



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS APPLICATION NO.24 OF 2012

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW AND FOR ORDERS OF
CERTIORARI AND PROHIBITION**

REPUBLIC

VERSUS

1. COMMISSIONER OF LANDS1ST RESPONDENT

2. KENYA PORTS AUTHORITY2ND RESPONDENT

EX-PARTE

1. SHAHID PERVEZ BUTT).....1ST APPLICANT

2. HAROON SHAHID BUTT)2ND APPLICANT

J U D G E M E N T

1. For determination is the motion dated 27th September 2012 in which the Exparte Applicants seek the following Judicial Review orders-

i. THAT AN ORDER OF CERTIORARI do issue to remove into this Honourable Court and quash Gazette Notice Number 3229 contained in the Kenya Gazette dated 16th March, 2012 in respect of the Applicants.

ii. THAT AN ORDER FOR CERTIORARI do issue to remove into this Honourable Court and quash Gazette Notice Number 3230 contained in the Kenya Gazette dated 16th March, 2012 in respect of the Applicants.

iii. THAT AN ORDER OF CERTIORARI do issue to remove into this Honourable Court and quash the decision of the Assistant Commissioner of Lands, H. Were on 12th April, 2012 being the Notice of Intention to compulsory acquire the Applicants land known as Land Reference Number MN/VI/495 Title Number C.R.2360.

iv. THAT AN ORDER FOR CERTIORARI do issue to remove into this Honourable Court and quash the decision of the Commissioner of Lands dated 22nd August, 2012 threatening to take up

possession of the Applicants land known as Reference Number MN/VI/495 Title Number C.R.2360.

v. THAT AN ORDER FOR CERTIORARI do issue to remove into this Honourable Court and quash the decision of the Assistant Commissioner of Lands J.K. Mutua dated 14th May, 2012 awarding the Applicants compensation in the total sum of Kshs.56,143,000/-.

vi. THAT AN ORDER OF PROHIBITION do issue forbidding the Respondents from taking up possession of the Applicants property known as Land Reference Number MN/VI/495 Title Number C.R.2360 as threatened in the First Respondent's decision or Notice dated 22nd August 2012 or otherwise dealing with the Applicants aforesaid property either by himself or his agents, employees, servants or any other person or persons or the second Respondent whatsoever.

vii. THAT AN ORDER OF PROHIBITION do issue forbidding the Respondents from surveying or re-surveying, sub-dividing, entering into or issuing new title documents on the Applicants property known as Land Reference Number MN/VI/495 Title Number C.R.2360.

2. The facts forming the background to this matter present no difficulty. Shahid Perez Butt (hereinafter '**S.P. Butt**') and Haroon Shahid Butt(hereinafter '**H.S. Butt**') are the Ex parte Applicants (hereinafter **the Applicants**). They are the joint registered owners of land reference Number MN/VI/495 (hereinafter the '**suitland**'). That land is located in the Portreitz area of The City Council of Mombasa. There is an intention by the Government to compulsorily acquire the suitland so the Commissioner of Lands published a Notice of Intention to acquire the land vide Gazette Notice No.3229. This was in the Kenya Gazette of 16th March 2012. Also published in the same Gazette was Gazette Notice No.3230 which was a Notice announcing the date of Inquiry into the claims to compensation. The contents of these Notices are a source of controversy, details of which are discussed below.

3. The Notices were served on the Applicants on 14th April 2012 and an Inquiry into the compensation payable for the acquisition was conducted on 26th April 2012 before a panel of valuers chaired by one J.K. Mutua (hereinafter '**Mutua**').

4. On 21st May 2012 the Applicants received a decision of the panel showing that they had been awarded a total sum of Kshs.56,143,000/-. In a statement dated 15th June 2012, the Applicants rejected the award and gave notice of their intention to appeal against it to the Land Acquisition Compensation Tribunal.

5. It would seem that the Applicants main grievance is that whilst the Commissioner has acquired a total of 1.8167 acres out of the parcel of land measuring 4.25 acres the remainder of the land would be rendered useless and sterile once the proposed road is constructed. It is said that the Applicants through their Counsel approached Mutua with a request that the property be acquired in terms of Sections 21 and 22 of The Land Acquisition Act (Chapter 295 Laws of Kenya(now repealed) (hereinafter **the Act**). The plea was that the Government should acquire the whole property. The request may not have been accepted as Mutua issued a Notice of Taking Possession and Vesting. The Notice was served on the Applicants on 22nd August 2012 and the take over was to happen on 14th September 2012. That is the Notice that triggered these proceedings.

6. Something needs to be said about the prelude to the interaction between the Applicants and the Commissioner of Lands. On 28th May 2010 Kenya Ports Authority (hereinafter '**KPA**'), the 2nd Respondent, sent a letter offering to buy the suit land at Kshs.35,000,000/- (and later revised to Kshs.39,050,000/- through a letter of 9th March 2011) from one Salim Abdalla the then registered owner. Before anything became of this offer, Abdalla sold the property to the proprietors of Vantage Road Transporters Limited. Vantage offered to sell the land to the KPA at Kshs.250,000,000/-. This offer dated 26th January 2012 was signed by S.P. Butt. The Applicants sent a letter revising the offer to Kshs.915,300,000/-. The 2nd Respondent made a final offer of Kshs.62,500,000/- through a letter dated 30th January 2012. This was rejected by the Applicants. Faced with this frustration the 2nd Respondent

wrote to the Permanent Secretary of the Ministry of Transport requesting him to compulsorily acquire some 4 parcels of land which included the suitland.

7. The Applicants case is captured in the grounds outlined in the Statutory statement in support of the application for leave. I will condense them for the sake of brevity-

7.1 The Respondents lack jurisdiction to commence and continue with the process of compulsory acquisition because-

- The Notice of Intention to Acquire was not served at least 21 days prior to the publication of the Notice of the date of inquiry. This contravenes Section 6(1) of the Repealed Act.
- The Notice containing the date of inquiry and the Notice of Intention to Acquire were published simultaneously thereby denying the Applicant the period of 21 days provided by the law.
- The Notice containing the date of inquiry was served on the Applicants on 14th April 2012 and was short of the period of 15 days contemplated by the law.

7.2 The Respondents also lacked jurisdiction because-

- The Notice of Intention to Acquire did not name the public body for which the acquisition was intended and that of the Minister authorizing the acquisition.
- Mutua did not have authority to effect the acquisition
- No reasons for the acquisition have been supplied on the Notice.

7.3 Further the portion of the suitland acquired render the remaining portions inaccessible, uneconomical and useless.

8) In the written submissions which were highlighted by way of oral argument there was an attempt by the Applicants to introduce other grounds for challenging the acquisition process. This was done contrary to the provisions of Order 53 Rule 4(1) of the Civil Procedure Rules as no leave was sought. The Rule reads:-

“4.(1) Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.” (emphasis mine).

The Applicants will no doubt notice that I will not discuss those additional grounds.

9) An important argument made by the Applicants in support of their case was that the Applicants were not estopped from bringing this challenge merely because they participated in the inquiry.

10) The Respondents opposed the application and took a somewhat similar position which can be abridged as follows-

- The challenged acquisition though carried out at the behest of KPA was really for the benefit of Government and was done in compliance with Section 6 of the Repealed Act. The Notice was explicit that the Government intended to acquire the land for construction of a public road. Section 2 of Repealed Act defines a public body to include the Government.
- The Notice of the inquiry was published on 16th March 2012 which would be more than 30 days required by Section 9(1) of The Land Repealed Act.
- The Commissioner made the necessary inquiry under Section 9(1) and rendered his verdict.
- The Minister properly authorized Jacinta, Mutua and Were to exercise the powers of the Commissioner.
- The Applicants participated, gave proposals for their compensation and never raised any objection

as to the legality of the process or the competence of the presiding officer.

The Determination

11) This is what I see as the issues whose answers will settle this dispute-

- i. Was Gazette Notice No.3239 valid so as to vest jurisdiction upon the Commissioner to begin and continue the inquiry?
- ii. Was Gazette Notice No.3230 valid so as to vest jurisdiction upon the Commissioner to begin and continue the inquiry?
- iii. Were the delegated officers properly authorized to exercise the powers conferred on the Commissioner?
- iv. Having participated in the inquiry, are the Applicants estopped from presenting and prosecuting these Judicial Review proceedings?

12) The path that this dispute takes is fairly well beaten and I will seek guidance from past decisions of this Court and the Court of Appeal. The first notice under attack is that of the intention to Acquire Land. It needs to be reproduced in full. This is the notice said to be invalid

“GAZETTE NOTICE NO.3229

THE LAND ACQUISITION ACT

(Cap.295)

THE MOMBASA PORT DEVELOPMENT PROJECT

ACCESS ROAD

INTENTION TO ACQUIRE LAND

IN PURSUANCE of Section 6(2) of the Land

Acquisition Act, the Commissioner of Lands gives notice that the Government intends to acquire the following land for the construction of Mombasa Port Development Project Access Road.

Plot	Registered Owners	Area to be Acquired in Acres
MN/VI/495	Shahid Pervez But Haroon Shahid But	1.8167
MN/VI/2827	Justus Kariuki Githogori Patricia Wambui Githongori	0.36
MN/2439	Akasha Abdalla Ibrahim	0.28

MN/VI/3897	The Gas Company	0.6400
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Plants of the affected land may be inspected during office hours at Ardhi House, 1st Ngong Avenue, Room 305 and District Land Office, Mombasa

Dated the 13th March, 2012.

MR/9107350

Z.A. MABEA

Commissioner of Lands”

13) In probing whether or not the notice complies with the provisions of Section 6 of The Land Acquisition Act and Article 40 of The Constitution 2010 one needs to bear in mind the following passage of the dictum of Lord Mansfield in **Rex – Vs- Croke (1774)1 COWP 26** approved by Akiwumi JA in **Civil Appeal No.252 of 1966 1) The Commissioner of Lands 2) The Minister for Lands & Settlement –Vs- Coastal Acquaculture Ltd-KLR (E & L) 1**

“This is a special authority delegated by the Act of Parliament on particular persons to take away a mans property and estate against his will, therefore it will be strictly pursued and must appear to be so upon the face of the order.”

Akiwumi JA himself agreed with this passage from the appealed decision of Ringera (J)(as he then was).-

“As regards the adequacy and validity of the notice published under Section 6(2) I have come to the judgement that notice should reflect the Minister’s certificate to the Commissioner under Section 6(1), and must accordingly include the identity of the public body for whom the land is acquired and the public interest in respect of which it is acquired. It is only when a notice contains such information that a person affected thereby can fairly be expected to seize his right to challenge the legality of the acquisition. That is because the test of the legality of the acquisition is whether the land is required for a public body for a public benefit and such purpose is so necessary that it justifies hardship to the owner. Those details must be contained in the notice itself for the prima facie validity of the acquisition must be judged on the content of the notice. The test must be satisfied at the outset and not with aid of subsequent evidence. I do not understand Re Kisima (supra) to hold that information subsequently gleaned from material before the court can cure the defects apparent on the face of the notice. I understand the case to hold that failure to specify the public body for whom the land is acquired and the purpose of the acquisition are the defects which persuaded the Court that the Applicant therein had established a prima facie case that the Commissioner of Lands lacked jurisdiction to proceed with compulsory acquisition.” (my emphasis)

14) Section 6 of The Repealed Act provides as follows-

(1) Where the Minister is satisfied that any land is required for the purposes of a public body, and that-

(a) The acquisition of the land is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of any property in such manner as to promote the public benefit; and

(b) The necessity therefore is such as to afford reasonable justification for the causing

of any hardship that may result to any person interested in the land.

And so certifies in writing to the Commissioner, he may in writing direct the Commissioner to acquire the land compulsorily under this Part.

(2) On receiving a direction under Subsection (1), the Commissioner shall cause a notice that the Government intends to acquire the land to be Published in the Gazette, and shall serve a copy of The notice on every person who appears to him to Be interested in the land.

So is the Gazette Notice No.3229 expressed in compliance with the provisions of Section 6 of The Repealed Act.

15) The decision of Ringera, J (as he then was) in **Mombasa Misc. Application No.55 of 1999 (Coastal Acquaculture Ltd -Vs- The Commissioner of Lands & Another)** which received the endorsement of The Court of Appeal discussed the validity of a Notice published under Section 6(2). This is what he said-

“The analogy that can be drawn is this. In Kenya where the statutory power to compulsorily acquire a person’s land against his will is first derived from the carefully worded provisions of the Constitution itself; where land is a most sensitive issue; and where in effect, the land in question has already been compulsorily acquired, though not taken possession of, by the time the interested party is notified so as to make his claim for compensation, there is all the more reason to ensure that all procedures related to compulsory acquisition must not only, be strictly pursued, but must also appear to be so on the face of the inquiry.”

I bear this in mind as examine the notice.

16) It is the argument of the Respondents that the notice names the Government as the public body for whose use the land is acquired. KPA, it is said, was merely an agent. In this regard I was asked to accept that Section 2 of The Repealed Act defines a public body to include the Government. The part of notice in contention is this-

“In pursuance of Section 6(2) of The Land Acquisition Act, the Commissioner of Lands gives notice that the Government intends to acquire the following land for the construction of Mombasa Port Development Project Access Road.

If it is true, as argued by the Respondents, that the Government intended to acquire the land for its own use then the Notice should have unequivocally and clearly stated so. On the face of the Notice, it should have been crystal clear that the Government intended to acquire the land for no other public body but itself. That is how precise the Notice needed to be. That is the Law. Gazette Notice No.3229 is imprecise and therefore invalid.

17) I dare add that even the evidence presented by the Respondents themselves does not support the argument that the Government was the public body for whom the land was acquired. KPA in a letter of 9th February 2012 requested the Permanent Secretary, Ministry of Transport to initiate the process of compulsory acquisition of 4 parcels of land that included the suit land. Part of that letter reveals that the Authority had earlier attempted to acquire the land through private treaty. The letter reads-

“9th February 2012

Dr. Cyrus Njiru, PhD, CBS

Permanent Secretary

Ministry of Transport

Nairobi

Dear

MOMBASA PORT DEVELOPMENT PROJECT –

COMPULSORY ACQUISITION: PLOT NOS. MN/VI/2439 & MN/VI/2565

The authority is in the process of constructing a Second Container Terminal West of Kipevu, beyond the existing Kipervu Oil Terminal.

The objective of the project is to enhance container handling capacity of the Port with a larger goal of facilitating trade and economic development of the country and the region.

The site will be accessed through a proposed 2.8km road branching from Port Reitz road. The road will pass through private land. The Authority in 2007, commenced with a negotiated acquisition of the affected parcels based on values returned by M/s Wambua Valuers (under Japan Port Consultants) who had been appointed by the Authority. The values were accepted; unfortunately funds for the acquisition were not availed till 2010. We were able to convince most of the affected owners to accept revised valuation, which has since been validated by the Chief Government Valuer, (a copy of the valuation is enclosed). We however have not been able to reach amicable settlement with the four land owners enumerated below.

Kindly note that the Authority risks to insure heavy contractual penalties in case of further delay in the commencement date and we urge that the compulsory acquisition is concluded prior to 1st March 2012.

Yours truly,

Gichiri Ndua, MBS

MANAGING DIRECTOR” (my emphasis)

In a letter of 13th February 2012 KPA makes a direct plea to the Commissioner of Lands to initiate the acquisition. This is that letter-

“Our Ref: NMN/4/2/01

13th February 2012

Mr. Zablon Mabea

The Commisisoner of Lands

P.O. Box 30089-00100

Nairobi

Dear

MOMBASA PORT DEVELOPMENT PROJECT ACCESS

ROAD – COMPULSORY ACQUISITION

The Mombasa Port Development Project funded by Japan International Cooperation Agency

(JICA) is set to provide additional Container Handling Capacity to the Port of Mombasa.

The 2.8km access road, leading from the proposed terminal passes through private property as shown in the attached drawings.

In view of the above, the Authority requests that you invoke Chapter 295 of the Constitution and initiate the process of compulsory acquisition of the following plots:

1. MN/VI/495/LR2565 - Jointly owned by Mr. Shahid P.

**Butt and Haroon S. Butt (recently
transferred from Vantage Road
Transporters Ltd)**

2. MN/VI/3897 - Gas Company Ltd
3. MN/VI/2827 - Mr. Justus Kariuki Githongori
4. MN/VI/2439 - Mr. Akash Ibrahim

**We confirm that sufficient funds have been set aside to duly compensate
the affective property owners.**

We would appreciate it if you could give this matter your urgent attention as the Contractor is due to take over possession on 1st March 2012.

Yours sincerely

Gichiri Ndua, MBS

MANAGING DIRECTOR

Encl.

Copy to: Dr. Cyrus Njiru, PhD, CBS

Permanent Secretary

Ministry of Transport

Nairobi

Mr. Joseph K. Kinyua, CBS

Permanent Secretary

Ministry of Finance

P.O. Box 30007

Nairobi.

Clearly, it is KPA who were to pay the affected property owners.

18) In the letter of 8th March 2012 directing the Commissioner of Lands to acquire the land compulsorily, the Minister of Lands does not state for whom the land is to be acquired. This is that short letter-

“Ref. NO.VAL. CONF/L/A/15/29 VOL. VI

8th March 2012

Commissioner of Lands,

Department of Lands

Ministry of Lands,

NAIROBI.

LAND ACQUISITION ACT (CAP 295)

MOMBASA PORT DEVELOPMENT PROJECT

ACCESS ROAD

In accordance with the requirement of Section 6(1) of the Land Acquisition Act (Cap 295), I am satisfied that the land referred to in your letter Ref. VAL.1426/4 dated 8th March 2012 is required for public purposes.

Accordingly, I direct you to acquire the land compulsorily under the Act.

James Orengo, EGH,MP,

MINISTER”

I cannot help but notice that the Minister makes reference to the Commissioner’s letter of 8th March 2012. None of the respondents showed this letter to court. Were the contents adverse to their case? This court may never get to know! Anyhow, on the evidence the suitland was to be acquired for use by KPA. As this was not expressed in the notice, then the notice would be invalid.

19) Being of that persuasion, it would be needless for me to consider the other arguments raised by the Applicants. What I must now decide is whether this court should interpose as requested by them. The Respondents urged that by participating in the inquiry, then the Applicants waived their right to raise any complaint about the manner in which the process was initiated and conducted. That argument would, however, be immediately confronted by the following proposition from Wades’ Administrative Law quoted with approval by Akiwumi JA in the **Coastal Acquactulture Ltd**

“.....The primary rule is that no waiver of rights and no consent or private bargain can give a public authority more power than it legitimately possess, once again, the principle of Ultra vires must prevail when the right comes into conflict with the ordinary rule of law.....”

20) The Court of Appeal has clarified that notice that does not comply with the mandatory Provisions

of Section 6 of the Repealed Act is invalid and cannot clothe the Commissioner with jurisdiction to commence and proceed with acquisition. The requirements of those provisions, are not merely not procedural, they are jurisdictional. Once the Commissioner acted without jurisdiction, then the Applicants cannot be estopped from subsequently maintaining that the Commissioner acted without jurisdiction in Judicial Review Proceedings. The holding of Lord Reid Essex County Council –vs- Essex Incorporated Congregational Church Union [1963] 1 All E.R. 326 is instructive. At pg.330, His Lordship stated as follows:-

“But the appellants say that the respondents cannot be allowed to maintain this point now because they consented to the matter being dealt with by the tribunal. What in fact happened was that the appellants requested the tribunal to deal with this point as a preliminary point of law; this request was intimated to the respondents and they did not object; then the respondents appeared before the tribunal and argued the point but, not being then alive to their rights, they did not protest. I need not consider whether this amounted to a consent to widening the reference to the tribunal, because in my judgement it is a fundamental principal that no consent can confer on a court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction, or can estop the consenting party from subsequently maintaining that such court or tribunal has acted without jurisdiction.” (my emphasis).

21) The inevitable decision I must reach is to intervene on behalf of the Applicants. This is a regrettable result as the Commissioner of Lands does not seem to have heeded the advise of the Court of Appeal in Coastal Acquaculture Ltd. There, Tunoi JA (as he then was) advised,

“...the Constitution and the enabling Act intended that compulsory Acquisition be treated with caution and the seriousness it deserves. The Notices should comply with the relevant provisions of the Constitution and the enabling Act.”

I grant all the prayers sought in the Motion of 27th September 2012 save on costs. Each party shall bear its own costs. The public may have suffered enough because of the inattention of the Commissioner of Lands. It should not shoulder further costs.

F. TUIYOTT

J U D G E

Dated and Delivered on 20th day of February 2014 in open court in the presence of:

.....**for Applicants**

.....**for 1st Respondent**

.....**for 2nd Respondent**

Court clerk

.....

J U D G E