



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**(CONSTITUTIONAL & JUDICIAL REVIEW DIVISION)**

**PETITION NO. 552 OF 2009**

**BERNARD MWANGI MBAI.....APPLICANT**

**AND**

**THE CABINET SECRETARY, MINISTRY OF ROADS.....1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY, MINISTRY OF LANDS....2<sup>ND</sup> RESPONDENT**

**COMMISSIONER OF LANDS.....3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**IN THE MATTER OF: AN APPLICATION BY THE APPLICANT FOR LEAVE**

**TO APPLY FOR AN ORDER OF COMMITTAL FOR CONTEMPT**

**OF COURT DIRECTED TO THE RESPONDENTS**

**IN THE MATTER OF: THE JUDICATURE ACT (CHAPTER 8 OF**

**THE LAWS OF KENYA) AND ORDER 52 OF THE SUPREME**

**COURT OF ENGLAND PRACTICE RULES**

**IN THE MATTER OF: JUDGMENT DELIVERED BY**

**THE HONOURABLE JUSTICE D. S. MAJANJA ON**

**THE 25/10/2012 DIRECTED TO THE RESPONDENT**

**EX PARTE:**

**RULING**

By a NOTICE OF MOTION dated the Applicant sought ORDERS:-

1. ***THAT*** this Honourable Court be pleased to Order that the Respondents be committed to civil jail for contempt of court order given on 25<sup>th</sup> October, 2012.

2. ***THAT*** costs of the Application be provided for.

The Application is based on the Applicant's Statement of facts dated 5<sup>th</sup> November, 2015, the Supporting Affidavit dated 5<sup>th</sup> November,

2015, and on grounds set out in the application as follows:-

1. **THAT** the Respondents have blatantly disobeyed and continue to disobey the order delivered by this Honourable Court.
2. **THAT** leave to commence these proceedings has been granted.
3. **THAT** the said Order has been duly served upon Respondents.
4. **THAT** despite the Respondents being served with the Orders they proceeded in utter disregard and contempt of this Court's Judgment by refusing/failing to stop trespassing, taking possession or in any other manner interfering with the Applicant's property described as L.R. NAIROBI/BLOCK 126/752.
5. **THAT** the dignity of this Honourable Court must be maintained.

In response the Respondents filed a REPLYING AFFIDAVIT sworn by John Mosonik deponing as follows:

1. **THAT** I am the Principal Secretary in charge of the State Department of Infrastructure at the Ministry of Transport and Infrastructure, thereby competent and duly authorized to swear this Affidavit on behalf of the Respondents herein.
2. **THAT** I am conversant with the issues raised in the Petitioner's Notice of Motion Application, its Supporting Affidavit and the annexure thereof filed on 18<sup>th</sup> November 2015 and wish to respond as follows;
3. **THAT** land Parcel Nairobi/Block 126/752 herein referred as the suit land is amongst other properties earmarked for acquisition for purposes of constructing the proposed Greater Eastern Bypass road.
4. **THAT** the background information of this matter is that, in the recent past, there has been rapid traffic growth (particularly cars and motorcycles), within the City of Nairobi. This rapid growth in the number of cars has brought along conventional challenges. Congestion along the major arterials serving the Nairobi City's Central Business District (CBD), resulting in increased passenger travel time, cargo transfer time, pollution among other negative traffic congestion impacts.
5. **THAT** the increased passenger travel times in particular has seen loss of valuable working time for the active resident population in Nairobi, thereby slowing economic growth by reducing productive working time while travel expenditure continue to increase.
6. **THAT** in view of the above the Ministry of Roads through the Kenya Urban Roads Authority, embarked on efforts that would divert this traffic and other through traffic from the Nairobi CBD by constructing a number of by-passes, namely, the Southern Bypass, Nairobi Western ring roads, Nairobi Missing Links, Northern and Eastern bypasses.
7. **THAT** the Construction of some of these road links are ongoing and significant progress has been achieved. Currently, the Northern, Eastern and Southern bypasses are substantially complete and are open to the public for use.
8. **THAT** the Government of Kenya further earmarked funds for the purpose of engaging the services of an Engineering Consulting firm to undertake feasibility preliminary and detailed engineering design for the construction to bitumen standard of the proposed Greater Eastern Bypass which affect the suit land Parcel Nairobi/Block 126/752. The road is intended to connect the Northern corridor (A109 road) to the existing Eastern bypass and A3 road near Thika town, a satellite industrial town located about 50 km to the east of Nairobi City.
9. **THAT** the Government through its implementing agency, the Kenya Urban Roads Authority (KURA) requested for proposal for undertaking Feasibility Study, Preliminary and Detailed Engineering Design for the upgrading to bitumen standard of the Greater Eastern Bypass project.
10. **THAT** the Greater Eastern Bypass project road is approximately 77 km long and is located within Machakos and Thika counties. The proposed road will by-pass the Central Business District of the City of Nairobi and with thus provide a vital link between Mombasa and Garissa roads thus decongesting the city of Nairobi.
11. **THAT** the project road will pass through several private lands and thus land has to be acquired for the proposed road. Further the project alignment follows the existing road and only land necessary to meet the right of way requirement will be acquired and it is proposed to acquire 100 metre right away.
12. **THAT** a total of seven hundred and seventy seven (777) properties have been earmarked for acquisition.
13. **THAT** Land Parcel Nairobi/Block 126/752 were among the property proposed for acquisition and the area affected is approximately 2.14 Ha.
14. **THAT the acquisition plans and schedules have been prepared and are to be submitted to National Land Commission to initiate the process of compulsory Land acquisition upon realization of the requisite funds.**
15. **THAT** in view of above, the Motion filed is premised on a total misreading of the order of 25<sup>th</sup> October, 2012, as the proposed

land acquisition was predicated on fruition of the proposed roads project.

16. **THAT** the Greater Eastern Bypass road project which will lead to the acquisition of several private land including the petitioner's has not yet commenced as it is subject to many factors including funds, therefore the petitioner cannot cite the Respondents for contempt.

17. **THAT** the Respondents are not in contempt of the court orders issued by the Honourable court on 25<sup>th</sup> October, 2012 **nor have they disobeyed the same as the said orders had no time limit of acquiring the suit property.**

18. **THAT** I swear this Affidavit in opposition of the Application filed herein.

The parties' Counsel made oral submissions on the Notice of Motion, principally, as follows:

Mr. Onyancha for the Applicant

Notice of Motion dated 17/11/2015.

Affidavit of W. Wambugu of 5/11/15 and statement of facts.

Contempt of Court of order of 25/10/12.

Order duly served.

Paragraph 6 of Supporting Affidavit indicates creation of record.

Responses of 9/2/15 by John Mosonik no denial. I refer to paragraph 3, 12 and 13 that suit land is earmarked for acquisition.

Article 40 (3) (b) – requiring upon acquisition owner of property to be compensated in full.

Land Acquisition Act Cap 295 Section 6 (2) requires notification and Section 8 prompt compensation.

I refer to the proceedings indicating that the invasion occurred in 2008.

Time for acquiring the parcel was not given but it is unconscionable that the Respondents continue to occupy land since 2008 without compensation. We pray that the application be allowed as prayed.

Ms. Kamande for the respondents

We oppose the application. Replying Affidavit on 16/2/16. Respondents are not in contempt as the Order stated that the respondent shall take such steps. Decree of 14/1/2015.

Acquisition is a process and that process depends on a number of factors (1) being the visibility of the project and availability of fund.

Project is yet to commence. I refer to paragraph 16 of Replying Affidavit. Project is subject to availability of funds. It is not possible to start compensating people yet we do not know when project will commence.

Applicant's parcel, though earmarked has not yet been gazzetted for acquisition. Before Gazzetment the process of compensation cannot be initiated.

The process of construction by the Respondent has not been commenced the entire process of acquisition has not placed any caveat on the land. The Applicant is pleased to use the land as he pleases. If and when the process of construction begins it shall be compensated depending on what is on the property. No person has been compensated. It would be discriminating against the others. The application is premature. The issue of the Respondent being on site is substituted.

I refer to Affidavit sworn of Joseph Mwaura considered by the court in its judgment indicates that it is only a track that is used by people as a means of passage. There is no development of a road. The respondent is not on the site.

The application is without merit and I urge the applicant to be patient and await the outcome of the project.

Mr. Onyancha in reply

Judgment of court at paragraph 4. Respondents do not deny that entered on the suit property.

Issue is not whether they entered or not. It was delivered by the Judge paragraph 6 of the Judgment order premised and the understanding that parties were negotiating they cannot be heard to say that they are not on site. It has been 9 years since the

invasion we pray that the application be granted.

### **Determination**

The resolution of the application before the court depends on the finding by the court as to whether the respondent has taken possession of the suit property without payment of due compensation in accordance with the law and the judgment of the Court herein. The judgment of the Court relied on by the Ex-parte applicant was in the following material terms:

“6. I am aware that parties have been negotiating the matter and in order to bring this matter to a close and in the circumstances, the Petition is allowed to the following extent:

**(1) I declare that the Petitioner is the registered proprietor of the property known as L.R. Nairobi/Block126/752.**

**(2) The Respondents shall take such steps as are necessary to acquire the Petitioner's property under the Land Acquisition Act (Chapter 295 of the Laws of Kenya).**

**(3) The 1<sup>st</sup> Respondent shall bear the costs of this petition.**

**Dated and Delivered at Nairobi this 25<sup>th</sup> day of October, 2012.**

**D. S. MAJANJA**

**JUDGE**

In *Property under the Land Acquisition Act (Chapter 295 of the Laws of Kenya)* the Court did not fix time lines. Although in such a case where no time is prescribed action should be taken within reasonable time, it is not possible to say that the time lapse in this case is unreasonable. The respondent's urge that “*the Greater Eastern Bypass road project which will lead to the acquisition of several private land including the petitioner's has not yet commenced as its subject to many factors including funds*”.

The Court would take judicial notice that it would require time for preparation by way of planning, design and financing for construction of a road bypass. Indeed the Replying affidavit alludes to the lengthy process of acquisition when it is deponed that “**the acquisition plans and schedules have been prepared and are to be submitted to National Land Commission to initiate the process of compulsory land acquisition upon realization of the requisite funds**”. The judgment of the Court anticipated the taking of “**such steps as are necessary to acquire the petitioner's property**”. As the parcel of land has not been gazzetted for acquisition, compensation which is a statutory procedure under the land acquisition law cannot be initiated. See Part VIII of the Land Act No. 6 of 2012 repealing the Land Acquisition Act (commencement on 2nd May, 2012).

Significantly, compulsory acquisition of land involves the independent National Land Commission (see section 107-114 of the Act) which is not a party in this suit, but whose action or delay in action affects the timely implementation of acquisition of the lands in question. Indeed, it is the National Land Commission which is under section 115 of the Land Act required to pay compensation as follows:

**“115. (1) After notice of an award has been served on all the persons determined to be interested in the land, the Commission shall, promptly pay compensation in accordance with the award to the persons entitled thereunder....”**

It would appear therefore that the proper defendant to the application for committal is not before the Court.

The acquisition of the properties as necessary for the construction of the Greater Eastern Bypass should be done for all the parcels of land affected simultaneously when the project commences. There would otherwise be an absurd result that the Applicant may be paid for his property in a project for the creation of the Greater Eastern Bypass which eventually may not be undertaken. A more reasonable approach in the matter would be to await the commencement of the road project.

Of course, the applicant is at liberty to utilize his property as he wills, in the meantime, and if the Respondent, which it disputes, is in possession of the land, the Applicant may properly recover damages in *mesne profits* for loss of user between the period of judgment and the actual acquisition of the property.

But the fact finding as to who is in possession of the suit property is not a matter for determination on through an application for contempt in the circumstances of this case where oral evidence including *locus in quo* or site visit may be necessary to determine the disputed possession. From the material before the court, I am not able to find, conclusively, that the respondent is in possession of the suit property so as to be in breach of the court order for compensation upon acquisition.

It should be a matter for resolution by the Environment and Land Court in suitable proceedings for compensation contemplated under the Constitution and the land acquisition law (Part VIII of the Land Act, No. 6 of 2012).

I consider that the application for committal for contempt of court is premature, and the same is declined. Costs in the cause.

**EDWARD M. MURIITHI**

**JUDGE**

**DATED AND DELIVERED THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2018.**

**E C MWITA**

**JUDGE**

**Appearances:**

Mr. Onyancha for M/S W. G. Wambugu & Co. Advocates for the Petitioner.

Ms. Kamande, Litigation Counsel for Attorney General for the Respondents.