



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC PETITION NO. E002 OF 2021

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

AND

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

AND

IN THE MATTER OF THE LAND ACQUISITION ACT, CAP 95 (NOW REPEALED)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

AND

IN THE MATTER OF THE COMPUSORY ACQUISITION OF LAND PARCEL NO. KIMILILI/KIMILILI/442

BETWEEN

SIMON MASIKA MAKOKHA.....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

THE HON. ATTORNEY GENERAL.....5TH RESPONDENT

J U D G M E N T

1. By a Petition dated 12th May 2021 and filed on 13th May 2021 **SIMON MASIKA MAKOKHA** (the Petitioner herein and suing as the personal representative of the Estate of **MOSES MAKOKHA SABUNI** alias **MUSA MAKOKHA WEKOLA**) sought the following orders against the County Government of Bungoma, the County Land Registrar Bungoma, the Cabinet Secretary Ministry of Lands, the National Land Commission and the Hon. Attorney General (the 1st to 5th Respondents respectively): -

(a) A **DECLARATION** that the proprietary interest in the portion of land out of the land parcel NO **KIMILILI/KIMILILI/447** on which **LUTASO MARKET** and **KIMILILI WARD ADMINISTRATION OFFICE** stand absolutely vests in the Estate of **MOSES MAKOKHA SABUNI** alias **MUSA MAKOKHA WEKOLA**.

(b) A **DECLARATION** that the compulsory acquisition of the portion of land out of land parcel number **KIMILILI/KIMILILI/442** on which **LUTASO MARKET** and **KIMILILI WARD ADMINISTRATION OFFICE** stands without consent or compensation violated Section 75 of the old Constitution and Article 40 of the new Constitution of Kenya 2010.

(c) An **ORDER OF MANDAMUS** to compel the 1st to 4th Respondents to jointly and/or severally pay the Estate of **MOSES MAKOKHA SABUNI** alias **MUSA MAKOKHA WEKOLA** mesne profits for the loss of user for the portion of land out of the land parcel number **KIMILILI/KIMILILI/442** on which **LUTASO MARKET** and **KIMILILI WARD ADMINISTRATION OFFICE** stands.

(d) A **MANDATORY INJUNCTION** directing the 1st Respondent to immediately vacate and hand over vacant possession of the portion of land out of the land parcel number **KIMILILI/KIMILILI/442** on which **LUTASO MARKET** and **KIMILILI WARD ADMINISTRATION OFFICE** stands to the Estate of **MOSES MAKOKHA SABUNI** alias **MUSA MAKOKHA WEKOLA** or pay the said Estate the equivalent market price of the said portion of land.

(e) **Costs of the Petition be borne by the Respondents.**

The Petition is supported by the Petitioner's affidavit also dated 12th May 2021 to which are annexed the following documents: -

1. A **Limited Grant of Letters of Administration** dated 11th October 2020 issued to the Petitioner in **BUNGOMA CHIEF MAGISTRATE'S COURT SUCCESSION CAUSE No 303 of 2020** limited for purposes of filing this Petition.

2. The **Land Certificate** in respect to the land parcel number **KIMILILI/KIMILILI/442** issued on 2nd September 1969 in the name of **MUSA MAKOKHA WEKOLA**.

3. A **Certificate of Official Search** in respect of the land parcel number **KIMILILI/KIMILILI/442** issued on 19th March 1970 in the name of **MUSA MAKOKHA WEKOLA**.

The legal foundation upon which the Petition is predicated are **Section 75** of the retired **Constitution** and **Article 40** of the **2010 Constitution**.

2. The basis of the Petition is that the land parcel number **KIMILILI/ KIMILILI/442** (the suit land) measuring 10 acres is the property of **MOSES MAKOKHA SABUNI** alias **MUSA MAKOKHA WEKOLA** (the deceased). That sometimes in the 1990s, the then **MUNICIPAL COUNCIL OF KIMILILI** compulsorily acquired a portion out of the suit land for purposes of constructing **LUTASO MARKET**. Following that compulsory acquisition, the deceased made several visits to the office of the said Municipal Council seeking compensation without success until he eventually passed away on 30th November 1971, (that must be an error. He could not be pursuing what occurred after his demise). Thereafter, the said Municipal Council proceeded to allocate parts of the acquired land to private individuals who had close connections with successive powerful mayors and town clerks. Following the advent of devolution, the 1st Respondent constructed an office of the **KIMILILI WARD ADMINISTRATOR** on another part of the acquired portion. Both that office and the market are still operational and running despite the proprietor of the suit land having not been paid any compensation. That the 1st Respondent has taken over the management of the market where it levies charges/fees/cess for all the market operators yet the family of the deceased continues to languish in extreme poverty. That several letters have been written to the 1st Respondent seeking compensation but without any response. I must at this stage point out that although the Petitioner's affidavit purports to annex some letters marked as **SM – 3(a)** and **(b)**, no such letters were in fact annexed to the said affidavit nor filed subsequently. This Court has therefore not had the benefit of perusing the said letters in the course of drafting this Judgment.

3. The Constitutional provisions alleged to have been violated by the Respondent have been pleaded in paragraphs 7 to 12 and 19 to 20 of the Petition. In brief, they relate to compulsorily acquiring the suit land without prompt and full compensation.

4. When the Petition was placed before me on 30th November 2021, I directed that it be canvassed by way of written submissions. The Petitioner was to file and serve the Petitioner with both the Petition and submissions within 14 days although **MR KHAEMBA** Counsel for the Petitioner informed me that the Petition had in fact already been served some six (6) months earlier but none of the Respondents had filed any responses.

5. I also directed that the Respondent would have 14 days from the date of service to file both their responses and submissions and the matter would be mentioned on 5th January 2022 to confirm compliance and take a date for Judgment. The Petition was subsequently mentioned as directed on 5th January 2022 but only Counsel for the Petitioner attended. As there was no evidence to confirm service upon the Respondents, the case was adjourned to 12th January 2022. On that day, both **MR KHAEMBA** and **MS NGANYI** were present for the

Petitioner while **MR WAFUMA MASINDE** was holding brief for **MR CYRIL WAYONGO** for the 1st Respondent who had not yet filed responses and submissions to the Petition. The other Respondents had also not filed any responses to the Petition and an application by the 1st Respondent seeking more time to file a response and submissions was declined. Judgment was set for 21st February 2022.

6. I have considered the Petition, the supporting affidavit and annexures thereto as well as the submissions by Counsel. As none of the Respondents filed any responses, the Petition is not contested.

7. The starting point must be whether or not the Petition meets the test set out in **ANARITA KARIMI NJERU .V. REPUBLIC 1970 – 80 KLR 1272** and reiterated in **MUMO MATEMU .V. TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE AND OTHERS 2013 eKLR** where it was stated that a party seeking redress in a matter involving reference to the Constitution must set out with reasonable precision the provisions which have been infringed and the particulars of the alleged infringement. That is the route which Courts have continued to take in such matters because precise pleading is provided for in the **MUTUNGA RULES**. 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 jurisdiction by a Court..... 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 of Section 1A and 1B of Civil Procedure Act Cap 21 and Section 3A and 3B of the Appellate Jurisdiction Act Cap 9. Procedure is also a hand maiden of just determination of cases.”

The Petition has met the requirement as to precision. The Petitioner has cited **Sections 75(1) and 75(2)** of the retired **Constitution** as well as **Articles 40(1)(3) (4) and 259** of the **2010 Constitution** and the infringements in issue.

8. The events on which this Petition is grounded took place in the 1990’s. That is some thirty-one (31) years before this Petition was filed on 13th May 2021. Both the retired and the 2010 Constitutions do not contain any time limit for filing Constitutional Petitions. Nonetheless, such Petition should ideally 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 its own peculiar circumstances. In this case, the Respondents did not rebut the Petitioner’s averments as contained in his supporting affidavit. There is therefore nothing to suggest that they have been prejudiced by the thirty-one (31) years delay in filing this Petition. In any event, the Petitioner has deponed in paragraph 9 of his affidavit, without rebuttal, that he has been communicating with the 1st Respondent on the issue of payment of compensation as recently as 23rd February 2012 and 6th April 2016. As stated earlier, copies of those letters though referred to as **SM – 3 (a) and (b)** were not annexed to the affidavit. However, in the absence of a rebuttal, this Court must take it as the truth. The fact that the Petitioner has been pursuing this claim with the 1st Respondent as demonstrated in the Petitioner’s averments through the writing of those letters is, in my view, a reasonable and plausible explanation for the delay in the circumstances. I note also that the Petitioner only obtained the Grant in 2020.

9. It is not in dispute that the deceased was the registered proprietor of the land parcel Number **KIMILILI/KIMILILI/442** having been issued with the Land Certificate thereto on 2nd September 1969. That registration bestowed upon him all the rights and privileges belonging and appurtenant thereto. This is clear from both **Sections 27 and 28** of the repealed **Registered Land Act** under which the title was issued and **Sections 25 and 26** of the new **Land Registration Act 2012**. Those rights and privileges enjoy Constitutional protection and cannot be taken away unless as provided by law. The Petitioner obtained a Limited Grant of Letters of Administration Ad Litem on 11th October 2020 allowing him to file this Petition. His locus standi cannot therefore be questioned. As the registered proprietor of the land parcel **NO KIMILILI/KIMILILI/442**, the deceased was entitled to enjoy the right to his property as set out in **Article 40(1)(a) and (b)** of the **Constitution** which reads: -

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.”

It is the Petitioner’s case, which has not been rebutted, that in the 1990’s the then **MUNICIPAL COUNCIL OF KIMILILI**, now represented by the 1st Respondent, compulsorily acquired a portion of the land parcel number **KIMILILI /KIMILILI/442** on which it constructed the **LUTASO MARKET** and the **KIMILILI WARD ADMINISTRATION OFFICE** as well as allocating other portions to private well connected individuals without compensating the deceased or his family. The 1st Respondent took over the said market from which it levies charges, fees and cess from market operators while the deceased’s family continues to languish in extreme poverty. The Petitioner’s averments have not been controverted and this Court must find, which I hereby do, that they are a true reflection of what transpired with respect to the land parcel **NO KIMILILI/ KIMILILI/442**. In **DAVID KIBET MUTAI & OTHERS .V. ATTORNEY GENERAL C.A CIVIL APPEAL No 95 of 2016 [2019 eKLR]**, the Court of Appeal stated the following in relation to an affidavit which is not rebutted: -

“The position before us is that the appellants averred to certain facts under oath in affidavit. These 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 in the affidavit 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 as averred in the affidavits sufficient to prove the appellant's claims?" Emphasis added.

That the deceased was the proprietor of the land parcel **NO KIMILILI/KIMILILI /442** is proved by the production of the title document itself. And although the letters referred to in paragraph 9 of the supporting affidavit which were addressed to the 1st Respondent seeking compensation have not been availed, I am persuaded that what is deponed in the said affidavit is sufficient to prove the Petitioner's claim.

10. It is clear from **Sections 75 (1) and (2)** of the retired **Constitution**, which was the applicable law when the matters complained herein occurred, that private property was protected and could not be compulsorily acquired without prompt and full payment of compensation. A Land Acquisition Tribunal was established for purposes of determining the compensation payable. **Article 40 (2)** of the **2010 Constitution** provides that Parliament shall not enact any law which 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)."

Any acquisition of the land parcel number **KIMILILI/KIMILILI/442** ought to have been procured through the process outlined in the repealed **Land Acquisition Act** specifically **Sections 3, 4, 5 and 6** which was the law applicable then. **Sections 107 to 133** of the new **Land Act** also has provisions that govern the compulsory acquisition of interests in land. In the case of **COMMISSIONER OF LANDS & ANOTHER .V. COASTAL AQUACULTURE LTD C.A CIVIL APPEAL No 252 of 1996 [1997 eKLR]**, the Court held that where it is intended to compulsorily acquire private land, then the provisions of the Constitution and other relevant laws must be adhered to. In the circumstances of this case, and believing the Petitioner's un – controverted evidence as I hereby do, I am satisfied that he has established his case as required in law. There was a clear infringement of the Constitutional provisions pleaded in the Petition in the manner in which the land parcel **NO KIMILILI/KIMILILI/442** was acquired by the then **KIMILILI COUNTY COUNCIL**.

11. What remedies are available to the Petitioner?

12. The first remedy sought is a declaration that the proprietary interests in the portion of the land parcel number **KIMILILI/KIMILILI/442** absolutely vests in the Estate of the deceased **MOSES MAKOKHA SABUNI alias MUSA MAKOKHA WEKOLA**. As the Petitioner's evidence is not rebutted, there is nothing to demonstrate that the deceased was fully compensated following the acquisition of his land or that in fact he had acquired it unlawfully in which case, as provided under **Article 40 (b)** of the **Constitution**, he would not be entitled to the protection under **Article 40(1) and (2)** of the **Constitution**. Further, that right was protected under **Sections 27 and 28** of the repealed **Registered Land Act** and **Sections 24 and 25** of the new **Land Registration Act**. That prayer is well merited.

13. The Petitioner also seeks the remedy of a declaration that the compulsory acquisition, without consent or compensation, of the portion out of the land parcel number **KIMILILI/KIMILILI/442** on which **LUTASO MARKET** and the **KIMILILI WARD ADMINISTRATION OFFICE** stands violated **Section 75** of the retired **Constitution** and **Article 40** of the **2010 Constitution**. It is clear from **Article 40 (3)** that a property owner is entitled to prompt, just and full compensation when his property is compulsorily acquired. In the circumstances of this case, it cannot even be said that the taking of the land parcel number **KIMILILI/KIMILILI/442** amounted to compulsory acquisition as known in law. This is because, the procedure for compulsory acquisition of land is clearly set out in the law. This was essentially a case of an arbitrary deprivation of property because no procedure was followed. The term arbitrary is defined in **BLACK'S LAW DICTIONARY 10TH EDITION** as: -

"Depending on individual discretion; of, relating to or involving a determination made without consideration of or regard for facts, circumstances, fixed rules or procedures."

Prayer (b) of the Petition is similarly allowed.

14. Prayer (c) seeks an order of **MANDAMUS** to compel the 1st to 4th Respondents to jointly and/or severally pay to the Estate of **MOSES MAKOKHA SABUNI alias MUSA MAKOKHA WEKOLA** mesne profits for the loss of user for the portion of land number **KIMILILI/KIMILILI/442** on which the **LUTASO MARKET** and the **KIMILILI WARD ADMINISTRATION OFFICE** stands.

15. 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 is a special damages claim which must be specifically pleaded and proved. In **HAHN .V. SINGH 1985 KLR 716**, the Court of Appeal held: -

"Special damages must not only be specifically claimed but also strictly proved."

And in **PETER MWANGI MBUTHIA & ANOTHER .V. SAMOW EDIN OSMAN 2014 eKLR**, the Court said the following with regard to claims 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 this Petition, it is clear from paragraph 21(a) that other than pleading a claim for a mesne profits for use of the land parcel number **KIMILILI/KIMILILI/442**, the Petitioner did not specifically plead any sum nor lead any evidence in his supporting affidavit to support that claim.

16. The claim for mesne profits is therefore not available to the Petitioner.

17. In prayer (d), the Petitioner seeks a mandatory injunction directing the 1st Respondent to immediately vacate and hand over vacant possession of the portion of land utilized as **LUTASO MARKET** and **KIMILILI WARD ADMINISTRATION OFFICE** to the Estate of the deceased or pay to the Estate the equivalent market price for the said portion. Unfortunately, however, the Petitioner has not pleaded what the current market value of the portion is. Nonetheless, and as is now clear, the intrusion of the 1st Respondent into the land parcel number **KIMILILI/KIMILILI/442** was in clear violation of the Constitutional right of the deceased to own property. There is nothing to suggest that the deceased obtained registration of the land parcel number **KIMILILI/ KIMILILI/442** through an unlawful process. The prayer for mandatory injunction is well merited. The 1st Respondent must vacate the land parcel number **KIMILILI/KIMILILI/442** or pay full compensation. The then **KIMILILI MUNICIPAL COUNCIL** clearly acted with impunity and had the Petitioner sought a remedy of general damages, I would have had no hesitation making an award for punitive damages.

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

(a) A declaration that the proprietary interests in the portion of land out of the land parcel number KIMILILI/KIMILILI/442 in which LUTASO MARKET an KIMILILI WARD ADMINISTRATION OFFICE stands absolutely vests in the Estate of MOSES MAKOKHA SABUNI alias MUSA MAKOKHA WEKOLA.

(b) A declaration that the compulsory acquisition of the portion of land out of the land parcel number KIMILILI/KIMILILI/442 in which LUTASO MARKET and KIMILILI WARD ADMINISTRATION OFFICE stands without consent or compensation violated Section 75 of the old Constitution and Article 40 of the new Constitution 2010.

(c) This prayer is declined.

(d) The 1st Respondent shall immediately initiate and ensure that the process of compulsorily acquiring the land parcel number KIMILILI/ KIMILILI/442 and paying adequate compensation to the Estate of MOSES MAKOKHA SABUNI alias MUSA MAKOKHA WEKOLA by the 4th Respondent is completed within the next six (6) months from the date of this Judgment.

(e) In default of (d) above, the 1st Respondent, its agents, servants or any other persons acting through it shall vacate the land parcel number KIMILILI/KIMILILI/442 and hand it back to the Estate of MOSES MAKOKHA SABUNI alias MUSA MAKOKHA WEKOLA.

(f) Costs of the Petition shall be borne by the 1st Respondent.

BOAZ N. OLAO.

J U D G E

21ST FEBRUARY 2022.

JUDGMENT DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 21ST DAY OF FEBRUARY 2022 BY WAY OF ELECTRONIC MAIL IN KEEPING WITH THE COVID – 19 PANDEMIC GUIDELINES.

Right of Appeal explained.

BOAZ N. OLAO.

J U D G E

21ST FEBRUARY 2022.