



**Kabungo (Suing as Registered Proprietor and Trustee of 35 Beneficiaries of LR. No. Aguthi/Gatitu/3447) v National Land Commission & another (Environment & Land Case 15 of 2020) [2022] KEELC 2882 (KLR) (19 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2882 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT & LAND CASE 15 OF 2020**

**JO OLOLA, J**

**MAY 19, 2022**

**BETWEEN**

**EPHRAIM GATHUMA KABUNGO (SUING AS REGISTERED PROPRIETOR AND TRUSTEE OF 35 BENEFICIARIES OF LR. NO. AGUTHI/GATITU/3447) ..... PLAINTIFF**

**AND**

**NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> DEFENDANT**

**THE MINISTRY OF AGRICULTURE ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. By the Notice of Motion dated and filed herein on 9<sup>th</sup> March 2020, Ephraim Gathuma Kabungo (hereinafter “the Plaintiff”) prays for orders:
  1. Spent;
  2. That the Honourable Court recalls immediately and keeps in its custody the certificate of title for L.R No. Aguthi/Gatitu/3447, which was issued on 17<sup>th</sup> January, 2014 or subsequently, (or titles, in case the land has since been sub-divided, and other sub-titles created tracing root to this lead title) by the Nyeri County Land Registrar and now held and kept by the 2<sup>nd</sup> Defendant herein to ensure that Land Parcel L.R No. Aguthi/Gatitu/3447, has only one lawful certificate of Title; this being the legal title issued to the Plaintiff and the other registered proprietors of the parcel on 14<sup>th</sup> December, 1999 and that the Court retains possession of the title(s), until the defendants pay full compensation to the owners of the private property;
  3. That the 2<sup>nd</sup> D(efendant) pay damages for the illegal interference with the P(laintiff’s)title; and
  4. That the costs of this application be provided for.



2. The application which is supported by an affidavit sworn by the Plaintiff is premised on the grounds:
  - (i) That the 2<sup>nd</sup> Defendant embarked on a process of compulsory acquisition of LR No. Aguthi/Gatitu/3447 through the 1<sup>st</sup> Defendant's predecessor in office, that is the Commissioner of Lands in January, 2007 and has not yet completed the process after 13 years because of the mismanagement of the process;
  - (ii) That the 2<sup>nd</sup> Defendant moved the Nyeri County Land Registrar on 17<sup>th</sup> January, 2014 to illegally issue a second title for LR No. Aguthi/Gatitu/3447, without paying any compensation to the Plaintiff and/or any of the 35 beneficiaries who were confirmed by the Public Inquiry on 12<sup>th</sup> April, 2007 and subsequently by the Nyeri ELC on 23<sup>rd</sup> September, 2015;
  - (iii) That the Plaintiff's private property should not have a second title issued and held by the Government as this undermines his lawful title and renders his useless, wherefore the Government has expropriated protected private land illegally and without paying the mandatory compensation so that it can become public land; and
  - (iv) That the 2<sup>nd</sup> Defendant though well aware who were the registered owners of the land left the Plaintiff outside any awards for compensation and also systematically, for 13 years (1995 – 2007) refused to pay the market rent for the land to the Plaintiff and others.
3. Both the National Land Commission and the Ministry of Agriculture sued herein as the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively neither entered appearance nor did they file any response to the Plaintiff's claim.
4. I have accordingly carefully perused the Plaintiff's application, the Supporting Affidavit and the annexures thereto. I have similarly perused and considered the oral submissions made before me by Mr. Wanyiri Kihoro, Learned Counsel for the Plaintiff.
5. The Plaintiff herein – Ephraim Gathuma Kabungo brings this suit as the registered proprietor and trustee of 35 other beneficiaries of a parcel of land known as LR No. Aguthi/Gatitu/3447. It is the Plaintiff's case that the Government through the 2<sup>nd</sup> Defendant did embark on a process of compulsory acquisition of the said parcel of land measuring some 54.55 Ha in January, 2007 but is to-date, more than 13 years down the line, yet to complete the process due to mismanagement.
6. The Plaintiff accuses the 2<sup>nd</sup> Defendant of proceeding on 17<sup>th</sup> January, 2014 to illegally acquire title for the suit property without paying any compensation to the Plaintiff and/or the 35 beneficiaries who were entitled to the same. It is the Plaintiff's case that by so doing, the Government had expropriated private land without compensation and thereby violating the beneficiaries rights as protected under Article 40 of *the Constitution*.
7. The two Defendants did not file any response to the Plaintiff's application. From the documents exhibited by the Plaintiff, it was not in contention that the said parcel of land was on 14<sup>th</sup> December, 1999 registered in the name of the Plaintiff and four other individuals named therein as Ephraim K. Wambugu, Kariuki M. Wambugu, George Mathangani Wambugu and Peter M. Maina.
8. Subsequently and vide a Gazette Notice No. 1466 published in the Kenya Gazette Volume CIX – No. 16 of 23<sup>rd</sup> February 2007, the Government through the 1<sup>st</sup> Defendant's predecessor – the Commissioner of Lands gave notice of its intention to acquire the said parcel of land from the five (5) named proprietors thereof for the purposes of construction of Wambugu Farmers Training Centre.



9. It was apparent that the suit land was subsequently acquired by the Government as per the Gazette Notice. That much is clear from a copy of the Green Card for the said parcel of land exhibited by the Plaintiff which Green Card reveals that the parcel of land was on 17<sup>th</sup> October, 2014 registered in the name of the Government of the Republic of Kenya.
10. It is the Plaintiff's case that the said acquisition was wrongful as the Plaintiff and the said 35 beneficiaries are yet to be compensated for their land more than 13 years after the land was gazetted for the construction of the Farmers Training Centre.
11. In regard to the issue of compulsory acquisition of land, Article 40(3) of *the Constitution* provides as follows:
 

“The state shall not deprive a person of property of any description or of any interest in, or right over, property of any description, unless the deprivation:-

  - (a) Results from an acquisition of land or an interest of land, or title to land, in accordance with Chapter Five; or
  - (b) Is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that:-
    - (i) Requires prompt payment in full of just compensation to the person; and
    - (ii) Allows any person who has an interest in, or right over, that property a right of access to a Court of law.”
12. Commenting on the elaborate process set out under the law in *Patrick Musimba -vs- National Land Commission & 4 Others* (2016) eKLR, the 5 Judge Bench comprising the Honourable Justices Isaac Lenaola (as he then was), Mumbi Ngugi, L. Achode, G. V. Odunga and J. L. Onguto observed in extenso as follows:
  83. The statutory framework for compulsory acquisition is founded under Part VIII of the Land Act, No. 6 of 2012.
  84. With a view to ensuring that there was a real, rather than a fanciful or remote connection between the compulsory acquisition and the States development needs, Part VIII was drafted in detail. History in the practice of compulsory acquisition prompted such detail. Not only was the State to keep its right to compulsorily acquire but the citizen too was to be protected from wanton and unnecessary deprivation of his private property.
  85. In summary, the process of compulsory acquisition now runs as follows:-
  86. Under Section 107 of the Land Act, the National Land Commission (the 1<sup>st</sup> Respondent herein) is ordinarily prompted by the National or County Government through the Cabinet Secretary or County Executive Member respectively. The land must be acquired for a public purpose or in the public interest as dictated by Article 40(3) of *the Constitution*. In our view the threshold must be met; the reason for the acquisition must not be remote or fanciful. The National Land Commission needs to be satisfied in those respects and this it can do by undertaking the necessary diligent inquiries including interviewing the body intending to acquire the property.



87. Under Section 107 and 110 of the Land Act, the National Land Commission must then publish in the Gazette Notice of the intention to acquire the land. The notice is also to be delivered to the Registrar as well as every person who appears to have an interest in the land.
  88. As part of the National Land Commission is due diligence strategy, the National Land Commission must also ensure that the land to be acquired is authenticated by the Survey Department for the rather obvious reason that the owner be identified. In the course of such inquiries, the National Land Commission is also to inspect the land and do all things as may be necessary to ascertain whether the land is suitable for the intended purpose. See Section 108 of the Land Act
  89. The foregoing process constitutes the preliminary or pre-inquiry stage of the acquisition.
  90. The burden at this stage is then cast upon the National Land Commission and as can be apparent from a methodical reading of the Sections 107 through 110 of the Land Act, the land owner's role is limited to that of a distant bystander with substantial interest.
  91. Section 112 of the Land Act then involves the land owner directly for purposes of determining proprietary interest and compensation. The section has an elaborate procedure with the National Land Commission enjoined to gazette an intended inquiry and the service of the notice of inquiry on every person attached. The inquiry hearing determines the person interested and who are to be compensated. The National Land Commission exercises quasi – judicial powers at this stage.
  92. On completion of the inquiry, the National Land Commission makes a separate award of compensation for every person determined to be interested in the land and then offers compensation. The compensation may take either of the two forms prescribed. It could be a monetary award. It could also be land in lieu of the monetary awards, if land of equivalent value, is available. Once the award is accepted, it must be promptly paid by the National Land Commission. Where it is not accepted, then the payment is to be made into a special compensation account held by the National Land Commission. See Sections 113 – 119 of the Land Act.
  93. The process is completed by the possession of the land in question being taken by the National Land Commission once payment is made even though the possession may actually be taken before all the procedures are followed through and no compensation has been made. The property is then deemed to have vested in the national or County Government as the case may be with both the proprietor and the Land Registrar being duly notified. See Sections 120 – 122 of the Land Act.
  94. If land is so acquired, the just compensation is to be paid promptly in full to persons whose interest in land have been determined. See Section 111 of the Land Act. This is in line with the Constitutional requirement under Article 40(3) of *the Constitution* that no person shall be deprived of his property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation.”
13. In the matter before me, the two Defendants have not denied that they compulsorily took over the suit land and have converted the same to a Farmers Training Centre without compensating the Plaintiff and the other 35 beneficiaries.
  14. At it were, *the Constitution* demands that where land is so acquired, the just compensation is to be paid promptly in full to those like the Plaintiff whose interest in the land have been determined. While they



only managed to remove the Plaintiff's and other beneficiaries names in the title in the year 2014, it is apparent that the 2<sup>nd</sup> Defendant took over the said property and has been using the same as a Farmers Training Centre since the year 2007.

15. From the material placed before me, it was clear that following an inquiry held on 12<sup>th</sup> April 2007, it was ascertained that the suit property had 35 beneficiaries who were eligible to receive compensation from the 1<sup>st</sup> Defendant's predecessor in title. That fact was again ascertained in a decision delivered by the High Court on 23<sup>rd</sup> September, 2015 in Nyeri High Court Misc. Civil Application No. 9 of 2009 (OS) which suit was instituted by the 1<sup>st</sup> Defendant's predecessor in title – the Commissioner of Lands.
16. That being the case, it was difficult to see why to-date the Plaintiff remains uncompensated for his property that was compulsorily acquired. It follows that the Certificate of Title acquired by the Government for the said property was obtained contrary to the law and in violation of the rights of the Plaintiff and other beneficiaries to the land and the same ought to be surrendered to this Court as sought by the Plaintiff.
17. While the Plaintiff had also sought an award of general damages, nothing was placed before me in support of the contention and I did not find any basis for the award of the same at this interlocutory stage.
18. It follows that the application partially succeeds in terms of Prayer No. 2 thereof. The Defendants are hereby accordingly directed jointly and severally to produce and surrender the said title (or titles) to this Court within 45 days from today.
19. The Plaintiff shall have the costs of the application.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 19TH DAY OF MAY, 2022.**

In the presence of:

Mr. Wanyiri Kihoro for the Applicant

No appearance for the Respondent

Court assistant - Kendi

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**J. O. OLOLA**

**JUDGE**

