



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 39 OF 2019

DOPP INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

KENYA RAILWAYS CORPORATION.....1ST DEFENDANT

NATIONAL LAND COMMISSION.....2ND DEFENDANT

AND

KAHIA TRANSPORTERS LTD.....1ST INTERESTED PARTY

TRADE LEAD LTD.....2ND INTERESTED PARTY

KACHUNGO EDWARD BEKWEKWE.....3RD INTERESTED PARTY

CHARLES MULOLE SHANGA.....4TH INTERESTED PARTY

HAMISI TSUMA MWERO.....5TH INTERESTED PARTY

REDALU MBOVO MGAIDI.....6TH INTERESTED PARTY

RULING

The application is dated 19th July 2021 and is brought under Sections 1A, IB and 3A of the Civil Procedure Act as well as the inherent Jurisdiction of this Honourable Court seeking the following orders;

1. That the matter be certified as urgent and service be dispensed with in the first instance.
2. That the 1st and 2nd Interested Parties' Application dated 27th January, 2021 be allowed and its properties, to wit, Titles 5153/VI/M N, 5141/VI/MN, 5154/VI/MN expunged from the Court record whilst Title LR 31537 be included in its Counter-Claim.
3. That the Plaintiff be immediately paid the Compensation Award in the sum of Ksh .667,903,887/-, being the amount due for the portion of the Suit property, Title MN/VI/1040/2 that is not in dispute
4. That the 1st and 2nd Interested Parties' claim on Title LR.31537 be subject to a full dress trial and eventual determination.
5. That the Orders granted by the Court on 8th November, 2018 in HCCC 405 of 2017 against the Plaintiff's Title MN/VI/1040/2 be varied to reflect the averments in Orders 2. 3 and 4 above.
6. That the Court to issue further Orders as it deems fit.

It is based on the grounds that a portion of the property subject to the Suit herein being Title No. MN/VI/1040/2 belonging to the Plaintiff, hereinafter the Suit property, has a Compensation Award granted to it on 11th October. 2017 by the 2nd Defendant; the portion of the said Suit property has already been compulsorily acquired by the Kenya Railways Corporation, denying the said Plaintiff the fruits of compensation, in blatant violation of Article 40 of the 2010 Constitution. The 1st and 2nd Interested Parties herein have ceded interest in properties TITLE 5153/VI/MN, 5154/V1/MN and 5141/VI/MN, which allegedly have a boundary dispute with Title MN/VI/1040/2

belonging to the Plaintiff; the properties are sought to be expunged from the Suit herein vide the said 1st and 2nd Interested Parties' Application dated 27th January, 2021. Title L.R 31537 also claimed by the 1st and 2nd Interested Parties and which superimposes, overlaps and encroaches upon Title MN/VI/1040/2 belonging to the Plaintiff, remains as the sole property in dispute with the Plaintiffs said Title MN/VI/1040/2. The part of the 1st and 2nd Interested Parties' alleged Title L.R 31537 which superimposes, overlaps, and encroaches upon the portion of the Plaintiffs Title MN/VI/1040/2 that has been compulsorily acquired by the 1st Defendant, constitutes 28.5% of the said portion. The non-disputed portion of the said Suit Property Title MN/VI/1040/2 which has been compulsorily acquired by the 1st Defendant herein amounts to 71.5% of the same. The Plaintiff suffers and continues to suffer great loss and damage due to the said compulsory acquisition of a portion of Title MN/VI/1040/2 without the requisite compensation. It is in the interest of Justice that the Application herein be allowed as prayed for the Plaintiff has and will continue to suffer great prejudice and loss if it continues to be kept out of compensation.

In response the 1st and 2nd Interested Party have no objection to the granting of Prayer 2 of the Application. That once Prayer 2 is granted Prayer No. 3 cannot issue because the Counter Claim raises serious prayers inter alia, the assessment for compensation dated 11th October, 2019 was done in favour of the Applicant ought to be cancelled and that the Defendants do assess and pay the 1st and 2nd Interested Parties compensation for their Plot No. LR. 31537. That the Parties must be heard on merits before the Court can make orders for the payment of the compensation award and hence the Court cannot just order immediate payment of the compensation award without hearing the Applicant and the Interested Parties since the Parties have competing Titles which have been affected by the Standard Gauge Railway. Annex is a copy of self-explanatory Surveyor's Report dated 13th June, 2020 marked as Exhibit No. "OAK-1". That the Plaintiff has no property that can be subjected to any award by the Defendants and indeed the entire Suit herein is a non-starter and a total waste of the Court crucial time, resources. The entire matter ought to be struck out and dismissed with costs to the Interested Parties because of the following information. The mother title for a Plot known as 1040/VI/MN was Plot No. 247/SECTION VI/MN (CR. 2297) registered on 31st July, 1923. That the said Plot No. 247/SECTION VI/MN was measuring 3.01 Acres. That an area measuring 2.45 Acres being a portion of Plot No. 247/VI/MN was compulsorily acquired by the Government vide a Notice No. 1021 dated 7th December, 1943 and same was registered on 11th December, 1944 in the Title. That on 21st July, 1945 the remainder Portion was named as Sub-division 1040 (Original No. 247/2) measuring 0.56 Acres was transferred to Raco Bin Abdulla. On 21st August, 1975 the Government did acquire the Subdivision No. 1040/SECTION VI/MN (Original No. 247/2) and hence the entire Property known as 1040/VI/MN got extinct from 21st August, 1975 and hence the same was not available Plot for allocation and or transfer thereafter. That it is very interesting that vide a purported grant dated 4th July, 1991. The Plaintiff purportedly got a Grant for forty-five (45) years from 1st June, 1991 for a Plot known as LR. 1040/2 (CR.21749) for approximately 610 Acres (246.86 Ha) which is impossible. Plot No. 1040/VI/MN having got extinct on 21st August, 1975. That in light of the fact Plot No. 1040/VI/MN which initial Mother Title was 3.01 Acres, later 2.45 Acres were acquired by the Government in 1943 and the balance of 0.56 Acres was acquired by 1975, the said Property was not available for allocation to the Plaintiff nor the Acreage of 610 Acres was not there for an allotment to the Plaintiff because the Mother Title was only 3.01 Acres and it is not logical at all that a Sub-division could be 610 Acres. That upon extinction of Plot No. 1040/VI/MN there is no way a new Sub-division could have Plot No. 1040/2 because Plot No. 1040/2 is an Entry Number not a Subdivision Number. A genuine Subdivision Number could not have 1040/2. The Plaintiff through Exhibit No. 11B being a letter dated 20th April, 2021 from the Director of Surveys who has confirmed that Plot No. 1040/2 was surveyed on 15th August, 1932 vide Survey Plan No. 39/59 however a Deed Plan No. 156221 of 24th June, 1991 is meant to support a 1932 Survey which is impossible. It is not logical that the Plaintiff who was issued with a Title dated 4th July, 1991 for Plot No. 1040/2. These are all lies because Plot No. 247/VI/MN was created in 1923, in 1945 it was subdivided after the Government acquired 2.45 Acres into a Portion known as 1040/VI/MN which was measuring 0.56 Acres and it was acquired by the Government in 1975 and thereafter the Plot ceased to exist. That the 1st Interested Party is aware that it is Plot No. 31537 is on the ground very far from where Plot No. 1040/VI/MN used to be before it ceased to exist in 1975. Plot No. 1040/VI/MN got extinct in 1975, there is no way a new Plot No. 1040/2 could have been created and hence the purported Plot No. 1040/2 is fake. That in light of the above fact which is partially admitted in NLC Report dated 12th February, 2016 by the former Chairman produced by the Plaintiff on the last page of the findings, same is produced hereto and marked as Exhibit No. "OAK-2" whereby the NLC admit that the Government acquired 0.56 Acres of Plot No. MN/VI/1040 in 1974 which ought to be 1975 and NLC in its Report is deliberately misleading people to know the truth hence NLC cannot compensate the Plaintiff for a Plot which does not exist and they know that fact from their own Report and the Gazette Notice quoted by NLC is misleading as they are hiding the fact of the proper Gazette Notice. That in light of the documents produced hereto below, it is true that the Plaintiff purported Plot No. 1040/2 (CR. 21749) does not exist and hence the entire Suit is a non-starter and the Orders being sought herein in the Application cannot issue or at all. The Plot was created as a vehicle to acquire SGR money illegally. The Plaintiff has produced contradicting documents at one time it purported to have purchased the Property from Mukinye Enterprises Limited as per Plaintiff's List of Documents No. 6 and as per the Title marked as Exhibit No. HP15 the Plaintiff is purported to be the Allottee of the Plot No. 1040/2 for forty-five (45) years with effect from 1st June, 1991 and hence this is a matter which must go for the full trial because they have disclosed that the Plot No. 1040/2 ceased to exist from 1975. That he produce a copy of the Mother Title for Plot No. 247/VI/MN marked as Exhibit No. "OAK-3" and a copy of the Gazette Notice dated 7th December, 1943 marked as Exhibit No. "OAK-4" which Plot ceased to exist from 1975 when the last portion Plot No. 1040/VI/MN measuring 0.56 Acres was acquired by the Government.

The 2nd defendant and Deputy Director in-charge of Survey and GIS at the National Land Commission, submitted that upon hearing all the parties, the 2nd Defendant/Respondent upheld the title of the Plaintiff herein vide a determination dated 25th February 2016.(Annexed and marked "NLC 3" is a copy of the said determination). That on 11th October 2017, the 2nd Defendant issued an award of Kenya shillings 667,903,887 to the V1 Respondent and the said award was duly accepted by the Plaintiffs on 6th March 2018. (Annexed and marked "NLC 4" is a copy of the said award). That the survey established that a total of 13.348 hectares had been compulsorily acquired by the Government and LR.31357 has encroached on the southern eastern part of LR.1040/2. That it is apparent from available official records that LR.Number 1040/2 was surveyed and registered in 1991 while LR.31357 was surveyed and registered in 2017. That in summary 3.81 hectares of LR.31357 are encroaching on LR.No1040/2 along the Standard gauge railway corridor that has been compulsorily acquired by the government. This constitutes 28.5% of the area compulsorily acquired by the government. That there is no evidence encroachment on the balance of the 13.348ha i.e 9.538 ha compulsorily acquired by the government which constitutes 71.5% of the area compulsorily acquired by the government from LR.1040/2.

This court has considered the application and the submissions therein. It is based on the grounds that a portion of the property subject to the Suit herein being Title MN/VI/1040/2 belonging to the Plaintiff, hereinafter the Suit property, has a Compensation Award granted to it on 11th October. 2017 by the 2nd Defendant. The portion of the said Suit property has already been compulsorily acquired by the Kenya

Railways Corporation, denying the said Plaintiff the fruits of compensation, in blatant violation of Article 40 of the 2010 Constitution. The 1st and 2nd interested Parties herein have ceded interest in properties TITLE 5153/VI/MN, 5154/VI/MN and 5141/VI/MN, which allegedly have a boundary dispute with Title MN/VI/1040/2 belonging to the Plaintiff; the properties are sought to be expunged from the Suit herein vide the said 1st and 2nd Interested Parties' Application dated 27th January, 2021. Title L.R 31537 also claimed by the 1st and 2nd Interested Parties and which superimposes, overlaps and encroaches upon Title MN/VI/1040/2 belonging to the Plaintiff, remains as the sole property in dispute with the Plaintiffs said Title MN/VI/1040/2. The part of the 1st and 2nd Interested Parties' alleged Title L.R 31537 which superimposes, overlaps, and encroaches upon the portion of the Plaintiffs Title MN/VI/1040/2 that has been compulsorily acquired by the 1st Defendant, constitutes 28.5% of the said portion. The non-disputed portion of the said Suit property Title MN/VI/1040/2 which has been compulsorily acquired by the 1st Defendant herein amounts to 71.5% of the same. The Plaintiff suffers and continues to suffer great loss and damage due to the said compulsory acquisition of a portion of Title MN/VI/1040/2 without the requisite compensation.

I find that the counterclaim raises serious allegations and triable issues. The 1st and 2nd interested parties state that the Plaintiff's Title does not exist hence it is fake. The Plaintiff cannot be compensated for a non-existence Plot. The last portion of Plot No. 247/VI/MN which is Subdivision No. 1040/VI/MN got extinct in 1975 upon Government acquiring the same. The initial entire acreage of the Plot was on 3.01 Acres and hence the Plaintiff's allegations of having acquired 610 Acres for Plot No. 1040/2 is for a non-existence size of Plot. It is not logical a Plot of size 3.01 Acres after subdivision could become 610 Acres.

In the case of **Gupta vs Continental Builders Ltd (1978)KLR 83**, the Court of Appeal stated;

“If no prima facie triable issue is put forward to the claim of the plaintiff, it is the duty of the court forthwith to enter summary judgment for it as much as it is against natural justice to shut out without proper cause a litigant from defending himself as it is to keep a plaintiff out of his dues in proper case. Prima facie triable issue sought to be allowed to go to trial as sham or bogus defence ought to be rejected peremptorily.”

In the case of **Job Kiloch vs Nation Media Group Ltd, Salaba Agencies Ltd & Michael Riorio (2015) eKLR**, the court stated as follows:

“Before the grant of summary judgment, the court must satisfy itself that there are no triable issues raised by the Defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner.”

What then is a defence that raises no bona fide triable issue. A bona fide triable issue is any matter raised by the Defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term “triable” as, subject or liable to judicial examination and trial”. It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.

The respondents state that the compensation award of 11th October, 2017 was made whereas the Interested Parties Parcel No. L.R. 31537 was already in existence since 1st June, 1994 but the Defendant failed to grant them any compensation award in spite of the fact its Property had been extensively affected by the Standard Gauge Railway as per the Exhibit No. “OAK- 1”. The Defendant proceeded to make award in favour of the Plaintiff for a nonexistence for purposes of stealing tax payer's money. That the issues in the Exhibit marked HP3 are issues which does not relate to this matter since the Applicant has conceded to the Interested Parties' Application dated 27th January, 2021 and the issues raised in exhibit HP3 will be dealt within among other cases ELC NO. 273 of 2017, ELC NO. 405 of 2017 and Petition NO. 9 of 2018 which are still pending and active in Court and they confirm that there are two (2) Investigating Reports that have been done by NLC and the Ministry of Lands confirming that the other two (2) Plots that is Plot No. 909 and Plot No. 910/VI/MN are fake or forged. Annexed are copies of the Reports marked as Exhibit Nos. “OAK-5”and “OAK-6” respectively. Whereby the Interested Parties' Plot Nos. 5141, 5153 and 5154 Section VI Mainland North were confirmed to be genuine by the said reports. All these are triable issues and the matter needs to go to full trial hence the prayers cannot be granted.

Again also, prayer No. 5 cannot be granted in this matter since there is a substantive Suit in ELC NO. 405 OF 2017 and if the Applicant wants to vary the said Orders of 8th November, 2018 then he should apply for the variation of the said Orders in that Suit not in this one. Any variation of Orders of a matter which is active in court should to be done in the same file and not through this one. Prayer 2 of the application is granted by consent. Costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 18TH JANUARY 2022.

N.A. MATHEKA

JUDGE