



IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.280 OF 2011

BETWEEN

GEORGE MWAI MBURU t/a KAMWA ENTERPRISES.....1ST PETITIONER

JENNIFER CHEPKEMOI t/a YES-HILLY-YARD.....2ND PETITIONER

AND

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE MINISTER FOR ROADS.....2ND RESPONDENT

THE COMMISSIONER OF LANDS.....3RD RESPONDENT

JUDGMENT

Introduction

1. The Petitioners have filed the Petition dated 25th November 2011 alleging a violation of their constitutional right to property as provided by **Article 40** of the **Constitution**, for what they allege is a failure of the Respondents to compensate them for compulsorily acquiring their property for purposes of the construction of the Nairobi-Thika Superhighway.

The Petitioners' Case

2. The Petitioners claim that they are the registered proprietors of all that parcel of land known as L.R.No. 209/14339 having been so registered on 21st December 2001 (*hereinafter the "suit property"*). They also claim that arising out of the survey and construction of the Nairobi-Thika Superhighway, the suit property was affected by the re-alignment of that Highway at the Pangani-Forest Road interchange and part of it was taken over by the Ministry of Roads and Public Works and utilised for the purposes of constructing the said interchange.
3. Following the takeover by the said Ministry, the Petitioners lodged a claim for compensation but allege that to date their compensation has not been effected, hence this Petition.
4. They further claim that in February 2010, they were summoned to appear before the Principal Registrar of Titles for verification of their title documents and that they did appear on 26th March 2010 before a Mr. T.N. Mburu who handled the matter. However, they contend that he was transferred to another Ministry before he could give his ruling on the verification of the title.
5. Subsequently and before any ruling could be delivered, the Ministry of Lands processed and paid the claims of other affected persons and left them out and they thus claim that their rights under

- Article 27** of the **Constitution** has been violated as they have been discriminated against in the payment of the compensation aforesaid.
6. They also allege that failure to compensate them is a violation of their right to property as protected by **Article 40** of the **Constitution**, because they are entitled to prompt and full compensation upon their property being compulsorily acquired. That in addition, under **Section 23** of the **Registration of Titles Act**, their certificate of title to the suit property should be taken as conclusive evidence that they are the absolute and indefeasible owners of the said property. They submit in that regard that they have proved that they are the registered owners of the suit property as the search certificate in respect thereof would reveal that the property is registered in their joint names. They also tendered evidence of a rates demand from the City Council of Nairobi which in their view confirms that the suit property belongs to them. They thus submit that the certificate of title tendered in evidence is sufficient and conclusive proof of ownership of the suit property and also of their entitlement to compensation.
 7. In their Petition they now seek the following orders;

“(a) A declaration that the Petitioners as registered proprietors of L.R.No.209/14339 are entitled to prompt payment in full and just compensation of the value of the portion of the said land taken up by Respondents for the purposes stated above.

(b) A declaration that the failure by the Respondents whether jointly or severally to pay to the Petitioners full and prompt compensation for the value of the portion of their land taken up for road construction as pleaded above is a violation of the constitutional rights of the Petitioners for protection against deprivation of their property rights and interests over the said portion of their land and contrary to Article 40 of the Constitution of Kenya.

(c) A declaration that the failure by the Respondents to pay full and prompt compensation to the Petitioners for the portion of their land aforesaid while doing so in respect of neighbouring parcels of land is an act of discrimination against the Petitioners and a violation of their right under Article 27 of the Constitution of Kenya.

(d) An order that the Respondents, jointly and severally do make full and immediate compensation to the Petitioner for the value of their portion of land taken up for road construction out of L.R. No.209/14339.

(e) An order that the Respondents do pay the costs of the Petition.”

The Respondents' Case

8. The Respondents oppose the Petition through the Replying Affidavits of Charles Ng'etich, the Registrar of Titles at the Ministry of Lands sworn on 15th October 2012 and that of Thomas Gicira Gacoki, a manager, at Survey of Kenya, sworn on 25th March 2012.
9. In his Affidavit, Thomas Gicira Gacoki admits that the Government in the process of expanding and upgrading Thika Road through the 2nd and 3rd Respondents, acquired some parcels of land along the said Road. That the Government upon confirmation and verification of ownership of those parcels of land fully compensated affected legal owners. In regard to the Petitioners' claim, he states that the 2nd Respondent faced challenges as to who owns the suit property since there were multiple claimants to it, namely; City Park whose title is held by the City Council of Nairobi, a Mr. Joseph Mwangi Maina and a Jennifer Chepkemoi Terer among others.
10. He further states that L.R No. 209/14339 (the suit property) is actually a secondary title overlapping the existing primary title i.e. L.R No.209/13385 and which is also the subject of compensation now demanded by the Petitioners. That faced with the dispute as to ownership and boundary, the 2nd Respondent is unable to process and pay any compensation for those reasons. He therefore states that while the 2nd Respondent was ready and willing to pay the appropriate legitimate owners the compensation for the compulsory acquisition of the suit property it can only do so once the two issues have been lawfully determined.
11. Lastly, he states that the instant Petition is unsuited for determination since there are other

- interested parties claiming the suit property and it would be inappropriate to determine the Petition without those parties being heard.
12. On his part, Charles Ng'etich states that sometime in 1932, the Government granted the City Council of Nairobi the suit property for a term of 99 years and later on extended the term for 67 years. Subsequently, the City Council surrendered 6.781 hectares of the said property to the Government for public purposes. He thus contends that the whole of the suit land claimed by the Petitioners in fact belongs to the City Council of Nairobi as shown in the Survey Plan produced as exhibit 'CN 4'.
13. He further alleges that the City Council has never leased the suit land to the Petitioners and that the certificate of title held by the Petitioners was issued to them illegally and the Petitioners must have been aware of the fraud leading to the issuance of the said title. He thus concludes that the Petitioners cannot claim compensation for land which does not belong to them as alleged in the Petition, and the said Petition should be dismissed with costs.

Determination

14. The Petitioners have filed this Petition under **Articles 22 and 23** of the **Constitution** alleging violation of their right to property under **Article 40** and violation of the protection from discrimination under **Article 27** of the **Constitution**. However, from the Parties' submissions and the evidence before me, it is clear that the issue of title to the suit land is paramount in the determination of the allegation of the violation of the said fundamental rights and freedoms. I must therefore pose here to address my mind to the issue of title *vis a vis* the jurisdiction of this Court. Jurisdiction is a fundamental matter in the dispensation of justice (See - **Re The Matter of the Interim Independent Electoral Commission Constitutional Application 2 of 2011 (Unreported)** and **Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1.**)
15. In that regard, an analysis of the provisions of **Article 162(2)** of the **Constitution** which establishes Courts with the status of the High Court and **Article 165** which establishes the High Court is critical. **Article 162** provide as follows;

“ 162. (2) Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

(4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.”

16. Further, the High Court is established under **Article 165(1)** and **Article 165(3)** provides for the jurisdiction of the High Court as follows;

“(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of —

- (i) the question whether any law is inconsistent with or in contravention of this Constitution;**
- (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;**
- (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and**
- (iv) a question relating to conflict of laws under Article 191; and**
- (e) any other jurisdiction, original or appellate, conferred on it by legislation.”**

17. **Article 165(5)** has then specifically limited the jurisdiction of the High Court in the following manner;

“(5) The High Court shall not have jurisdiction in respect of matters—

- (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or**
- (b) falling within the jurisdiction of the courts contemplated in Article 162 (2).”**

18. A summary of these provisions is that apart from the Superior Courts which are the Supreme Court, Court of Appeal and the High Court, Parliament is empowered under **Article 162(2)** of the **Constitution** to establish Courts with the status of the High Court to hear and determine disputes relating to; (a) employment and labour relations; and (b) the environment and the use and occupation of, and title to, land. Under **Article 162(3)**, Parliament is empowered to determine the jurisdiction of the said Courts which are also granted the status of the High Court.

19. Pursuant to the provisions of **Article 162(3)** Parliament enacted **the Environment and Land Court Act, No. 19 of 2011** (hereinafter **ELC Act**) which came into effect on 30th August 2011. The object of the **Act** states as follows;

“An Act of Parliament to give effect to Article 162(2)(b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes”.

Section 13(2) of the **ELC Act**; then sets out the jurisdiction of the Environment and Land Court (hereinafter **ELC**) as follows;

“13 (2) In exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the Court shall have power to hear and determine disputes relating to environment and land, including disputes?

- (a) relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;**
- (b) relating to compulsory acquisition of land;**
- (c) relating to land administration and management;**
- (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and**
- (e) any other dispute relating to environment and land.”**

20. Looking at the above provisions it is clear that the High Court cannot exercise jurisdiction in regard to the matters set out in **section 13** of the **ELC Act** and further that the ELC has the exclusive jurisdiction to determine matters involving title to land as well as compulsory acquisition of land.
21. The Petitioners have, as stated above, filed this Petition alleging that their fundamental rights and freedoms under **Article 40** of the **Constitution** have been violated as a result of compulsory acquisition of the suit property without compensation. They are also seeking a declaration that they are the registered owners of the suit property. I have already found as is seen from above that this Court has no jurisdiction to determine matters involving title and ownership of land. As much as the High Court has jurisdiction to determine violations of the Constitution under **Article 23** of the **Constitution**, I am clear in my mind that it does not have jurisdiction to determine the instant Petition and the reasons are straight forward in that regard. Firstly, the acts that are the subject of this Petition involve title to the suit land, compulsory acquisition and compensation which falls squarely under the jurisdiction of the ELC as seen from the provisions of **Section 13** of the **ELC Act**.
22. Secondly, pursuant to the provisions of **Section 13(3)** of the **ELC Act**, ELC has jurisdiction to determine matters involving a violation of the Constitution. This Section states that;

“(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to the environment and land under Articles 42, 69 and 70 of the Constitution. ”

23. I therefore find that under **Article 162(3)** of the **Constitution** and **Section 13** of the **ELC Act**, the High Court has no jurisdiction to determine matters within the exclusive domain of the **ELC** and having so stated, I find no reason to delve into the merits or demerits of the Petition.
24. For the above reasons the Petition is dismissed and as to costs, since the dispute has certainly not been resolved and no Party has yet succeeded, let each party bear its own costs.
25. Orders Accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 18TH DAY OF JULY, 2014

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Mr. Kingara for Petitioner

Miss Muchiri for Respondent

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE