



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC PETITION NO. E004 OF 2021

IN THE MATTER OF ARTICLES 40 (1), (2), (3), (4) and 259 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTION 75(1) and (2) OF THE OLD CONSTITUTION

AND

IN THE MATTER OF THE LAND ACQUISITION ACT, CAP 295 (NOW REPEALED)

AND

IN THE MATTER OF THE LAND ACT, 2012, ACT NO. 6 OF 2012

AND

IN THE MATTER OF THE LAND REGISTRATION ACT, 2012

AND

IN THE MATTER OF SECTION 23 OF THE INTERPRETATION AND GENERAL PROVISIONS ACT, CAP 2

AND

**IN THE MATTER OF THE COMPUSORY ACQUISITION OF LAND PARCEL NO. KIMILILI/KIMILILI/442 (Originally
comprised in land parcel Number KIMILILI/KIMILILI/2097)**

BETWEEN

ABDALLAH ALI WERE 1ST PETITIONER

MWANAIKI NABWIRE MOHAMMED 2ND PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF BUNGOMA..... 1ST RESPONDENT

THE COUNTY LAND REGISTRAR BUNGOMA 2ND RESPONDENT

THE CABINET SECRETARY

MINISTRY OF LANDS 3RD RESPONDENT

THE NATIONAL LAND COMMISSION 4TH RESPONDENT

J U D G M E N T

1. **ABDALLAH ALI WERE** and **MWANAIKI NABWIRE MOHAMMED** (the 1st and 2nd Petitioners respectively) are the Co – Administrators to the Estate of **ABDALLAH WAMBWERE** (the deceased) who prior to his demise on 2nd September 1997 was the proprietor of the land parcel **NO KIMILILI/KIMILILI /2097** on which he used to operate a private slaughter house facility where he used to slaughter cows, goats and sheep and supply meat to private butcheries and individuals within **KIMILILI TOWN** and beyond.

2. Sometimes in the year 1990, the then **TOWN COUNCIL OF KIMILILI** compulsorily acquired the slaughter house together with a portion of land measuring 960 feet by 66 feet by 16 feet which it put under the management of the defunct **BUNGOMA COUNTY COUNCIL** having paid only Kshs. 151,226.85/= out of the calculated figure of Kshs. 371,230/= being the cost incurred by the deceased in constructing the slaughter house and for which no compensation was paid. Following the advent of devolution, the 1st Respondent took over the management of the slaughter house where it levies charges for every animal slaughtered therein.

3. After the demise of the deceased, the land parcel **NO KIMILILI/ KIMILILI/2097** was sub – divided by his Estate into land parcels **NO KIMILILI /KIMILILI/2592** and **2593**. The slaughter house fell into the land parcel **NO KIMILILI/KIMILILI/2593** which was transmitted to **ABDALLAH ALI WAMBWERE** who passed away on 2nd June 1998 leading to a further sub – division of the land parcel **NO KIMILILI/KIMILILI/2593** into land parcels **NO KIMILILI/KIMILILI/7373** to **7397** with the slaughter house now falling into parcel **NO KIMILILI/KIMILILI/7397** which is registered in the names of the 1st Petitioner. To – date, the 1st Respondent continues to operate the slaughter house and generate income therefrom yet the Estate is yet to be compensated.

4. Arising out of the above facts as contained in the affidavit of the 1st Petitioner sworn also on behalf and with the authority of the 2nd Petitioner, the Petitioners moved to this Court vide their Petition dated 14th July 2021 seeking the following reliefs: -

(a) **A declaration that the proprietary interest in the land parcel NO KIMILILI/KIMILILI/7397 in which the KIMILILI slaughter house stands together with the buildings and structures constituting the slaughter house popularly known as MACHINJONI absolutely vests in the 1st Petitioner.**

(b) **A declaration that the compulsory acquisition of the land parcel NO KIMILILI/KIMILILI/7397 (formerly comprised in KIMILILI/ KIMILILI/2593 and KIMILILI/KIMILILI/2097) without consent or compensation violated Section 75 of the retired Constitution and Article 40 of the 2010 Constitution.**

(c) **An order of mandamus to compel the 1st to 4th Respondents to jointly and/or severally pay the Estate of MOHAMED WAMBWERE ALI mesne profit for the loss of user for the slaughter house and the entire parcel of land KIMILILI/KIMILILI/7397.**

(d) **A mandatory injunction directing the 1st Respondent to immediately vacate from the land parcel NO KIMILILI/KIMILILI/7397.**

(e) **Costs of the Petition.**

Annexed to the Petition are the following documents: -

1. **The supporting affidavit of the 1st Petitioner dated 14th July 2021.**
2. **Letters of Administration issued to the Petitioners in respect to the Estate of ABDALLAH ALI WAMBWERE in BUNGOMA HIGH COURT SUCCESSION CAUSE No 356 of 2014.**
3. **Green Card for the land parcel NO KIMILILI/KIMILILI/2593.**
4. **Title deed for the land parcel NO KIMILILI/KIMILILI/7397.**
5. **Authority to swear affidavit granted to the 1st Petitioner by the 2nd Petitioner.**

The factual basis of this Petition is as already captured above from the supporting affidavit of the 1st Petitioner.

5. The legal foundation of the Petition is that **Section 75(1)** of the retired **Constitution** provided that 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 county planning or the development or utilization of property so as to promote public benefit; and**

(b) **The necessity thereof is such as to afford reasonable justification for the causing 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 possession or acquisition for the prompt payment of full compensation.

Section 75(2) of the retired **Constitution** provided that 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 to 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.

The protection of private property as guaranteed in the retired Constitution was carried over under **Article 40** of the **2010 Constitution** which provides in sub – **Articles (1) (2) (3) and (4)** that: -

40(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 or 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 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.”

When the Petition was placed before me for directions on 30th November 2021, only **MR KHAEMBA** Counsel for the Petitioners was present. Counsel informed the Court that he had served the Respondents six (6) months earlier but he had not been served with any responses.

6. I directed that the Petition be canvassed by way of submissions to be served upon the Respondent within 14 days. The Respondents would then have 14 days from the date of service to file and serve their replies and submissions. The Petition would then be mentioned on 5th January 2022 to confirm compliance and take a date for Judgment.

7. On 5th January 2022 only **MR KHAEMBA** appeared for the Petitioners but since he had not filed any affidavit of service, the matter was listed for mention again on 12th January 2022.

8. On 12th January 2022 both **MR KHAEMBA** and **MS NYANGI** attended for the Petitioners while **MR MASINDE** held brief for **MR CYRIL WAYONGO** who had entered appearance for the 1st Respondent. The other Respondents were not represented and neither had they filed any replies to the Petition. **MR MASINDE**'s application for more time to file the 1st Respondent's response was declined and the Judgment was set for 21st February 2022.

9. This Petition is therefore not contested. That notwithstanding, I must consider the Petitioners case in light of the applicable law and precedents.

10. I must start by examining whether the Petition meets the threshold set out in the case of **ANARIT KARIMI NJERU .V. R 1976 – 80 KLR 1272** as reiterated in the case of **MUMO MATEMU .V. TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & OTHERS 2013 eKLR** where it was held that a party seeking redress in a matter involving reference to the Constitution must set out with reasonable precision the provisions which he alleges to have been infringed and the particulars of the alleged infringement. That is the route which Courts in this country have continued to take in Constitutional Petitions. In the **MUMO MATEMU** case (supra), the Court of Appeal said: -

“We cannot but emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdictions by a Court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not conterminous with exactitude

Yet, the principle in ANARITA KARIMI NJERU (supra) underscores the importance of defining the dispute to be decided by the Court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under Section 1A and 1B of the Civil Procedure Act (Cap 21) and Section 3A and 3B of the Appellate Jurisdiction Act (Cap 9).

Procedure is also a handmaiden of just determination of cases.”

This Petition satisfies the requirement for precision. It has set out in paragraphs 7 to 12 thereof that it is anchored on **Section 75(1) and (2)** of the retired **Constitution** as well as **Articles 40(1) (3) (4) and 259** of the **2010 Constitution**. It has also set out the alleged infringements in paragraphs 21 and 22 which are a violation of the right to property and the compulsory acquisition thereof without compensation.

11. The other issue that I have considered is whether the Petition is defeated by laches since the events complained of first occurred in 1990. Both the retired and the 2010 Constitution have no provision limiting the time within which a Constitutional Petition alleging a breach of a fundamental right should be filed. Ideally however, such Petitions should be filed promptly so as not to appear to be an abuse of the process of the Court. Each case must however be considered on the basis of its own peculiar circumstances.

In this case, it is clear from the supporting affidavit of the 1st Petitioner, whose contents have not been controverted, that when the then **TOWN COUNCIL OF KIMILILI** first acquired a portion of the land parcel **NO KIMILILI/KIMILILI /2097**, it compensated the late **MOHAMED WAMBWERE ALI** in the sum of only Kshs. 151,226.85/= out of the figure of Kshs. 371,220/=. That was clearly a recognition that the deceased was entitled to compensation. The family of the deceased therefore had a legitimate expectation that the acquisitions that occurred subsequently would be compensated appropriately. There is nothing to suggest that the delay of some thirty-one (31) years in filing this Petition has caused any prejudice to the Respondents. This Petition is therefore neither incompetent for want of precision nor defeated by delay.

12. It is not in dispute that the land parcel **NO KIMILILI/KIMILILI/7397** is registered in the name of **ABDALLAH ALI WEREH** the 1st Petitioner herein. He has annexed a copy of the title deed to the said land. That title is evidence that he *“is the absolute and indefeasible owner”* thereof as provided under **Section 26(1)** of the **Land Registration Act**. A similar protection was afforded under **Section 27** of the repealed **Registered Land Act** under which the said title was issued. As the registered proprietor of the land parcel **NO KIMILILI/KIMILILI /7397**, the 1st Petitioner is entitled to all the rights and privileges belonging and appurtenant thereto including the right to be fully compensated if it is compulsorily acquired. His averments that the family of the late **MOHAMED WAMBWERE ALI** was only partially compensated when a portion measuring 960 by 66 by 16 feet was compulsorily acquired for use as slaughter house by the then **TOWN COUNCIL OF KIMILILI**, and later on by the 1st Respondent, was not rebutted. This Court must therefore conclude that those averments are correct. In the case of **DAVID KIBET MUTAI & OTHERS .V. ATTORNEY GENERAL C.A CIVIL APPEAL No 95 of 2016 [2019 eKLR]** the Court of Appeal stated thus: -

“The position before us is that the appellants averred to certain facts under oath in an affidavit. Those facts were not controverted by the respondents either through an affidavit in response or through cross – examination. An affidavit is sworn evidence. It occupies a higher pedestal than grounds of opposition that are basically issues of law intended to be argued. Two things flow from this. First, by the mere fact of the affidavits not having been controverted, there is an assumption that what is averred as factual evidence is admitted. Secondly, a question arises regarding the weight or probative value of the averred factual evidence. In other words, are the facts averred in the affidavits sufficient to prove the appellants’ claims?”

Without a rebuttal of the 1st Petitioner’s supporting affidavit, I must find that indeed the matters raised therein are true. I also have no doubt in my mind that those un – rebutted facts sufficiently prove the Petitioner’s claims that there was a violation of his constitutional right to the land parcel **NO KIMILILI/KIMILILI/ 7397** which was compulsorily acquired by the then **BUNGOMA COUNTY COUNCIL** for use as a slaughter house without compensation. Both the repealed **Land Acquisition Act** had a procedure set out in **Sections 3, 4, 5 and 6** as to how land could be compulsorily acquired and similarly the new **Land Act** has provisions in **Sections 107 to 133** stating how private land can be acquired. Those provisions were not invoked. In the case of **COMMISSIONER OF LAND S & ANOTHER .V. COASTAL AQUACULTURE LTD C.A CIVIL APPEAL No 253 of 1990 [1997 eKLR]**, the Court of Appeal held that where it is intended to compulsorily acquire private land, both the provisions of the Constitution and other relevant laws must be adhered to. That was not done in this case. The Petitioners have proved their case to the required standard.

13. What remedies are available to the Petitioners?

14. The first relief sought is that the proprietary interest in the land parcel **NO KIMILILI/KIMILILI/7397** on which the slaughter house stands together with other structures thereon absolutely vests in the 1st Petitioner. As already indicated above, the 1st Petitioner holds the title to the land parcel **NO KIMILILI/ KIMILILI/7397**. There is no evidence to suggest that it was obtained illegally or through any fraudulent process and that it therefore runs foul of the provisions of **Article 40(6)** of the **Constitution**. That remedy is therefore well merited.

15. The Petitioners also seek the remedy that the compulsory acquisition of the land parcel **NO KIMILILI/KIMILILI/7397** (formerly comprised in **KIMILILI/KIMILILI/2593** and **2097**) without compensation violated **Article 75** of the retired **Constitution** and **Article 40** of the new **Constitution**. The Petitioners claims that the land parcel **NO KIMILILI/KIMILILI/7397** was compulsorily acquired without compensation have not been rebutted. If the Respondents had any evidence to demonstrate that there was compliance with the provisions of the repealed **Land Acquisition Act** or the new **Land Act** in the manner in which the said parcel of land was acquired, nothing would have been easier than for them to respond to this Petition. They elected not to. That prayer is equally allowed.

16. The Petitioners also seek an order of mandamus to compel the 1st to 4th Respondents to jointly and/or severally pay the Estate of **MOHAMED WAMBWERE ALI** mesne profits for the loss of user for the slaughter house and the entire parcel of land **NO KIMILILI/KIMILILI/7397**. The term mesne profits is defined in **Section 2** of the **Civil Procedure Act** as: -

“ those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession.”

A claim for mesne profits being a special damages claim must be specifically pleaded and proved. In the case of **PETER MWANGI MBUTHIA & ANOTHER .V. SAMOW EDIN OSMAN 2014 eKLR**, the Court said the following with regard to a claim for mesne profits:-

“As regards the payment of mesne profits, we think the applicant has an arguable appeal. No specific sum was claimed in the plaint as mesne profits and it appears to us prima facie that there was no evidence to support the actual figure awarded.”

In **SANDE .V. K.C.C 1992 LL.R 314 (CAK)** the Court of Appeal up – held the decision of the trial Court declining to award damages based on loss of profits on the grounds that the same should have been specifically pleaded and proved. That decision was followed in **COSMO – AIR .V. DIANI BEACH 1998 LL. R 757 (CAK)**. Mesne profits being a claim that is ascertainable and quantifiable, the Petitioners ought to have specifically pleaded it and placed tangible evidence before the Court to support it. That was not done. The claim for mesne profits is therefore not available to the Petitioners.

17. The Petitioners also seek the order that the 1st Respondent should immediately vacate from the land parcel **NO KIMILILI/KIMILILI/7397**. Having compulsorily acquired the said parcel of land without paying full and just compensation to the Petitioners, the 1st Respondent is basically a trespasser and ought to vacate the said land or pay the Petitioners full, just and adequate compensation for it's use as required by **Article 40(3) (b) (i)** of the **Constitution**. However, since the 1st Respondent is utilizing the said land for a public purpose, it is proper that it be given time to compensate the Petitioners as an order for immediate removal may course suffering to the same public of whose use the said land was initially acquired.

18. Ultimately therefore and having considered the evidence herein, there shall be Judgment for the Petitioners as against the Respondents jointly and severally in the following terms: -

1. A Declaration that the proprietary interest in the land parcel **NO KIMILILI/KIMILILI/7397** on which the **KIMILILI** slaughter house stands together with the buildings and other structures thereon and which is popularly known as **MACHINJONI** absolutely vests in the 1st Petitioner.

2. A Declaration that the compulsory acquisition of the land parcel **NO KIMILILI/KIMILILI/7397** without consent or compensation violated **Section 75** of the repealed **Constitution** and **Article 40** of the **2010 Constitution**.

3. Prayer for payment of mesne profits is declined.

4. A mandatory injunction is issued directed at the 1st Respondent to immediately initiate, and together with the 4th Respondent, ensure that the process of compulsorily acquiring the land parcel **NO KIMILILI/ KIMILILI/7397** for public purposes and the payment of adequate and just compensation to the 1st Petitioner is completed within six (6) months from the date of this Judgment.

5. In default of (4) above, the 1st Respondent, it's agents, servants or any other persons acting through it shall vacate from the land parcel **NO KIMILILI/KIMILILI/7397** or be evicted therefrom in accordance with the law and should there be any resistance, the assistance of the Officer Commanding (OCS) **KIMILILI POLICE STATION** or any other authorized officer be sought.

6. The 1st Respondent shall meet the costs of this Petition.

Boaz N. Olao.

J U D G E

21st February 2022.

Judgment dated, signed and delivered at **BUNGOMA** on this 21st day of February 2022 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines and with notice to the parties.

Right of Appeal explained.

Boaz N. Olao.

J U D G E

21st February 2022.