



Chesingei v County Land Registrar, Elgeyo Marakwet County & 3 others (Petition E006 of 2022) [2023] KEELC 20074 (KLR) (25 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20074 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
PETITION E006 OF 2022
L WAITHAKA, J
SEPTEMBER 25, 2023
IN THE MATTER OF ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER
ARTICLES 22 AND 40 OF THE CONSTITUTION OF
KENYA 2010.**

BETWEEN

**JOSEPH KIMUTAI CHESINGEI ALIAS JOSEPH KIMUTAI
SUTER PETITIONER**

AND

**THE COUNTY LAND REGISTRAR, ELGEYO MARAKWET
COUNTY 1ST RESPONDENT**

THE ATTORNEY GENERAL 2ND RESPONDENT

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
(IEBC) 3RD RESPONDENT**

THE NATIONAL LAND COMMISSION 4TH RESPONDENT

JUDGMENT

Introduction.

1. Joseph Kimutai Chesingei alias Joseph Kimutai Suter, the petitioner herein, filed the Petition dated 28th July 2022 and amended on 8th December 2022 seeking judgment against the respondents for:-
 - a. A declaration that the respondents jointly and severally violated his right to own property
 - b. and right against arbitrary deprivation of property;



- c. An order of mandamus directing and compelling the 1st respondent to remove the restriction lodged against title number Elgeyo Marakwet/Moiben/Kapsowar/1981;
 - d. An order that the 3rd respondent vacates the suit property within 30 days or such time that the court would deem just and in the alternative the 3rd respondent compensates him on current value of the suit property being Kenya shillings fifteen million (Kshs.15,000,000/-).
 - e. Costs of the Petition.
2. From the pleadings filed in this suit comprised in the Petition, the affidavits sworn in support thereof and the affidavits sworn in response to the Petition, it is common ground that the subject matter of the Petition to wit the parcel of land known as Elgeyo Marakwet/Moiben/Kapsowar/1981(the suit property) is registered in the name of the petitioner. It is also common ground or admitted that pursuant to a verbal directive given by the former President of the Republic of Kenya the late Daniel Arap Moi, the suit property was purportedly compulsorily acquired by the Government. As a result of the purported compulsory acquisition of the suit property, the 1st respondent put a restriction on the register of the suit property restraining dealings with the suit property on the ground that the suit property had been acquired by the Government for Kapsowar Divisional Headquarters.
 3. Whilst the petitioner has feigned ignorance on the circumstances upon which the restriction was placed on the register of the suit property, from the totality of the evidence adduced in this case comprised of the conduct of the petitioner, (petitioner admits that he has all along lived in the suit land and that a portion of it measuring 1 acre is in use and occupation of the 3rd respondent yet other than the current suit, there is no evidence of any complaint by him against the alleged unlawful takeover) there is a letter from the defunct Electoral Commission of Kenya dated 10th January, 2007 to the petitioner, which forms part of the documents relied on by the petitioner in support of the Petition. That letter shows that as early as 10th January, 2007, the petitioner and the writer of the letter were to meet with the District Commissioner (DC) to discuss the issue of compensation for land acquired by Government, meaning that the petitioner was aware of the purported compulsory acquisition of the suit property by the Government.
 4. The 1st and the 2nd respondents through the replying affidavit of Marvin Onyango, Land Registrar, Elgeyo Marakwet, sworn on 9th May 2023, contend that the petitioner alongside other persons affected by the acquisition were compensated with land elsewhere, Kapkoros and Chebara. That contention is premised on a letter from the office of the Deputy County Commissioner, Marakwet East, dated 22nd August 2023 (the letter is annexed to the replying affidavit and marked MO2).
 5. I have read and considered the contents of that letter and the assertion by the petitioner through his further/supplementary affidavit sworn on 18th May 2023 to the effect that he was not compensated.
 6. My view of the contents of the letter marked M02 is that it is not proof that the persons whose parcels of land were purportedly compulsorily acquired by Government were compensated but an acknowledgement of the purported compulsory acquisition and the action taken towards compensation of the persons affected. It is not conclusive proof that the Government fulfilled its obligation arising out of the exercise.
 7. The fact that the Government did not fulfil its part of the bargain is made bare by the letter from National Land Commission (NLC) dated 18th February 2015, attached to the 1st and 2nd respondent's replying affidavit referred to above, marked MO4 (a). That letter shows that those whose lands were compulsorily acquired were moved and settled in Chebera Government forest but the forest was not degazetted. The letter indicates that the allocations have not been regularized.



8. The 4th respondent filed a replying affidavit, sworn on 28th February, 2023, contending that the law was complied with in acquisition of the suit property and terming the suit a cause to disturb the peaceful use and occupation of the suit property by the Government offices constructed in the suit property following conclusion of the acquisition exercise. The 4th respondent further contends that grant of the orders sought would restrict state's power of eminent domain and that the respondent will suffer irreparable harm if the orders sought are granted.
9. Pursuant to directions given on 6th March 2023, that the Petition shall be disposed of by way of written submissions, the petitioner and the 1st and 2nd respondents filed submissions which I have read and considered.

Submissions.

The Petitioner's Submissions:

10. Through his submissions filed on 19th April 2023, the petitioner submits that the respondent violated his right under Article 40(3) of *the Constitution* of Kenya; that his interest over the suit property has not been extinguished since the suit property is still registered in his name and that the mode and manner in which the restriction was entered is arbitrary as it was not carried out in accordance with law.
11. The petitioner urges the court to issue a permanent injunction to restrain the respondents by themselves or through their agents from interfering with his enjoyment of the suit property.
12. The petitioner further submits that by arbitrarily placing a restriction against the register of the suit property, the respondents violated his right to equal protection and benefit of the law enshrined under Article 27(1) of *the Constitution*.
13. The respondents are also said to have violated the petitioner's right to protection and benefit of the law, particularly Sections 24(a) and 25(1) of the *Land Registration Act*, 2012. In that regard, the petitioner cited the decision in the case of Richard Kimaiyo Kiyeng v. Land Registrar, Elgeyo Marakwet County & another (2018) eKLR where the court lifted a restriction registered against the title of the registered proprietor of the subject matter of that suit on the ground that the law was not complied with in the purported compulsorily acquisition of the land and which acquisition formed the basis of registration of the restriction in support of his plea for removal of the restriction registered against the title to the suit property.

The Respondent's Submissions:

14. In their submissions filed on 10th May 2023, the 1st and the 2nd respondents identified the issues for determination, arising from the Petition and the responses filed in respect thereof as:-
 - a. Whether or not the Petition meets the threshold of a constitutional Petition;
 - b. Whether or not this court has jurisdiction to hear and determine a Petition on an acquisition that took place in 1989;
 - c. Whether or not the Petition offends the principle of constitutional avoidance; and
 - d. Whether or not the Petition has merit.
15. On whether or not the Petition meets the threshold of a constitutional Petition, it is submitted that the pleadings as filed by the petitioner falls short of a Constitutional Petition. The petitioner is said to



have merely mentioned Article 40 of the Constitution in passing and to have failed to give particulars in specificity and precision on how the 1st and the 2nd respondents violated his rights.

16. It is contended that the Petition does not meet the threshold of a Constitutional Petition espoused in the cases of *Anarita Karimi Njeru v. Attorney General and Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR.
17. On whether or not this court has jurisdiction to hear and determine a Petition on acquisition that took place in 1989, it is submitted that the Land Acquisition Act (now repealed) provided for dispute resolution mechanism on matters touching on compulsory acquisition of land which mechanism the petitioner did not comply with before coming to this court. It is contended that Section 29 of the Land Acquisition Act expressly limited the jurisdiction of this court to hearing appeals from institutions created under the Act.
18. It is pointed out that from the pleadings in this case, the impugned compulsory acquisition took place in 1984 or thereabouts when the Land Acquisition Act was in operation. The petitioner is said to have failed to demonstrate that he challenged the impugned decision before the Tribunal established under the Act. Based on the decision in the case of *Kenya Highway Authority v. Shalien Masood Mughal & 5 others* (2017)e KLR the 1st and 2nd respondents assert that the jurisdiction of this court is limited to hearing appeals from the Tribunal established under the Land Acquisitions Act, now repealed.
19. Further, based on the provisions of the Land Value (Amendments Act), 2019, Sections 133 C, it is submitted that the Land Acquisition Tribunal established under Section 133A of the Land Value (Amendment) Act, 2019, is the first port of call on issues touching on compulsory acquisition of land.
20. It is further submitted that under Section 133D of the Land Value (Amendment) Act, 2019 the jurisdiction of this court is to hear Appeals arising from the Tribunal.
21. The 1st and the 2nd respondents further submit that from the pleadings and documentation filed in this suit, it is evident that the process of acquisition was concluded and the persons affected given land elsewhere.
22. It is explained that what remained is regularization of the allocations which fall under gazetted forest land. It is further explained that the main actors in the regularization exercise namely the National Land Commission and the Kenya Forest Service are in communication and taking positive steps towards the regularization of the process. For those reasons, it is submitted that the Petition herein is premature.
23. On whether or not the Petition offends the principle of constitutional avoidance, it is reiterated that the petitioner had not exhausted the dispute resolution mechanism provided for under the Land Acquisition Act, the Land Act, 2012 and the Land Value (Amendment Act), 2019 and based on the decision in the case of *Communication Commission of Kenya & Others v. Royal Media Services Limited & 5 others* (2014)e KLR reiterated that the Petition offends the constitutional avoidance and ought to be struck out.
24. On whether an order of mandamus should issue compelling the 1st respondent to remove the restriction registered against the title to the suit property, it is submitted that the impugned action of the 1st respondent was geared towards protection and preservation of public utilities on the suit property against any adverse dealings pending resolution of the dispute concerning acquisition of the suit property hence not unlawful.
25. It is further submitted that the petitioner has not demonstrated that he made an application to and/or demanded the land registry to remove the restriction and that the application or demand was denied or declined to warrant an issuance of an order of mandamus. In that regard reliance is placed on the



cases of Republic v. Attorney general & Another ex parte Jackson Musyoka Munyalo (2015) eKLR where it was inter alia held:-

“...The applicant has to show that there is a duty imposed on the respondent to act and the respondent has failed to act in accordance with that duty. ...It has therefore being held that generally a demand for the actions to be taken is a prerequisite to grant of an order of mandamus.”

26. As to whether the Petition has merit, it is reiterated that the Petition falls short of a Constitutional Petition and that the petitioner has failed to demonstrate that he has exhausted available remedies before coming to court.
27. It is asserted that the Petition is premature as the subject matter of the Petition is under active consideration by the National Land Commission and the Kenya Forest Service.
28. It is further submitted that it is in the interest of justice and public policy that the remedies sought by the petitioner be declined.

Analysis and determination

29. From the pleadings filed in this suit, the affidavit evidence adduced in support thereof and submissions filed by the parties, I find the issues for determination to be as follows:-
 - i. Whether the applicable law and procedures were complied with in the purported compulsorily acquisition of the suit property by the Government of Kenya?
 - ii. Subject to the outcome of (i) above, whether the petitioner was under any legal obligation to pursue the dispute resolution mechanism provided for under the Land Acquisition Act, the [Land Act](#) and/or the Land Value (Amendment) Act, 2019?
 - iii. Whether the petitioner has made up a case for being granted the orders sought or any of them;
 - iv. What orders should the court make?
30. On whether applicable law and procedures were complied with in the purported compulsorily acquisition of the suit property by the Government of Kenya, a review of the evidence adduced in this case vis-a-vis the applicable law and procedures shows that there was no compliance with the applicable law and procedures in carrying out the impugned compulsorily acquisition of the petitioner's land. This is so because the evidence adduced in this case shows that the impugned compulsorily acquisition was carried out pursuant to an oral order/direction given by the former President of the Republic of Kenya, the late Daniel Arap Moi. No evidence has been given by the respondents capable of showing that arising from that directive, the applicable procedures were complied with. These included publication of gazette notices of the intended compulsorily acquisition; holding inquiries; valuation of the affected land and determination of what would amount to adequate compensation of affected persons and lastly; adequate compensation of the persons affected, which needed to be done without undue delay.
31. The respondents have, in their evidence acknowledged that the compensation exercise arising from the purported compulsorily acquisition of the petitioner's land is still work in progress (is yet to be regularized). That kind of compensation cannot by any measure of imagination be what the law contemplated in requiring for prompt and adequate compensation.
32. Failure to adhere to the law in carrying out the impugned compulsory acquisition rendered the exercise unlawful and null and void. In arriving at that determination, I am guided by decision of the Supreme



Court in the case of Attorney General v. Zinj Limited (Petition 1 of 2020) (2021) KESC 23 (KLR) (CIV) (3 December 2021) (Judgment)-Supreme Court; where it was stated/held:-

“The only way the Government could lawfully deprive the respondent of part or all of its property, was through a compulsory acquisition, in conformity with the provisions of Article 40(3) of *the Constitution*, and the procedure stipulated in the Land Acquisition Act (now repealed) which was the applicable law at the time.... 28. It follows that any compulsory acquisition process, ought to have commenced with a requisite Notice to the respondent, and any other persons claiming an interest in the land. The public purpose for which the land was to be acquired, ought to have been clearly stated. Most critically, the resultant acquisition ought to have been attended with prompt payment in full, of a just compensation to the respondent. There is nothing on the record to show, that any of these mandatory processes, was followed before a portion of the suit property was acquired. This being the case and despite the appellant’s protestations to the contrary, we must reach the conclusion, in agreement with the trial court, that the issuance of titles over a portion of the suit property, in favour of third parties was unlawful, un-procedural, and an egregious violation of the respondent’s right to property. We therefore have no doubt, that the issuance of titles to third parties over a portion of the suit property, amounted to a violation of Article 40 (3)(a) and (b) of *the Constitution*....Such action could not be regarded as “a compulsory acquisition” as it was done contrary to *the Constitution* and the law. The acquisition was “compulsory” only because the Government used its coercive powers to deprive the respondent of its property in disregard of *the Constitution*. However, such governmental action cannot be regarded as “a compulsory acquisition” as known to law. It was simply a brazen and an unlawful deprivation of the respondent’s right to property, for which just recompense was awarded by the trial court.

33. Having so held, we find difficulty in vindicating the appellate court’s conclusion, to the effect that, the Government had compulsorily acquired the land. Following our determination to the contrary, it becomes clear that the principles governing compensation for compulsorily acquired land, could not be applicable to the suit land, as the same had not been so acquired. The most appropriate remedy in our view, was an award of damages, as held by the trial court and partially upheld by the Court of Appeal.”

33. On whether the petitioner was under any legal obligation to pursue the dispute resolution mechanism provided for under the Land Acquisition Act, the *Land Act* and/or the Land Value (Amendment) Act, 2012; having determined that the purported acquisition was not carried out in accordance with the applicable law and procedures, hence null and void, it is the considered view of this court that the petitioner could not be expected to comply with the Land Acquisition Act or the other statutes governing compulsory acquisition of land as there was no lawful acquisition of his land on which those processes could hinge.
34. On whether the petitioner has made up a case for being granted the orders sought or any of them, flowing from the determination that the law and applicable procedures were not followed in the purported compulsorily acquisition of the petitioner’s land, it follows that the activities undertaken by the respondents on the petitioner’s land are a violation of the petitioner’s constitutional and legal rights. Consequently, I do find that the petitioner has made up a case for issuance of a declaration that the respondents jointly and severally violated his right to own property and his right against arbitrary deprivation of property.



35. As to whether an order of mandamus directing and compelling the 1st respondent to remove the restriction lodged against the title to the suit property should issue, despite having determined that the purported acquisition of the suit property was unlawful, taking into account the demonstrated intention of the Government to compulsorily acquire the suit property for public purpose, it is in public interest to give the Government an opportunity to actualize its intention by giving it limited time to regularize the otherwise unlawful acquisition of the petitioner's land before it can be compelled to remove the otherwise irregularly registered restriction.
36. Concerning the petitioner's alternative prayer for payment of Kshs.15,000,000/- being the current market value of the one acre the 3rd respondent is said to be unlawfully occupying, the court notes that the prayer is not supported by the evidence tendered by the petitioner. The valuation report submitted by the petitioner shows that the 1 acre said to be wrongfully occupied by the 3rd respondent has a current market value of Kshs.13,000,000/- and not Ksh.15,000,000/- sought by the petitioner in the Petition.
37. Although the valuation report indicates that the market value was assessed using market comparable approach, no basis of that assertion has been given as no sales of plots of similar acreage in the area have been given in the valuation report. The basis of concluding that the area occupied by the 3rd respondent is one acre has also not been given.
38. The above observations makes the report not very reliable for purpose of ascertaining the market value of the portion said to be wrongfully occupied by the 3rd respondent. The foregoing observation notwithstanding, there being no other report provided by the respondents to guide the court, the court is left with no choice but to fashion appropriate orders/reliefs based on the valuation report.
39. The upshot of the foregoing is that the Petition has merit and is allowed in terms of prayer (a) and prayer (c) to the extent that the 4th respondent in conjunction with the 3rd respondent is directed to regularize the acquisition of the suit property in total compliance with the provisions of the Land Act, 2012 and the Land Value (Amendment) Act, 2019 within a period of nine (9) months from the time of delivery of this judgment, failing which the 3rd respondent shall pay the petitioner Kshs.13,000,000/- for the one acre of the suit property it occupies or vacate the suit property.
40. The prayer for removal of the restriction shall abide the outcome of the order for regularization of the acquisition, so that in the event that regularization is not done within the period of nine (9) months from the time of delivery of this judgment and the 3rd respondent does not either compensate the petitioner for the one acre or there about it occupies, an order of mandamus shall forthwith issue compelling the 1st respondent to remove the restriction registered against the title of the suit property.
41. As the petitioner has succeeded, I award him the costs of the petition.

Orders accordingly.

DATED, SIGNED AND DELIVERED, AT KABARNET THIS 25TH DAY OF SEPTEMBER, 2023.

L. N. WAITHAKA

JUDGE

