



**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 187 OF 2013**

**BETWEEN**

**CHRISTABEL AKINYI ONYANGO.....PETITIONER**

**AND**

**KENYA AIRPORTS AUTHORITY.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The petitioner claims that her land was compulsorily acquired by the Kenya Airports Authority for the construction of the Kisumu Airport and that she has not been compensated to date contrary to **Article 40(3)(b)** of the Constitution. The transaction subject of these proceedings occurred during the currency of the former Constitution but the obligation to compensate the petitioner continued under the Constitution.
2. ?The petitioner is sole beneficiary of the Estate of Gordon Nyagudi Onyango (deceased) by virtue of a certificate of confirmation of grant of letter of administration dated 28<sup>th</sup> February 2011 issued in **Kisumu HCSC No. 1146 of 2009** and by which she inherited **KISUMU/KOGONY/438** and **KISUMU/KOGONY/444** (“the suit properties”).
3. Kenya Airports Authority (“the Authority”) is a statutory corporation established under **Kenya Airports Authority Act (Chapter 395 of the Laws of Kenya)**. It is the state authority charged with development and maintenance of airports in Kenya including the Kisumu Airport.

**Petitioner’s Case**

4. The petitioner’s case is set out in the petition dated 19<sup>th</sup> March 2013 and is supported by the petitioner’s affidavit sworn on 27<sup>th</sup> March 2013. The petitioner relies on written submissions dated 14<sup>th</sup> March 2014.
5. The petitioner seeks compensation arrived at being the sum of Kshs 1,809,400.00 after the acquisition of suit properties in 2008 for the construction of the Kisumu Airport. The petitioner claims that she has not been paid since 2008 and as a result her right to protection of property has been violated by failure of the respondent to fulfil its obligation to make prompt payment.

6. The petitioner prays for payment of prompt compensation for the acquisition the suit properties together with interest and costs of the suit.

### **Respondent's Case**

7. The Authority opposes the petition based on the replying affidavit sworn on 27<sup>th</sup> March 2013 by Victor Arika, its acting Corporation Secretary and Chief Legal Officer. He was also cross-examined on his affidavit. The respondent relies on written submissions filed on 19<sup>th</sup> March 2014.
8. In his deposition, Mr Arika confirms that in the year 2008, the Authority began undertaking the exercise of the expansion of the Kisumu Airport which involved securing land from neighbouring land owners. This was done by way of negotiation in accordance with the provisions of **section 13(1)(a)** of *Kenya Airports Authority Act*. The respondent denies that the suit properties were compulsorily acquired but maintain that they were purchased from the petitioner for a consideration of Kshs 1,809,400.00 as evidenced by a sale agreement dated 10<sup>th</sup> March 2012 (“the Sale Agreement”).
9. The respondent avers that the sale could not be concluded at the earliest opportunity because the suit properties were not registered in the petitioner’s name by that of Gordon Nyagundi Onyango (deceased) as she had not obtained the certificate of confirmation of grant. The respondent further avers that there were third parties laying claim to the suit properties. Mr Arika testified that he communicated this position to the petitioner’s counsel, *Ochieng’ Onyango, Kibet and Ohaga Advocates*, by a letter dated 6<sup>th</sup> February 2009 when they wrote to the Authority demanding payment.
10. Mr Arika further testified that the certificate of confirmation of grant had been delivered to the Authority’s advocates and that the petitioner’s documents were in order and that the Authority was prepared to pay the petitioner. He stated that the amount could not be paid immediately because of the nature of the Authority’s budgeting cycle. The agreement dated 10<sup>th</sup> March 2012 at the end of the 2012/2013 budget cycle and just after completion of the budget for the year 2013/2014 which had been forwarded to the relevant Government Departments for approval hence provision was not made for this payment and hence payment could only be forthcoming on during the 2013/2014 cycle.
11. The respondent opposes the petition on the ground that the matter does not raise any constitutional issue or violation of fundamental rights. It submits that the matter is a contractual matter whose resolution was outside the scope of **Article 22** of the Constitution. The respondent contends that the Authority entered into the Sale Agreement in good faith and that payment was delayed due to factors beyond the Authority’s control which the petitioner knew and acquiesced to. The respondent submits that the petition is an abuse of the court process and ought to be dismissed.

### **Determination**

12. The principal facts in this matter are not in dispute. First, the Authority took possession of and has occupied the suit properties since 2008. Second, no payment has been paid by the Authority either to the deceased or petitioner for possession and occupation of the suit properties. Third, the petitioner is the lawful proprietor of the suit properties having acquired the same through transmission. Fourth, there are no claims adverse to the petitioner’s title made by third parties.
13. The issue which the respondent contests is that the matter is does not raise any constitutional issue as the matter is governed by the Sale Agreement. The respondents case is that the transaction subject of this matter is not an acquisition or deprivation within the meaning of **section 75(1)(c)** of the former Constitution or **Article 40(3)(c)(b)(ii)** of the Constitution. The petitioner avers that land was acquired and since no compensation has been paid, her right to receive prompt payment

upon such acquisition has been violated.

14. **Section 13** of the *Kenya Airports Authority Act* (“the *Act*”) gives the Authority statutory power to acquire land. It provides as follows;

13. Where land is required by the Authority for purposes of the Authority, it may either—

(a) if such land is not public land, acquire such land through negotiation and agreement with the registered owner thereof: Provided that notwithstanding the provisions of section 6 of the Land Control Act the ensuing transaction shall not require the consent of a land control board if the land to be acquired is agricultural land; or

(b) if such land is public land or if the Authority is unable to acquire it by agreement in accordance with paragraph (a) notify the Minister responsible for public lands that the land specified in the notice is required for the purposes of the Authority

15. In this case the Sale Agreement was signed on 10<sup>th</sup> March 2012 while the respondent took possession in 2008. The Authority did not state under what circumstances it took possession at least 5 years before the Sale Agreement was executed. The purpose of the Sale Agreement was therefore to facilitate the acquisition which had already taken place. The intent and purpose of **section 13(a)** of the *Act* is to facilitate the acquisition of property for the airport which is a public purpose contemplated in **section 75** of the former Constitution and **Article 40(3)** of the Constitution. Thus any transaction carried out under the **section 13(a)** of the *Act* is deprivation of property and must therefore comply with the condition as to prompt payment. What **section 13(a)** of the *Act* does is to allow the acquisition of the property on a voluntary basis without application of the full rigours of the *Land Act, 2012* which governs compulsory acquisition of land. While the petitioner would have had the option of refusing to part with the land on a voluntary basis, the Authority would have invoked **section 13(a)** of the *Act* which would trigger full application of the *Land Act, 2012*.

16. My reasoning is fortified by the letter dated 6<sup>th</sup> February 2009 written by Mr Arika in which he stated that payment could only be made when a sale agreement is duly executed by the land owners. This letter, it is important to recall, came after the respondent had already taken possession of the land. The authority to acquire land under **Article 40(3)** is through, “*any Act of Parliament.*” The Authority is given power to acquire land for its use through negotiation and agreement hence its responsibility is to effect prompt compensation once the formalities of sale are completed. The promptness of the payment in this instance is governed by the Sale Agreement. In my view, a purposive approach to the objects of the Constitution must be taken in dealing with the issue where State entities are empowered to acquire land for public purposes. To exclude them from the obligations under **Article 40(3)** would permit the State through statutory corporations and devices to evade the responsibility of imposed by **Article 40(3)** to pay compensation promptly when acquiring land for public purposes.

17. I therefore find and hold that the transaction between the petitioner and the respondent contained in the Sale Agreement made under the authority of **section 13(a)** of the *Kenya Airports Authority Act* is for all intents and purposes the kind of acquisition or deprivation for which respondent must pay full and prompt compensation in accordance with the contract of sale which is an instrument used to effect the compensation. In the circumstances, I further find and hold that the petitioner’s right to the protection of property has been violated as the compensation secured by the Sale Agreement has not been paid to date.

18. It follows that the reasons given by the respondent for failing to pay compensation once the agreement was executed and the completion date expired cannot stand both in the face of the Constitution and the Sale Agreement. I do not think the fact of the budgetary cycle or planning discharge the respondent from its obligation to effect payment promptly. Under the Sale Agreement, the respondent undertook to settle the purchase price within 45 days. According to

**Clause 3** of the Sale Agreement, the full purchase price was, “*to be paid in full to the Vendor or the Vendor’s appointed agent within 45 days of the execution of this agreement and the delivery to the Purchaser’s advocates of completion documents.*” Under the Sale Agreement the respondent acknowledge receipt of the requisite documentation from the petitioner to enable it complete the transaction.

19. As a result I find and hold that the petitioner is entitled to the sum of Kshs 1,809,400.00 which was due on the completion date being 10<sup>th</sup> June 2012. The respondent contends that interest should not be awarded yet Special Condition No. 3 of the Sale Agreement contemplates that interest will be payable upon default. In the circumstances, the said sum shall accrue interest at court rates from 11<sup>th</sup> June 2012 until payment in full.
20. Finally it is clear from the foregoing that this matter raises constitutional issues for resolution and as such the claim cannot be termed an abuse of the court process. To dismiss the case in the face of the very clear and unequivocal admission by the respondent that the suit properties are part of the Kisumu Airport and that the petitioner has not been paid would not only be a grave injustice but a violation of **Article 159(2)(b)** of the Constitution which obliges the court to dispense justice without delay.

### **Disposition**

21. In conclusion, I grant the following reliefs;

- a. I declare that the respondent violated the petitioner’s rights to the protection of property under **section 75(1)(c)** of the former Constitution and **Article 40(3)(b)** of the Constitution by failing to pay her prompt compensation for acquisition of the **KISUMU/KOGONY/438** and **KISUMU /KOGONY/ 444**.
- b. The respondent shall pay the petitioner the sum of Kshs 1,809,400.00 with interest at 12% per annum from 11<sup>th</sup> June 2012 until payment in full.
- c. The respondent shall bear the costs of these proceedings.

**DATED** and **DELIVERED** at **NAIROBI** this 24<sup>th</sup> day of March 2014.

**D.S. MAJANJA**

**JUDGE**

Mr Echesa with Mr Ouma instructed by Ochieng’, Onyango, Kibet and Ohaga Advocates for the petitioner.

Mr Otieno instructed by Otieno, Ragot and Company Advocates for the respondent.