



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 584 of 2012

JOHN GITONGA GACHUHI 1ST PETITIONER

EILEEN WAMBUI NJOROGE 2ND PETITIONER

PETER NJOROGE NJOROGE 3RD PETITIONER

SAMUEL KARANJA MURIAKARA 4TH PETITIONER

SALOME NJAMBI GITAU as Administratrix

and Legal Representative to the estate of

ANDREW GITAU NG'ANG'A(deceased) 5TH PETITIONER

AND

THE COMMISSIONER OF LANDS 1ST RESPONDENT

MINISTRY OF LANDS 2ND RESPONDENT

THE KENYA NATIONAL HIGHWAYS

AUTHORITY..... 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

THE COUNTY COUNCIL OF KIAMBU..... 5TH RESPONDENT

THE TOWN COUNCIL OF KIKUYU6TH RESPONDENT

JUDGMENT

1.This petition relates to compulsory acquisition by the Government, for construction of the Nairobi Southern by-pass, of certain parcels of land owned by the petitioners. It is the petitioners' contention that the Government has compulsorily acquired their land without paying compensation.

2. The petitioners are the registered owners of the following land parcels (“the suit properties”);

(a) The 1st petitioner is the registered proprietor of **Muguga/Gitaru/842/59** having purchased it from the original allocated in 1995 and was issued with a certificate of lease.

(b) The 2nd petitioner is the registered proprietor of **Muguga/Gitaru/842/62** having been allocated the same by the County Council of Kiambu.

(c) The 3rd petitioner is the owner of **Muguga/Gitaru/1042** which was formerly **Muguga/Gitaru/487/85** and which was allocated by the County Council of Kiambu.

(d) The 4th petitioner is the registered proprietor of **Muguga/Gitaru/842/63** originally owned by the County Council of Kiambu.

(e) The 5th petitioner as the legal representative of the estate of Andrew Gitau Ng’ang’a (deceased) is the registered owner of **Muguga/Gitaru/842/1** which was originally part of **Muguga/Gitaru/842**.

3. The Town Council of Kikuyu, the 6th respondent, was hived off from the County Council of Kiambu, the 5th respondent, as evidenced by an Orders contained in **Legal Notices Nos. 77 and 78** made by the Minister for Local Government dated 31st January 1991 effectively bringing the suit properties under its jurisdiction.

4. The genesis of this petition is the **Gazette Notice Number 3788** dated 26th May 2006 in which the Commissioner of Lands gazetted a list of properties to be compulsorily acquired and whose owners would be entitled to compensation. The names of the petitioners were omitted from the Gazette Notice but the original titles being **Muguga/Gitaru/842** and **Muguga/Gitaru/487** were listed as belonging to the County Council of Kiambu. As a consequence, the County Council of Kiambu would be entitled to compensation rather than the petitioners.

5. The petitioners’ contend that they did not know their land parcels would be adversely affected by the Southern bypass and only came to learn of it when the road Building Contractors started marking out areas where the Nairobi Southern bypass would be constructed on the basis that the suit properties had been compulsorily acquired. The petitioners aver that this move amounts to a violation of their right to property protected under **Article 40**.

6. Mr Njuguna, learned counsel for the petitioners, submitted that it is the petitioners who ought to have appeared on the Gazette Notice as the registered proprietors of the suit properties and not the County Council of Kiambu as it neither had jurisdiction nor ownership over the suit properties. The petitioners accordingly seek orders to be declared the owners of the suit properties and to be compensated by the State for the acquisition of their properties.

7. The respondents did not file any documents in opposition but I heard their respective advocates in response. Mr Moimbo, learned counsel for the 1st, 2nd and 4th respondents submitted that there appeared to be a dispute regarding the ownership of the property and the court ought to take this into account in making its orders.

8. Ms Gichuhi, learned counsel for the Town Council of Kikuyu, submitted that the suit properties were allocated by the County Council of Kiambu yet they belonged to the Town Council of Kikuyu by reason of the **Legal Notices Nos. 77 and 78** dated 31st January 1991. The legal notices which created the Town Council terminated jurisdiction of the County Council over the suit properties and therefore the allocations of the suit properties to the petitioners were *ultra vires*. Town Council of Kikuyu therefore asserts that it was the legal owner of the properties and it is entitled to compensation.

Determination

9. I am satisfied on the basis of the depositions filed in court that the petitioners are the duly registered owners of the suit properties having been issued with title certificates of leases in accordance with the law. The deposition of John Gitonga Gachuhi sworn on 17th December 2012 demonstrates that the issue of compulsory acquisition of the suit properties was raised back in 2006 by the petitioners. The Chief Engineer Roads wrote to the Ministry of Lands a letter dated 7th August 2006 requesting it to investigate the claims for compensation made by amongst other persons, the petitioners, before compensation any payment is made. Despite several reminders to the Ministry of Lands and later to the Kenya National Highways Authority, the authority charged with construction of the by-pass, from the petitioners' advocates, *Njoroge Regeu and Company Advocates*, no response on the issue was forthcoming. This evidence is not contested by the respondents.

10. The only issue for determination is whether the due process of compulsory acquisition as required by the law was followed. **Section 75** of the former Constitution, the regime under which the process of acquisition in question was initiated, protected the right to property and required that, "*provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.*"

Part II - PROCEDURE FOR COMPULSORY ACQUISITION OF LAND

11. **Part II** of the *Land Acquisition Act, (Chapter 295 of the Laws of Kenya)* (now repealed) sets out the procedure for compulsory acquisition of land. **Part VIII** of the *Land Act, 2012 (No. 6 of 2012)* which repealed the *Land Acquisition Act* makes provisions for compulsory acquisition of interests in Land. **Article 40** of the Constitution protects private property rights. **Article 40(3)** provides for the conditions which must be met before the State can proceed with compulsory acquisition. The constitution requires, "*prompt payment in full, of just compensation to the person.*" As I stated in *Isaac Gathungu Wanjohi and Another v Attorney General and Others, Nairobi Petition No. 154 of 2011 [2012] eKLR* "*Article 40(3) of the Constitution protects a person from deprivation of property by the state unless the deprivation is for a public purpose or in public interest and is carried out in accordance with the Constitution or an Act of Parliament and prompt payment in full of just compensation. This is achieved through following the procedure set out in the Land Acquisition Act.*"

12. As the ownership of the suit properties is not disputed, I find and hold that they are entitled to compensation as a result of the acquisition intended to provide for the Nairobi Southern By-pass. As the petitioners are the owners of the suit properties, **Gazette Notice No. 3788** shall be rectified to reflect the names of the petitioners and their properties and the law concerning compulsory acquisition shall be applied accordingly to ensure that they are paid compensation.

13. As I have declared that the petitioners are entitled to compensation, it is unnecessary to issue an order to stop construction of the road as this would be unduly onerous on the State and its agencies and contrary to public interest (see *Maisha Nishike Limited v Commissioner of Lands Nairobi HC Misc. Civil App. No. 66 of 2010 [2011] eKLR*).

14. The issue of compensation, as I have stated was raised way back in 2006, this suit has now been brought to vindicate the rights to compensation. It would have been unnecessary if the Ministry of Lands and the Commissioner of Lands dealt with then issue then as requested by the Ministry of Roads. I therefore order that costs of the suit be paid by them.

15. Before I proceed to dispose of the matter, I must deal with the issue raised by counsel for the 6th respondent. If there is a dispute as to the properties within the jurisdiction of the Town Council of Kikuyu between it and County Council of Kiambu it is to be resolved by the two local authorities. I do not think that this issue in any way implicates the petitioners' properties. In any case, the petitioner deposition shows that all transactions regarding the suit properties were approved by the respective authorities without raising any issue. If, on the other hand the Town Council of Kikuyu has any claim against the petitioners, it is free to commence proceedings against them. I do not think their claims affect the subject matter of this suit at this stage.

Disposition

16. In light of the findings I have made above, I hereby make the following orders;

a) **Gazette Notice No. 3788 dated 26th May 2006** shall be rectified by deleting the entry relating to **“Plot No 842 – Kiambu County Council and Plot No. 487 – County Council of Kiambu”** and replacing the same with the following;

“Muguga/Gitaru/842/59 – John Gitonga Gichuhi.

Muguga/Gitaru/842/62 - Eileen Wambui Njoroge.

Muguga/Gitaru/1042 (formerly Muguga/Gitaru/487/85) – PeterNjoroge Regeru.

Muguga/Gitaru/842/62 – Samuel Karanja Muriakiara.

Muguga/Gitaru/842/1 – Salome Njambi Gitau (administrator of Andrew Gitau Ng’ang’a (Deceased).”

b) The order in (i) above shall be published in the Kenya Gazette within 14 days from the date hereof.

c) The 1st, 2nd and 4th respondents shall comply with the law regarding compulsory acquisition of the petitioners’ properties and the petitioners shall accordingly be paid compensation for the acquisition of their properties in accordance with the law.

d) The costs of the suit shall be paid by the 1st and 2nd respondents.

DATED and DELIVERED at NAIROBI this 19th day of April 2013

D.S. MAJANJA
JUDGE

Mr Njuguna instructed by Kiarie Njuguna & Co. Advocates for the petitioners.

Mr Moimbo, Litigation Counsel, instructed by the State Law Office for the 1st, 2nd and 4th respondents

Mr Dulo instructed by Dulo and Company Advocates for the 3rd respondent

Mr Gikonyo instructed by J. Ngaii Gikonyo and Company Advocates for the 5th respondent.

Mrs Gichuhi instructed by G. N. Gichong’i Gichuhi and Company Advocates for the 6th respondent