Parcel Machakos/Matuu/650 was not by then registered. Therefore, I find and hold that the land upon which Matuu Police Post was established did not belong to the deceased and therefore the Petitioners have no claim over the same.
23. Although in his further affidavit the Petitioner attached a valuation report showing that the land upon which Matuu Police Post was constructed was Parcel No Machakos/Matuu/9127, that title was issued to the Petitioner on 10th August 2021, that is 31 years after the Police Post had been established on the disputed property and no surveyor's report was produced to demonstrate the nexus between Title No Machakos/Matuu/9127 and the land where the Police Station stands and upon which Gazette Notice No 5859 of 1992 was issued. In addition, the valuation report although having referred to survey maps, none of such maps was attached to the report. In the premises, the evidence of valuation report produced by the Petitioner is of no probative value in this matter.
24. Therefore this court finds and holds that the Petitioner having failed to demonstrate the nexus between the land upon which Matuu Police Station stands and Parcel Machakos/Matuu/650, the Petitioner has failed to demonstrate that the deceased was the owner of the parcel on which Matuu Police Station is situated. Having failed to demonstrate ownership of the disputed land, the Petitioner cannot in law be compensated for that which does not belong to him.
25. In the premises, I find and hold that the Petition lacks merit and the same is hereby dismissed, with no orders as to costs.
26. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 27TH DAY OF SEPTEMBER, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of:

Mr. Thuita for Petitioner



No appearance for Respondent

Ms Josephine – Court Assistant

