



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC PETITION CASE NO. E016 OF 2021

IN THE MATTER OF ARTICLES 1, 2, 20, 22(1), 233, 40, 47, 48, 159(2), 162(2) (B) AND 165(3) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF: SECTION 4, 6 AND 7 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF: VIOLATION AND THREATENED OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER (INTER ALIA) ARTICLES 10, 27, 28, 29, 40 AND 47 236 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

JOYCE KILONZO1ST PETITIONER

JOCELYNE MBULA2ND PETITIONER

JAMES WILLIAM MAILU.....3RD PETITIONER

REBECA JOICE JOEL4TH PETITIONER

VERSUS

THE NATIONAL LAND COMMISSION1ST RESPONDENT

KATHEKA-KAI FARMERS COOPERATIVE SOCIETY LTD.....2ND RESPONDENT

RULING

INTRODUCTION

1. By a Notice of Motion application dated 12th August 2021 and brought under Article 23 of the Constitution of Kenya and Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, the Petitioners sought for the following orders;

1. Spent

2. Spent

3. Spent

4. Spent

5. An injunction suspending the operation and/or implementation of Gazette Notice No. 4392 dated 6th May 2021 that was published in the Kenya Gazette Vol. CXXXIII-No. 97 dated 7th May 2021 expressing an intention by the 1st Respondent to acquire under Part VIII of the Land Act, 2012, Parcel No. L.R. No. 11161, measuring 31.58 Ha from the Katheka-Kai Farmer's Cooperative Society Limited for the purposes of construction of the Machakos Water Supply Project, pending the hearing and determination of the Petition filed herein.

6. An injunction restraining the 1st Respondent, whether acting directly or through third parties, agents, employees, officers and/or proxies, from undertaking any activity leading to the compulsory acquisition of the following parcels of land owned by the Petitioners/Applicants and located at the Parcel No. L.R. No. 11161 pending the hearing and determination of the Petition filed herein:-

a. Ms. Joyce Mukulu Kilonzo – Plot No. Mks/Katheka-Kai 'B' No. 5/275 & 268

b. Ms. Jocelyne Mbula - Plot No. Mks/Katheka-Kai 'B' No. 5/274

c. Ms. Rebecca Joice Joel -Plot No. Mks/Katheka-Kai 'B' No. 5/266

d. James William Mailu – Plot No. Mks/Katheka-Kai 'B' No. 5/263

7. An injunction restraining the 2nd Respondent, whether acting directly or through third parties, agents, employees, officers and/or proxies, from negotiating, acting, representing and/or dealing anyhow on behalf of the legal/beneficial owners of the following parcels of land owned by the Petitioners/Applicants and located at the Parcel No. L.R. No. 11161 pending the service, hearing and determination of this Application:

a. Ms. Joyce Mukulu Kilonzo – Plot No. Mks/Katheka-Kai 'B' No. 5/275 & 268

b. Ms. Jocelyne Mbula - Plot No. Mks/Katheka-Kai 'B' No. 5/274

c. Ms. Rebecca Joice Joel -Plot No. Mks/Katheka-Kai 'B' No. 5/266

d. James William Mailu – Plot No. Mks/Katheka-Kai 'B' No. 5/263

8. The costs of and incidental to this Application shall abide in the outcome of the Petition herein.

9. Such other, further, incidental or alternative reliefs as the Honourable Court may deem just and expedient.

2. The application is premised on the grounds enumerated on its face together with the supporting affidavit of **JOYCE MUKULU KILONZO**, the 1st Petitioner herein. Despite service of the Application and notice of hearing of the same upon the Respondents, no response or submissions were filed by the Respondents.

APPLICANT'S CASE

3. The Applicants averred that they were the legal/registered and or beneficial owners of parcels of land being part of Parcel No. L.R. No. 11161 measuring 31.58 Ha, having purchased the same from Katheka-Kai Cooperative Limited; that the 1st Petitioner owns Plot No. MKS/KATHEKA-KAI "B" NO. 5/275 & 268, the second Petitioner owns Plot No. MKS/KATHEKA-KAI "B" NO. 5/274, the 3rd Petitioner owns Plot No. MKS/KATHEKA-KAI "B" NO. 5/263 and the 4th Petitioner owns Plot NO. MKS/KATHEKA-KAI "B" NO. 5/266.

4. The Petitioners/Applicants further averred that the 2nd Respondent is a land buying company, which bought Parcel Number 11161 and sold it to its members, whereof the land was subdivided, surveyed, balloted and allotted to various members of the 2nd Respondent whereof no land remained in the ownership of the 2nd Respondent; that the Petitioners have been in occupation of their parcels for a long time; that the 1st Respondent illegally and irregularly published Gazette Notice No. 4392 dated 6th May 2021 where it declared its intention of acquiring Parcel Number L.R. 11161 measuring 31.58 Ha from the 2nd Respondent; that the Notice is illegal and irregular as it excludes the Petitioners who are the owners and in occupation of the suit property while the 2nd Respondent does not own the suit land; that the Notice violated and was in contempt of maintenance of status quo orders made in MACHAKOS ELC CASE NO. 64 OF 2019, that the Gazette Notice violates Article 40 and 47 of the Constitution and that the same in contravention of Section 107 of the Land Act.

5. It was also stated by the Petitioners that prior to issuance of the impugned Gazette Notice, the 1st Respondent failed to comply with the legal requirements for compulsory acquisition provided for in Part VIII of the Land Act by failing to map out and value the suit land in breach of Section 107(4) (a) of the Act and failing to establish that the acquiring authority has identified the number and maintains a register of persons in actual occupation of the land and that the Petitioners with their families stand to suffer irreparable harm if the orders sought are not granted.

APPLICANT'S SUBMISSIONS

6. In their submissions, the Applicants' regurgitated the averments contained in their supporting affidavit and argued that though the Respondents were duly served with the Application and the Petition, no response was filed and therefore the facts as presented by the Applicants remain unchallenged. Counsel for the Applicants submitted that it was not in dispute that the Petitioners were owners of the suit land as evidenced by the land transfer forms and receipts as well as letters of confirmation of ownership for each of the Petitioners from the 2nd Respondent.

7. It was further contended for the Applicants that the impugned Gazette Notice was irregular and illegal for recognizing the 2nd Respondent as the owner of the suit land instead of recognizing the Petitioners, in violation of Articles 40 and 47 of the Constitution. Further it was submitted that by implication the 1st Respondent intends to deal with the 2nd Respondent to the exclusion of the Applicants. Counsel also submitted that the impugned Gazette Notice violated Section 107 of the Land Act as the 1st Respondent failed to map out and value the suit property contrary to Section 107(4) (a) of the Land Act and failed to establish that the acquiring authority had identified the number and maintains a register of persons in actual occupation of the land, how long they have been in occupation contrary to Section 107(4) (b) of the Land Act. Counsel argued that Article 40(3) (b) of the Constitution provides the circumstances under which the state can acquire a person's private property and contended that such compulsory acquisition by the state should be for a public purpose and in accordance with the Constitution and Section 107 of the Land Act. It was argued by the Applicant's that forcefully taking their property without compliance with the constitution and the Land Act will render them homeless.

8. Counsel also submitted that the impugned Gazette Notice was issued in contravention of the orders made on 15th April 2021 in Machakos ELC Case No. 64 of 2019, in which the court had ordered for maintenance of the status quo, which suit seeks to establish the rightful owners of the suit property. Counsel contended that before publishing the impugned Gazette Notice, the 1st Respondent ought to have established that the acquiring authority (Athi Water Service Board) had complied with Section 107(4) (b) of the Land Act in respect of the Project Affected Persons and that the 1st Respondent ought to have waited for the conclusion of Machakos ELC Case No. 64 of 2019 before issuing the impugned Gazette Notice.

9. On whether the Applicants had met conditions for grant of interlocutory injunction, counsel relied on the case of *Giella vs. Cassman Brown Co. Ltd [1973] EA 358* to argue that the Applicants had established a prima facie case with a probability of success, that the Applicant stood to suffer irreparable loss which could not be compensated in damages and that if the court was in doubt, it ought to determine the application on a balance of convenience. Counsel relied on the cases of *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] eKLR* on the description of a prima facie case and the case of *Kenleb Cons Ltd vs. New Gatitu Service Station Ltd & Another [1990] eKLR* to argue that before an injunction is granted, the Applicant must make a full and frank disclosure of relevant facts. Counsel argued that on the strength of documentary evidence produced, the Applicants, had established a prima facie case as they had shown that they were the owners of the suit property.

10. It was the Applicant's contention that they stand to suffer irreparable loss if the injunction is not granted. They placed reliance on the case of *Paul Gitonga Wanjau vs. Gathuthi Tea Factory Company Limited & 2 Others [2016] eKLR*, where it was held that irreparable injury means injury that could not be adequately atoned by damages. Counsel also cited the case of *Joseph Sire Oromo vs. Housing Finance Company of Kenya [2008] eKLR* for the proposition that damages ought not be a substitute for loss which has been occasioned by a breach of the law.

11. On the question of balance of convenience, counsel submitted that the balance of convenience tilted in favour of the Applicants as they stood to suffer more injustice if the injunction was not granted. For this argument they relied on the case of *Joel Kipkurui Arap Koech vs. Alice Wambui Magandu & 3 Others [2018] eKLR*.

ANALYSIS AND DETERMINATION

12. I have carefully considered the application as well as the submissions and the authorities cited. The only issue that arise for determination is whether the Applicants have met the threshold for grant of temporary injunction in the circumstances of this case.

13. The law governing grant of temporary injunction is provided for in Order 40 Rule 1 of the Civil Procedure Rules which provides as follows;

“Where in any suit it is proved by affidavit or otherwise –

a. That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

b. That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

14. Principles for grant of temporary injunction are well settled. In the case of *Giella vs. Cassman Brown Co. Ltd [1973] EA 358*, the court stated that for the court to grant a temporary injunction, the Applicant must meet the following conditions;

a. Demonstrate a prima facie case with a likelihood of success.

b. Demonstrate that they will suffer irreparable injury that may not be compensated by an award of damages if the injunction is denied.

c. If the court is in doubt, then it ought to decide the application on the balance of convenience.

15. In the case of *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* [2014] eKLR, the Court of Appeal stated as follows;

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to (a) establish his case only at a prima facie level, (b) demonstrate irreparable injury if a temporary injunction is not granted and (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially.”

16. In the case of *Mrao Ltd vs. First American Bank of Kenya Ltd* [2003] eKLR the Court of Appeal described a prima facie case in the following terms;

“....in civil cases, if is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

17. In essence, under Order 40 Rule 1 and in line with several decisions by courts, a temporary injunction will only issue where the Applicant has shown that he has a legal right which has apparently been violated or there is a real threat of violation from the defendant, that if the injunction is not granted, the injury he may suffer would not be adequately restituted in damages and that where there is doubt on the nature of the injury that may be suffered, the court ought to consider in whose favour the balance of convenience tilts.

18. In the instant application, the Applicants have stated that they are the owners of the suit property having purchased the same from the 2nd Respondent. They have attached letters from the second Respondent confirming that indeed they own the suit property. They have also attached documents and receipts for payment of transfer fees paid to the 2nd Respondent. They have stated that they are in occupation of the suit property. In short, they claim to have legal right in the suit property which right ought to be recognized by the 1st Respondent before compensation in respect of the compulsory acquisition of the suit property is effected. I have perused the impugned Gazette Notice and note that the same is referred to as an “intention to acquire” and is issued pursuant to Part VIII of the Land Act No. 6 of 2012, and more specifically under Section 107 (5) of the Land Act. This notice is the preliminary notice and the first step towards compulsory acquisition.

19. It is my understanding that at the time of issuance of the preliminary notice, the commission is yet to establish all the persons having interest in the land to be acquired. It cannot therefore be expected that at the point of issuing a preliminary notice of intention to acquire under Section 107(5) of the Land Act, the commission is seized of all the information of all the persons in occupation and or having interest in the land intended to be acquired.

20. Part VIII of the Land Act provides a systematic manner and process for compulsory acquisition. After issuance of the preliminary notice under Section 107, Section 112 of the Act provides that after 30 days of publishing the notice of intention to acquire land, the National Land Commission appoints a date for an inquiry to determine issues of proprietary and claims for compensation by persons interested in the land. Under Section 112(5) the commission exercises the powers of the court in summoning and examining witnesses including persons interested in the land, to administer oaths and compel production of documents of title of land. Unlike the usual trial by the court which is adversarial in nature and to a large extent restricted in terms of obtaining evidence from the parties, the National Land Commission in its inquiry under Section 112 of the Land Act, has a wide inquisitorial mandate and applies all the tools at its disposal as a quasi-judicial body for purposes of establishing all the persons who are truly interested in the land to be acquired. Therefore the commission is better equipped to conduct the inquiry to the satisfaction of the Land Act, than this court. In determining persons interested in the land to be acquired, the National Land Commission is guided by Section 107(7) which provides as follows;

“For the purposes of Sections 107 to 133, interested persons shall include any person whose interests appear in the land registry and the spouse or spouses of any such person, as well as any person actually occupying the land and the spouse or spouses of such persons.”

21. In the case of *Patrick Musimba vs. National Land Commission & 4 Others* [2016] eKLR, the court held as follows;

“Section 112 of the Land Act then involves the land owner directly for purposes of determining proprietary interest and compensation. The Section has an elaborate procedure with the National Land Commission enjoined to Gazette an intended inquiry and the service of the Notice of inquiry on every person attached. The inquiry hearing determine the persons interested and who are to be compensated. The National Land Commission exercise quasi-judicial powers at this stage.”

22. It is my considered view that as an independent commission clothed with the mandate to determine the real owners of land intended to be acquired, it is necessary that the National Land Commission is given the space to exercise its mandate without being unnecessarily inhibited by the court as long as it exercises its mandate within the ambit of the law. As was held in the case of *Diana Kethi Kilonzo vs. IEBC & 2 Others* where the court observed as follows;

“We note that the constitution allocated certain powers and functions to various bodies and tribunals. It is important that

these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the constitution so long as they comply with the constitution and National Legislation. These bodies and institutions should be allowed to grow. The people of Kenya in passing the constitution found it fit that the powers of decision making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for the other authorities.”

23. Similarly, in the case of *Henry Wainaina Wakihoru & Another vs National Land Commission & 2 Others [2018] eKLR*, the court stated as follows;

“It is therefore clear that since the 1st Respondent expressed its intention to acquire the stated parcels of land, then the Plaintiffs concerns could be adequately addressed during inquiry stage as contemplated by Sections 112 and 115 of the Land Act.

.....the Applicant have come to court prematurely as they can ventilate its claim at the inquiry stage and if the Plaintiffs/Applicants would be aggrieved by any decision taken by the National Land Commission then they are at liberty to come to court for redress. The Plaintiffs/Applicants ought to have exhausted the mechanism provided under Section 112 to 115 of the Land Act.”

24. While this court appreciates that it is apparent that the Applicants have a prima facie claim or interest in the suit land, this court is of the considered view that the Plaintiff’s claim ought to be determined by the National Land Commission in exercise of its mandate under Section 112 of the Land Act. Therefore this court is not inclined to injunct the 1st Respondent’s process of compulsory acquisition in respect of the suit property at this preliminary stage as that would amount to usurping the powers of the 1st Respondent. This court is alive to the legal notion that a court’s jurisdiction flows from either the constitution or statute or both, and a court cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. See the Supreme Court decision in *Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR*. It is my considered view that the jurisdiction to determine the true owners of land intended to be acquired for purposes of awarding compensation for compulsorily acquired land, is vested in the National Land Commission by virtue of the statutory provisions of Section 112 of the Land Act. It is only after the National Land Commission has decided on who are the true owners of the land intended to be acquired, that in the event any person interested in such land is aggrieved, they can move the court for redress.

25. It is my considered view therefore that the Applicants are not entitled to the orders of injunction sought as their prayer is premature.

26. The upshot of the above is that the Notice of Motion dated 12th August 2021 is struck out with no orders as to costs.

27. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 16TH DAY OF FEBRUARY 2022 THROUGH

MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. Ngwele for the Petitioners/Applicants

No appearance for the Respondents

Ms Josephine Misigo – Court Assistant