



REPUBLIC KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC PETITION NO.36 OF 2021

MOMBASA WEST LIMITED.....PETITIONER/APPLICANT

VERSUS

NATIONAL LAND COMMISSION.....1ST RESPONDENT

HON ATTORNEY GENERAL.....2ND RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY.....3RD RESPONDENT

JUDGEMENT

The Petitioner stated that at all material times, the Petitioner has been and still is the registered proprietor of all that property being the land title Number MN/VI/3806 situated in Changamwe, Mombasa County. Sometimes in 2019, the Petitioner was drawn to the attention of the agents, servants and/or staff of the 3rd Respondent who entered the suit without any notice, prior warning, or informing the Petitioner of their intention and/or purpose of the entry and began marking and clearing the land. Upon consultation and inquiry over the purpose of the trespass and intrusion on its parcel of land, the Petitioner was dismayed to learn that the suit property had been earmarked for compulsory acquisition by the 1st Respondent for the dualling of the Mombasa-Mariakani(A109) Road Project. The Petitioner further to its dismay learnt that its parcel of land was listed in the 1st Respondent's Gazette Notice No. 5266 of 2018 of inquiry dated 22nd May 2018 and published on, 31st May 2018, inter alia notifying the public that inquiries for hearing of claims to compensation by people interested in the various parcels of land listed therein to be acquired for the dualling of the Mombasa-Mariakani (A109) Road Project would be held on Tuesday 7th August 2018. The Petitioner was appalled by the Respondents' attempt to illegally and unlawfully deprive of its constitutional instilled right to own property without following the due procedure as pre-empted by the law and without conducting any due diligence as required by the law. In particular, the Petitioner is disgruntled with the 1st Respondent's intentional disregard of its interest over the suit property and the failure and or omission to be served with requisite notices as mandatorily required by the law. The Petitioner's discontentment is legitimate as no notice was published by the 1st Respondent of its intention to acquire the suit property as stipulated under Section 107(5) of the Land Act, 2012. The 1st Respondent if at all such notice was published, refused, neglected, and or failed to serve the Petitioner with a notice of intention to acquire the suit property. Section 107 (5) of the Land Act mandates the 1st Respondent to publish a notice of intention to acquire a certain property and deliver a copy of such notice to the Registrar and to every person who appeared to the Commission to be interested in the land. The 1st Respondent not only disregarded the law on the mandatory requirement to publish and serve every person who have interests in the suit property, but also notoriously in what the Petitioner legitimately construes to allude of the 1st Respondent's calculated action to deprive the Petitioner the suit property arbitrarily, also refused, failed and/or neglected to serve the Petitioner with the purported notice of inquiry dated 22nd May 2018 and published at the Kenya Gazette on 31st May 2018.

That upon receipt of the notice of intention to acquire a parcel of land, the Registrar is required under Section 107 (5B) of the Land Act to prohibit or restrict dealings with the affected portion of land until it vests in the acquiring authority. The 1st Respondent's malicious failure to comply with the mandatory requirement to serve the requisite notices precariously exposed the Petitioner to possible litigation and allegations of contravention of the law on account of dealings on its suit property which dealings would pursuant to Section 105(B) above, be prohibited and/or restricted by the Registrar. The procedural sequence of notices under the Land Act clearly required the 1st Respondent to at least 30 days after publishing the notice of intention to acquire the land, appoint a date and location for inquiry and invite through the Kenya Gazette and serve a copy of the notice on every person with interest in the land. The 1st Respondent also refused to conduct due diligence and carry out an official search at the Land Registry to ascertain the status of the property. If the same was conducted, the 1st Respondent would have acknowledged and appreciated the Petitioner as one of the persons of interest in the suit property for purposes of service and conducting inquiries for compensation as required by law. The 1st Respondent also in failing to conduct due diligence, neglected the fact that the suit property was not available for compulsory acquisition owing to an encumbrance by way of a charge registered in favour of I&M Bank Limited, which charge is still being serviced by the Petitioner. In the unlikely event that the 1st Respondent undertook its due diligence, then the said Respondent wilfully and arbitrarily ignored the various interests over the suit property and gave the 3rd Respondent the go-ahead to

possess the suit property. The failure by the 1st Respondent to adhere to the due process for compulsory acquisition and serve the respective notice of intention to acquire the suit property and notice of the inquiry as to compensation, deprived the Petitioner an opportunity to attend the inquiry and lay down its valid claim and interest over the suit property. The Petitioner conscious and apprehensive of the glaring breach, violation, and infringement of its proprietary rights wrote various letters to the 1st Respondent asserting its proprietary rights and expressing its dismay towards the taking possession by the 3rd Respondent of the suit property despite the uncontended contravention of the due process, particularly the notification of the Petitioner and their continued failure to respond to the various letters addressed to them seeking inter alia the just compensation owed to the Petitioner. The Petitioner further expressed its discontent over the unprocedural and unlawful manner in which the 1st Respondent had determined its proprietary rights without due and just compensation as the law dictates. Pursuant to Article 40 (3) (b) (i) of the Constitution and Section 111 of the Land Act, 2012, the Respondent is required to promptly pay in full just compensation to all persons whose interests in land have been determined on account of compulsory acquisition. The Respondent is required pursuant to Section 113 of the Land Act, 2012 to upon conclusion of the inquiry, prepare a written award which is to be filed by the Commission for every person whose land interest has been determined and further under Section 114, serve the notice of award and offer of compensation to the person determined to be interested in the land. The 1st Respondent has abused its statutory mandate by failing to conduct due diligence to establish the Petitioner's interests over the suit property. In doing so, the 1st Respondent maliciously and in contravention of the law refused, failed and/or ignored to serve the Petitioner with any notice of the award or make an offer for compensation for the purported compulsory acquisition of the property.

That in addition to the malicious failure to duly notify the Petitioner or serve the Petitioner with the various notices as stipulated under the law, the Respondent has failed, refused and/or neglected to regularize the process of purported compulsory acquisition of the suit property and/or issue to Petitioner with an award or an offer of compensation. Despite the failure to comply with the law relating to compulsory acquisition regarding service of notices, awarding and notifying of such an award for compensation promptly, as the law requires, Kenya National Highways Authority has moved into a huge portion (0.1069 ha) of the suit property rendering the remaining small portion of 0.0959 ha as uneconomical and useless for its intended purpose. The Petitioner has continued to pay annual land rates to the County Government of Mombasa for the suit property, the most recent payment being that made on 2nd March, 2021. If at all the suit property had been rightfully acquired by the 1st Respondent, the said property would have automatically become a No Rates zone since rates are not charged on public land. This further confirms that the property is still registered under the Petitioner and the due procedure was not in any way followed by the 1st Respondent. The Petitioner had acquired the suit property with the sole intent to construct a mall which process had, as a matter of fact, been commenced by I&M Bank Limited, the previous owner thereto, who had already begun the process of procuring various statutory approvals. As a result of the 1st Respondent's negligence, the Petitioner incurred economic investment loss which it had anticipated to collect as rent. In the event, the construction of the mall had been, concluded as intended; the Petitioner would have recovered the invested amount in five years from the rental income, which income would have been a monthly net pay of Kenya Shillings One Million (Kshs. 1,000,000.00), thus amounting to Sixty Million Shillings (Kshs. 60,000,000.00) in five (5) years.

The Petitioner is reasonably apprehensive that the pre-existing construction costs and the economic loss cost due to the anticipated rent, fees from the mall to be constructed on the suit property before the compulsory acquisition which ought to have been considered by the 1st Respondent in preparing an award and particularly, apprehensive that the true and actual value and just compensation entitled to the award as shown below will be disregarded

Kshs.

Total acreage of the suit property: 0. 3028 Ha valued at approximately 60,000,000.00

Costs incurred in the preparation of constructing the mall. 10,917,630.00

(Surveyor costs, structural engineer certificates etc) .

Anticipated rent from the mall (rent for five years) 60,000,000.00

Sub total 130,917,630.00

Ad 15% disturbance allowance 9,000,000.00

Total amount for compensation 139,917,630.00

The Petitioner's legitimate expectation of enjoying and exercising its proprietary rights over the suit property peacefully and construct the said mall was arbitrarily brought to an end by the 1st Respondent without consideration for due compensation as enshrined under the Constitution. The Petitioner is also apprehensive that if this Honourable court does not intervene, its constitutional rights continue being infringed, not to mention the insurmountable losses it continues to incur as the charge against I&M Bank Limited continues to accrue interest. The 3rd Respondent has already taken possession of the most viable portion of the suit property and the Petitioner. The Petitioner prays for;

a. A declaration that the Petitioner's rights as enshrined under Articles 40(3) and 47(1) of the Constitution of Kenya, 2010 and Part VIII of the Land Act No 6 of 2012, Sections 107, 108,111, and 112 have been and continue to be infringed by the Respondent in the manner pleaded hereinabove.

b. A declaration that the compulsory acquisition of 0.1069 ha of the Petitioner's parcel of land in plot number MN/V/3806 by the 1st Respondent without adhering to strict and mandatory provisions of the Constitution and Land Act, 2012 violated the Petitioner's constitutional right guaranteed under Article 40 of the Constitution.

c. A declaration that the 3rd Respondent's possession of the suit property MN/VI/3806 without prompt and just compensation is unconstitutional, illegal, a trespass, a breach of the Petitioner's constitutional rights and was done without due process.

d. An Order compelling the 1st Respondent to immediately conduct issue the Petitioner with an award for compensation for a sum of Kshs. 139,917,630.00 the as due and just compensation for the compulsory acquisition of the suit property.

e. An injunction be issued against the Respondents either by themselves, their servants, agents and/or persons acting under their directions barring, restraining and/or stopping them from carrying on any construction works on the suit property, MN/VI/3806 until the Petitioner is fully compensated the sum Kshs. 139,917,630.00 tot the compulsory acquisition.

f. An order compelling the 1st Respondent to commence the process of acquiring the remainder of the suit property of measuring 0.1951 ha, which has been rendered uneconomical by the purported acquisition.

g. A declaration that the purported compulsory acquisition of plot no. MN/V/3806 by the 1st Respondent for the dualling of Mombasa - Mariakani Road Project in contravention of the provisions of the Constitution and other provisions of the law is invalid and void ab initio.

h. Exemplary damages for a sum of Kshs. 20,000,000.00

i. Costs of and incidental to the Petition

j. Interests in h) and i) above.

k. Any further orders that this Honourable Court shall deem just to grant.

The petition proceeded by way of written submissions. Article 40 (1), (2), (3), and (4) of the Constitution provides 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 of 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 the 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.'

Further Article 47 of the Constitution states as follows:'

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.'

The Land Acquisition Act (now repealed) provided for the procedure to be followed in the compulsory acquisition of property by the Government of Kenya. When the compulsory acquisition herein began, the Land Acquisition Act Cap 295 Laws of Kenya Section 3 of the Land Acquisition Act provided as follows;

"Whenever the Minister is satisfied that the need is likely to arise for the acquisition of some particular land under section 6, the Commissioner may cause notice thereof to be published in the Gazette, and shall deliver a copy of the notice to every person who appears to him to be interested in the land."

The Universal Declaration of Human Rights has the force of law in Kenya. In the case of R vs Chief Immigration Officer (1976) 3 AER 843

Lord Denning stated thus regarding the Universal Declaration of Human Rights;

"... Among the important rights which individuals traditionally have enjoyed is the right to own property. This right is recognised in the Universal Declaration of Human Rights (1948). Article 17(1) which states that everyone has the right own property and Article 17(2) guarantees that "no one shall be deprived of his property" The contention of the State counsel negates this right. An intention to provide for arbitrary infringement of human rights cannot be attributed to the legislature unless such intention is unequivocally manifest. When Parliament is enacting a statute, the court will assume that it had regard to the Universal Declaration of Human Rights and intended to make the enactment accord with the Declaration and will interpret it accordingly..."

And Justice G.V. Odunga in Republic v Council of Legal Education Ex-parte Nyabira Oguta (2016) eKLR, phrased it thus:

"Our Constitution embodies the values of the Kenyan Society, as well as the aspirations, dreams and fears of our nation as espoused in Article 10. It is not focused on presenting an organisation of Government, but rather is a value system itself hence not concerned only with defining human rights and duties of individuals and state organs, but goes further to find values and goals in the Constitution and to transform them into reality".

This court has carefully considered the petition, submissions and authorities cited herein. It has come out from the pleadings that the Petitioner did contravene Section 67 of the Kenya Roads Act. Section 67 (a) of the Kenya Roads Act which states:

"67. Where any action or other legal proceeding lies against an Authority for any act done in pursuance or execution, or intended execution of an order made pursuant to this Act or of any public duty, or in respect of any alleged neglect or default in the execution of this Act or of any such duty, the following provisions shall have effect—

(a) the action or legal proceeding shall not be commenced against the Authority until at least one month after written notice containing the particulars of the claim and of intention to commence the action or legal proceedings, has been served upon the Director-General by the Plaintiff or his agent;"

In the case of **Michael Otieno Nyaguti & 5 Others vs Kenya National Highways Authority & 5 Others (2015) eKLR** the court stated concerning the requirement for notice under Section 67(a) of the Kenya Roads Act that;

"The court holds the view that the requirement of a notice being served on the Director General would not amount to hindering a litigant from accessing the seat of justice. It only creates an opportunity to the Director General's office of exploring an out of court settlement and is in line with the provisions of Article 159 of the Constitution which encourages alternative forms of dispute resolution. The provision of Section 67 of the Kenya Roads Act 2007 is not in contravention with the Constitution 2010".

Be that as it may, in the case of **Benson Ruiyi Njane vs Kenya Rural Roads Authority & 36 Others (2016) eKLR** the Court had a chance of addressing issues raised in a notice of preliminary objection under Section 67 of the Kenya Roads Act. The Court made the following imperative findings:

"The limitation set out in Section 67 of the Roads requiring notice of thirty days to the Authority before instituting suit only applies to ordinary civil claims. It does not apply to cases (Petitions/Applications) alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or threatened. The Respondents' claim to the contrary is not borne out by the Constitution, and that leg of defence therefore fails."

Having reviewed the law including case law, it is my view that the requirement of notice under **Section 67 of the Kenya Roads Act** does not apply to petitions or applications brought under the Bill of Rights.

From the evidence presented, the respondent generated a Gazette Notice No. 5266 of 2018 of inquiry dated 22nd May 2018 and published on, 31st May 2018, inter alia notifying the public that inquiries for hearing of claims to compensation by people interested in the various parcels of land listed therein to be acquired for the dualling of the Mombasa-Mariakani (A109) Road Project would be held on Tuesday 7th August 2018. The Petitioner submitted that procedural sequence of notices under the Land Act clearly required the 1st Respondent to at least 30 days after publishing the notice of intention to acquire the land, appoint a date and location for inquiry and invite through the Kenya Gazette and serve a copy of the notice on every person with interest in the land. The 1st Respondent also refused to conduct due diligence and carry out an official search at the Land Registry to ascertain the status of the property. If the same was conducted, the 1st Respondent would have acknowledged and appreciated the Petitioner as one of the persons of interest in the suit property for purposes of service and conducting inquiries for compensation as required by law. The 1st Respondent also in failing to conduct due diligence, neglected the fact that the suit property was not available for compulsory acquisition owing to an encumbrance by way of a charge registered in favour of I&M Bank Limited, which charge is still being serviced by the Petitioner. The respondents never filed any evidence to contravene these assertions and the Petitioner's evidence went unchallenged. It is clear herein that the **Petitioner** was condemned unheard and that goes against the doctrine of Natural Justice as was outlined in the **Halsbury Laws of England Volume 1(1) page 218**, which states as follows:-

"Natural justice comprises two basic rules; first that no man is to be a judge in his own cause (nemo iudex in causa sua), and second that no man is to be condemned unheard (audi alteram partem). These rules are concerned with the manner in which the decision is taken rather than with whether or not the decision is correct".

In the case of **Patrick Musimba v National Land Commission & 4 others (2016) eKLR** where the Learned Judges held that:

“In our view, a closer reading of Article 40(3) of the Constitution would reveal that the Constitution did not only intend to have the land owner who is divested of his property compensated or restituted for the loss of his property but sought to ensure that the public treasury from which compensation money is drawn is protected against improvidence. Just as the owner must be compensated so too must the public coffers not be looted. It is that line of thought that, under Article 40(3), forms the basis for “prompt payment in full, of just compensation to the person” deprived of his property through compulsory acquisition. As was stated by Scott L.J, in relation to compulsory acquisition, in the case of Horn-v- Sunderland Corporation [1941] 2 KB 26,40: “The word “compensation” almost of itself carries the corollary that the loss to the seller must be completely made up to him, on the ground that unless he receives a price that fully equaled his pecuniary detriment, the compensation would not be equivalent to the compulsory sacrifice”. Effectively Lord Scott’s statement gave rise to the unabated proposition that the compensation of compulsorily acquired property be quantified in accordance with the principle of equivalence. A person is entitled to compensation for losses fairly attributed to the taking of his land but not to any greater amount as “fair compensation requires that he should be paid for the value of the land to him, not its value generally or its value to the acquiring authority”: see Director of Buildings and Lands –v- Shun Fung Wouworks Ltd [1995] AC 111,125. We see no reason why the same approach should not be adopted locally. The Constitution decrees “just compensation” which must be paid promptly and in full. The Constitution dictates that the compensation be equitable and lawful when the word “just” is applied as according to Black’s Law Dictionary 9th Ed page 881 the word “just” means “legally right; lawful; equitable”. In our view, the only equitable compensation for compulsory acquisition of land should be one which equates restitution. Once the property is acquired and there is direct loss by reason of the acquisition the owner is entitled to be paid the equivalent. One must receive a price equal to his pecuniary detriment; he is not to receive less or more. This can be achieved to the satisfaction of the owner of land by Appeal to the market value of the land.”

From a cursory look at the gazette notice one will notice that the name of the registered owner was not indicated and from the submissions by the Petitioner the Respondents have already taken possession. Be that as it may, there is no Valuation Report attached to ascertain the value of the said suit land and this court cannot assume it is approximately Kshs. 60,000,000/= as indicated in the pleadings. I find that the respondents failed to follow the laid down procedure in compulsory acquisition of land particularly the notification of the Petitioner and their continued failure to respond to the various letters addressed to them seeking inter alia the just compensation owed to the Petitioner. I find that the Petitioner is entitled to adequate and just compensation of the portion acquired by the Respondents. The Respondents cannot pay for the remaining portion not acquired.

In the case of Attorney General vs Zinj Limited (Petition 1 of 2020) (2021) KESC 23 (KLR) the Supreme Court of Kenya held that;

“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.”

In the instant case this was not done. As to whether the Petitioner is entitled to General, exemplary and aggravated damages I wish to rely on the case of Rookes vs Barnard (1964) 1 All ER 367, where the Court held that;

“exemplary damages may be awarded in two classes of cases; first where there is oppressive, arbitrary or unconstitutional action by the servants of the government, and secondly, where the defendant’s conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff.”

In relying on this authority and the current circumstances, I do not find the actions of the Respondents to compulsorily acquire the suit land to be oppressive nor calculated to benefit them hence exemplary damages cannot be awarded. Basically the parcels of land therein were to be acquired for the dualling of the Mombasa-Mariakani (A109) Road Project meant for public use.

From the foregoing that I find the Petition dated 19th July 2021 is merited and make the following orders:

1. A declaration that the Petitioner’s rights as enshrined under Articles 40(3) and 47(1) of the Constitution of Kenya, 2010 and Part VIII of the Land Act No 6 of 2012, Sections 107, 108,111, and 112 have been and continue to be infringed by the Respondent in the manner pleaded hereinabove.
2. A declaration that the compulsory acquisition of 0.1069 ha of the Petitioner’s parcel of land in plot number MN/V/3806 by the 1st Respondent without adhering to strict and mandatory provisions of the Constitution and Land Act, 2012 violated the Petitioner’s constitutional right guaranteed under Article 40 of the Constitution.
3. The Petitioner be and is hereby entitled to prompt, just and adequate compensation in full within the meaning and tenor of Article 40 (3) (b) (i) of the acquired portion only.
4. The cost of the Petition is awarded to the Petitioner which should be borne by the Respondents.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 22ND DAY OF FEBRUARY 2022.

N.A. MATHEKA

JUDGE