



**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO.402 OF 2013**

**BETWEEN**

**STANLEY MUNGA GITHUNGURI ..... PETITIONER**

**AND**

**KENYA NATIONAL HIGHWAYS AUTHORITY .....1ST RESPONDENT**

**CHINA ROAD AND BRIDGE CONSTRUCTION CORPORATION ..... 2ND RESPONDENT**

**ATTORNEY GENERAL .....3RD RESPONDENT**

**JUDGMENT**

**Introduction**

1. It is an undisputed fact that the petitioner is the registered owner of L.R. Nos. 12389 and 1055/31 measuring approximately 10 acres and 9.6 acres (“the suit properties”) respectively. His claim against the respondents is that his right to the protection of property guaranteed under **Article 40** of the Constitution has been violated by the respondents trespassing on the suit property for purposes of constructing the Nairobi Southern By-pass.
2. The 1<sup>st</sup> respondent is a statutory body mandated under the **Kenya Roads Act, 2007** to perform amongst other functions construct, upgrade, rehabilitate and maintain national roads under its control. The 2<sup>nd</sup> respondent has been engaged to construct the road and works under its direction and control.

**Background and facts**

3. The petitioner’s case is set out in the petition dated 5<sup>th</sup> August 2013 which is supported by his own affidavit sworn on the same day and a further affidavit sworn and a second further affidavit sworn on 4<sup>th</sup> September 2013 and 28<sup>th</sup> November 2013 respectively. The respondents rely on the replying affidavit of Engineer Paul Omondi, Manager Special Projects of the Kenya National Highways Authority, sworn on 5<sup>th</sup> September 2013 and supplementary affidavit of Thomas Gacoki, Manager Survey of the Kenya National Highways Authority, sworn on 28<sup>th</sup> October, 2013.

4. The dispute between the parties arose when on 2<sup>nd</sup> August 2013, it is alleged that the 2<sup>nd</sup> respondent's workers moved onto the suit properties without notice, stationed large bull-dozers and tractors and people and destroyed the perimeter fence, cut down trees on approximately 6 acres and exposed the petitioner's homes in order to pave way for construction of the Nairobi Southern By-pass.
5. The respondents state that after a feasibility study was done by the Ministry of Transport and Communication in 1986, it was ascertained that the suit properties would be affected. The Government evinced its intention to acquire 0.0570 Ha of LR No. 12389 by publishing Kenya Gazette No. 3788 in the 26<sup>th</sup> May 2006 edition. The acquisition of that portion of the property was completed by payment of compensation.
6. As work progressed, it became necessary to redesign the By-pass and as a result the Government sought to acquire an additional 1.9886 Ha of LR No. 12389 and 0.0462 Ha of LR No. 1055/31. In order to effectuate the acquisition, the National Land Commission issued Gazette Notice No. 11990 on 23<sup>rd</sup> August 2013. The process was completed by the National Land Commission issuing awards and the vesting was done on 15<sup>th</sup> January 2013.
7. The petitioner's case is that the respondents' actions were unjustified since the suit properties were not on a road reserve and the respondents had not acquired them in accordance with the **Land Act (Act No. 6 of 2012)**. He laments that his rights to the protection of and freedom to enjoy his property under **Article 40** of the Constitution have been violated.
8. The respondents deny that they have violated the petitioner's rights as alleged. They claim that they have acted with due process and that their acts were in contemplation of the acquisition and were well within the ambit of **Article 40(3)(a)** and **(b)** and were administratively correct, transparent and for public purpose and interest.

### **Issues for Determination**

9. The evidence on record is very clear that suit properties were acquired and vested in the Government on 15<sup>th</sup> January 2014. By virtue of **Article 40(3)** of the Constitution the petitioner's right to the land is extinguished upon payment of just compensation in full. Prior to that, the proprietor is entitled to all the rights available to the holder of title issued under **section 23** of the **Registration of Titles Act (Repealed)** which includes the right to quiet and exclusive possession. This provision has been replicated in the **section 26(1)** of the **Land Registration Act (Act No. 3 of 2012)**.
10. The dispute in this case revolves around what transpired on 2<sup>nd</sup> August 2013 and the effect thereof. In the circumstances, I framed the following issues for determination;
  - a. Whether the 1<sup>st</sup> and 2<sup>nd</sup> respondent entered the property before acquisition in accordance with the **Land Act, 2012**.
  - b. If the answer is in the affirmative, did it amount to violation of the petitioner's right to property under **Article 40**.
  - c. If so, what relief should be granted.
11. Mr Gacoki, in his further affidavit, detailed circumstances under which trees on the suit property were cut. The tenor and effect of the evidence was that the respondents did not commit or authorise any person to commit the trespass.
12. Mr Gacoki explained that the petitioner's property borders land owned by the Kenya Forestry Service ("KFS"). In order to access the part of the petitioner's land it was necessary for KFS to cut down some trees. Mr Gacoki deposed that inquiries from KFS confirmed that it hired a contractor, one Solomon, to cut down trees on its behalf. He also states that when some of the petitioner's

workers saw that a profit could be made from cutting trees, they let Solomon onto the petitioner's land to harvest trees.

13. The petitioner countered this denial by his second further affidavit. He produced photographs to show the nature and extent of the trespass on his property. He states that access through his land was unnecessary as it borders the Nairobi-Ngong Highway and that no access was required for that purpose. He further depones that the acts of trespass were more than just the cutting of trees but included clearing the land with bulldozers. He also denied that his workers were involved in cutting trees. He stated that once trees on his land were felled, people came onto his land to collect firewood.
14. I have considered the evidence and I find that on the balance of probabilities the 1<sup>st</sup> and 2<sup>nd</sup> respondent's committed acts of trespass. I have looked at the photographs of the scene produced by the petitioner which Mr Gacoki confirmed were photographs of the petitioner's property. They clearly show that part of the land has been cleared by heavy machinery. There are tree stumps which have actually been removed by the bulldozers. The bulldozers were on the land and in the area for no other purpose than to construct the road. This evidence is inconsistent with the single acts of one Solomon who has been blamed. In his further affidavit Mr Gacoki did not explain how part of the petitioner's land was cleared by bulldozers. Mr Gacoki also confirmed in cross-examination that after the complaint was raised by the petitioner, he went for a site visit and confirmed that part of the land had been cleared though he did not make a report or take photographs. The totality of the evidence suggests that the acts of trespass were committed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents and were aimed at clearing the land for road construction.
15. In conclusion, I find and hold that the 1<sup>st</sup> and 2<sup>nd</sup> respondent entered the petitioner's property without his consent or authority before the acquisition was commenced and indeed completed. I also find that the 2<sup>nd</sup> respondent was acting under the direction and control of the 1<sup>st</sup> respondent for purposes of constructing the highway which resulted in the act of trespass complained about. The State and or its entities have no right to enter a person's property without the consent of the owner until the property is vested in the government. Under **section 108** of the *Land Act, 2012* the National Land Commission may, in writing, authorize any person to enter and inspect land in respect of which a notice of intention to acquire the land has been issued under **section 107** of the *Act*. In this case, such notice would only have been issued on or after 23<sup>rd</sup> August 2013 when the notice was published in the Kenya Gazette. The respondents could not obtain such authority on 2<sup>nd</sup> August 2013. In the circumstances, the 1<sup>st</sup> and 2<sup>nd</sup> respondent's violated the petitioner's rights under **Article 40** of the Constitution.
16. Before I turn to deal with the issue of remedies, it is necessary to address the arguments raised by Mr Oregó, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondent, that this matter is not a constitutional matter and as it is one for trespass simpliciter and should have been brought by way of a plaint. Counsel cited several cases to support this proposition; *Stephen Saitoti Kapaiku v Coca Cola Sabco Nairobi Bottlers Limited and Another Nairobi Petition No. 338 of 2012*[2013]eKLR, *Tom Kusienya and Others v Kenya Railways Corporation Limited and Others Nairobi Petition No. 353 of 2012*[2013]eKLR and *Papinder Kaur Atwal v Majir Amrit Nairobi Petition No. 236 of 2011*.
17. I agree with the decisions cited and indeed there may be times that the facts which give rise to a constitution violation also give rise to a claim in ordinary law. In such a situation, it is not necessary to adjudicate the constitutional claim as the ordinary law is sufficient to provide relief. In this case though, the issue arose for the taking of the petitioner's property before the process of acquisition was commenced and completed. The issue falls squarely within what is prohibited under **Article 40** and is within this court to provide relief.

## **Relief**

18. **Article 23** gives this court broad power to fashion a remedy depending on the facts of the case.

19. In considering the relief in this matter, it is clear that the land required by the Government has already been acquired. The issue is what is the level of damages expected for the trespass that occurred between the time when the respondents entered the suit property on 2<sup>nd</sup> August 2013 until the property was vested in the Government on 15<sup>th</sup> January 2014.
20. In order to make a case for damages, the petitioner has annexed to his second further affidavit a valuation report prepared by Ragos Valuers and Estate Agents Ltd dated 26<sup>th</sup> September 2013 on which basis he claims Kshs 45 million general damages at Kshs 5 million per acre, punitive damages amounting to Kshs 4,000,000.00 and exemplary damages amounting to Kshs 4,000,000.00. He has also relied on ***Willesden Investments Limited v Kenya Hotel Properties Limited Milimani HCCC No. 367 of 2000 [2006]eKLR*** where the sum of Kshs 10 million was awarded as general damages and ***Evelyn College of Design Ltd v The Director of the Children's Department and Another Petition No. 228 of 2013 [2013]eKLR*** where Kshs 100,000 was awarded as general damages.
21. The petitioner has not pleaded any special damages in the petition. It is trite law that special damages must be pleaded with particularity and proved and this obligation is not discharged because the matter is one brought under **Article 22** of the Constitution. Any actual loss occasioned or loss of a business prospect is in the nature of a claim for special damages. In the case of general damages, the award is very much at large and intended to vindicate the right of the party wronged. The petitioner's property has now been acquired using the proper legal process. As the valuation report notes that the property was "*a vacant residential hotel parcel of land.*" The destruction of trees and other damage occasioned by heavy vehicles no doubt aggravated the situation. Having regard to the cases cited, I think the best the Court can do in the circumstances is to award a sum of Kshs 100,000 as general damages.
22. While the conduct of the respondents in trespassing upon the suit property cannot be excused, this is not a case where punitive or exemplary damages are appropriate. The Court of Appeal in ***Obongo and Another v Municipal Council of Kisumu (1971) EA 91***, the Court of Appeal established that the exemplary and punitive damages would be awarded where there is oppressive, arbitrary or unconstitutional action by the servants of the government and where the defendant's action was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff.
23. The act of trespass was not one which was done with impunity, malice or in bad faith. There is no allegation that the respondents' employees were high-handed in their conduct towards the petitioner. Perhaps they were only too enthusiastic to take over land that would subsequently be acquired through the legal process. I therefore reject the claim for punitive or exemplary damages.

### **Disposition**

24. The final orders are therefore as follows:

- a. It is hereby declared that the respondents violated the rights of the petitioners under **Articles 40** by trespassing on part of LR No. 12389 before commencing and completing the acquisition of the said property under the ***Land Act, 2012***.
- b. The petitioner is awarded Kshs 100,000.00 as general damages for the said violation.
- c. The petitioner is awarded costs as against the 1<sup>st</sup> respondent.

**DATED and DELIVERED at NAIROBI this 21<sup>st</sup> day of March 2014**

**D.S. MAJANJA**

**JUDGE**

**Mr Mogeni instructed by Mogeni and Company Advocates for the petitioner.**

**Mr Orego instructed by Orego and Odhiambo Advocates for the 1<sup>st</sup> and 2<sup>nd</sup> respondent.**

**Ms Muchiri, Litigation Counsel, instructed by the State Law Office for the 3<sup>rd</sup> respondent.**