



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

CONSTITUTIONAL PETITION NO. E001 OF 2020

IN THE MATTER OF ARTICLES 3(1), 22, 23, 162 AND 258 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 111, 112, 113, 114, 122 AND 128 OF THE LAND ACT, 2012

AND

IN THE MATTER OF CONTRAVENTION OF THE BILL OF RIGHTS

UNDER ARTICLES 40(3) AND 47(1) OF THE CONSTITUTION OF KENYA, 2010

AND IN THE MATTER BETWEEN

PATRICK KITHINJI MUGAMBI.....PETITIONER

-VERSUS-

NATIONAL LAND COMMISSION.....1ST RESPONDENT

KENYA RAILWAYS CORPORATION.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

The Petitioner seeks the following prayers against the Respondents in his petition dated 4th December, 2020;

A) A declaration that his right to property without arbitrary deprivation without compensation is guaranteed by **Article 40 (3)** and the Respondents have contravened this right.

B) A declaration that the acts of the 1st Respondent have infringed on the Petitioner's right to fair administrative action guaranteed under **Article 47 (1)** of the **Constitution**.

C) An order compelling the Respondents to pay general damages, exemplary damages and aggravated damages to the Petitioner for the gross violation of the Petitioner's fundamental rights under **Article 40 (3)** and **47 (1)** of the **Constitution**.

D) An order compelling the 1st Respondent to pay fair and just compensation to the Petitioner in respect of the compulsory acquisition of the suit property.

E) A declaration that the revision of the acreage as per Gazette Notice dated 12th February, 2019 being 1547 and 1548 was arbitrary, without just cause and violates the Petitioner's right to just compensation and is breach of **Section 122 (3)** of the **Land Act** and hence null and void.

F) Interest on (c) above at Court Rates from the time of filing suit until payment in full.

G) The costs of this Petition be awarded to the Petitioner.

H) The Court do issue such other orders and further directions as it may deem fit.

The Petition is supported by the affidavits dated 4th December, 2020 and 25th May, 2021.

A summary of the Petitioner's case as can be discerned from the two affidavits and the accompanying annexures is as follows;

The Petitioner is the registered proprietor of all those parcels of land knowns as KAJIADO/KITENGELA/38936, 38937 and 38938 each of which measures 0.05 Hectares or thereabouts.

On 22nd December, 2017 and 2nd March, 2018 vide Gazette Notices 12526, 2032 and 2033 respectively, the 1st Respondent notified the public and all affected land owners that the Government intended to acquire the Petitioner's land parcels, among others on behalf of second Defendant for the construction of a Standard Gauge Railway phase 2A from Nairobi to Naivasha for a public purpose.

Pursuant to the said notices, the said Respondent appointed contractors who approached the Petitioner. The Petitioner allowed them entry into the suit property for the purposes of constructing an embankment for the Standard Gauge Railway.

Thereafter the first Respondent issued the Petitioner with three (3) awards of Kshs. 1, 704,300/= as compensation for the acquisition of the suit property.

When the Petitioner visited the 1st Respondent's offices on diverse dates to follow up on settlement of the awards, he was informed informally that the first Respondent was planning to revoke the said awards and revise them downwards.

Eventually, the first Respondent published gazette notice number 11371 dated 2nd November, 2018 to the effect that the awards had been cancelled.

The reasons for the cancellation ranged from discrepancies in computations, omissions and errors in the areas acquired and changes in size of land acquired as a result of project realignment among others.

The gazette notice advised that individual details of how each parcel of land was affected was available in the first Respondent's offices.

The Petitioner tried everything he could to contact the first Respondent for this purpose to no avail. He wrote several letters which were not responded to.

The construction of the Standard Gauge Railway through the Petitioner's property resulted in complete blockage to the property rendering them inadequate for any economic use and the value was reduced to zero.

It is for the above reasons that the Petitioner filed this suit.

Annexed to the Petitioner's affidavits are the following exhibits;

- (i) Copies of the Title Deeds for the three land parcels belonging to the Petitioner.
- (ii) Gazette Notice No. 12526 of 22nd December, 2017, Gazette Notice No. 2032 and Gazette Notice No. 2033 of 2nd March, 2018.
- (iii) Agreement for early entry into the Petitioner's suit property dated 22/11/2017.
- (iv) Copy of the Awards dated 25/4/2018.
- (v) Copy of Gazette Notice dated 2nd November, 2018.
- (vi) Gazette Notice No. 1547 dated 15th February, 2019.
- (vii) Gazette Notice No. 1548 of 15th February, 2019.
- (viii) Copies of letters written by the Petitioners Counsel to the first Respondent dated 18/8/2019, 26/11/2019, 17/7/2020 and 13/11/2020 all pursuing compensation for the Petitioner.

It is only the second Respondent who filed an answer to the Petition. The response is as follows;

Firstly, the Petitioner's suit property was not included in the gazette notices of 22nd December, 2017 or 2nd March, 2018.

Secondly, when the Petitioner's property was gazetted on 15th February 2020, the acreage affected was as follows;

- (a) Parcel No. 38935 – 0.00090

(b) Parcel No. 38937- 0.00070

(c) Parcel No. 38938-0.0060

Thirdly, the intended compulsory acquisition was not for the entire land owned by the Petitioner.

Fourthly, it is the second Respondent's contention that all the suit parcels have existing access.

Fifthly, the second Respondent contends that if the Petitioner feels that the remainder of the affected parcels is not economically viable, he is not barred under **Section 122 (3)** of the **Land Act** from making a formal request to the first Respondent.

Finally, the second Respondent concludes the reply by saying that the funds for compensation are with the first Respondent and it is up to the Applicant to follow up with them as its role was only to identify the land for acquisition and no more.

Counsel for the Petitioner filed written submissions on 28th October, 2021 while counsel for the second and third Respondents filed theirs on 24/11/2021 and 20th December 2021 respectively.

The issues raised by the Petitioner in the submissions are as follows;

(1) Whether the first Respondent's unilateral revocation of the awards dated 25/4/2018 was a violation of the Petitioner's Right to Fair Administrative Action.

*(2) Whether the Respondents' failure to compensate the Petitioner for over three (3) years after compulsorily acquiring his property is a violation of the principles of prompt and just compensation and his right to property guaranteed under **Article 40(3) of the Constitution**.*

(3) Whether the Petitioner is entitled to the reliefs sought and

(4) Who should bear the costs.

On the other hand, the second Respondent identified two issues for determination namely;

(1) Whether the Second Respondent violated the Petitioner's Constitutional Right to Property?

(2) Whether the Petitioner is entitled to the orders sought.

Counsel for the third Respondent identified four (4) issues for determination namely;

(1) Whether the Petitioner is the registered proprietor of the suit property.

(2) Whether the Petitioner's land was acquired through compulsory acquisition

(3) Whether the Petitioner is entitled to compensation.

(4) Who should bear the costs?

I have carefully considered the Petition in its entirety including the pleadings, affidavits annexures, submissions and the case law cited therein.

I find that the following issues would determine the Petition.

(1) Has the Petitioner proved that his land was compulsorily acquired by the Respondents?

(2) Has he proved that whatever land was left after acquisition has zero value?

(3) Was the Petition the right way to commence this suit?

(4) Who should bear the costs?

On the first issue, I find that the Petitioner has not proved that his property was compulsorily acquired by the Respondents for the following reasons;

Firstly, he has failed to prove that his property was in the Gazette Notices numbers 12526 OF 22nd December, 2017 and that of 2nd March, 2018. The first time his name and his property appear is on 15th February, 2019.

Secondly, the Petitioner has failed to prove that none of the six (6) grounds listed in Gazette Notice Number 11371 of 2/11/2018 apply to him.

The burden was always on the Petitioner to establish his claim on a balance of probabilities. He needed to adduce cogent and consistent evidence to prove this. He did not do so because the Gazette Notices do not apply to him.

On the second issue, I find that no report of a valuer was exhibited to prove that any land was acquired and that the remainder had zero value. Yet this is one of the averments in the petition.

Under **Section 107 of the Evidence Act**, it was incumbent upon the Petitioner to prove each and every averment in the Petition.

On the third issue, I find that the Petition was not the right method of commencing the suit.

In this regard, I am persuaded by the submissions by the counsel for the second Respondent that the Petitioner in this case has not set out with a degree of reasonable precision his claim against the Respondents as is required of all constitutional references.

This was ratio decidendi in the case of **Anarita Karimi Njeru – vs- The Republic Miscellaneous Application Number 4 of 1979 at Nairobi also (1979) eKLR**.

Furthermore, in the case of **Hon. Uhuru Muigai –VS- Nairobi Star Publications Limited, Petition Number 187 of 2012 (2013) eKLR** it was held that;

“It is important to recognize that even if a case does raise a constitutional matter, the assessment of whether the case should be heard by this Court rests instead on the additional requirements that access to this court must be in the interests of justice and not every matter will raise a constitutional issue worthy of attention.”

I find that had the suit been commenced vide a plaint, the issues in dispute would have been defined more precisely by elaborate witness statements and documents including valuation reports and photographs.

Finally on costs, I find that each party should bear its own because the Petitioner may still bring this claim in another form.

The upshot is that Petition is dismissed with no order as to costs.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 10TH DAY OF MARCH, 2022.

M.N. GICHERU

JUDGE