



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

PETITION NO. 262 OF 2011

IN THE MATTER OF AN APPLICATION UNDER ARTICLE 22 (1) & ARTICLE 23 OF THE
CONSTITUTION OF KENYA, 2010 FOR THE ENFORCEMENT OF THE FUNDAMENTAL
RIGHTS AND FREEDOMS

AND

IN THE MATTER OF THE NORTHERN CORRIDOR TRANSPORT IMPROVEMENT PROJECT
EMBAKASI-MACHAKOS TURNOFF AND MACHAKOS-SULTAN HAMUD ROAD

AND

IN THE MATTER OF COMPULSORY ACQUISITION OF THE PROPERTY KNOWN AS LAND
REFERENCE NUMBER 12498/4

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLE 40, ARTICLE 47, AND ARTICLE 35 OF THE CONSTITUTION OF
KENYA, 2010

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND
PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH
COURT PRACTICE AND PROCEDURE RULES, 2006

BETWEEN

MATHATANI LIMITED PETITIONER

VERSUS

1. THE COMMISSIONER OF LANDS
2. THE ATTORNEY GENERAL
3. THE CHIEF ENGINEER MINISTRY OF ROADS
4. THE KENYA NATIONAL HIGHWAY'S AUTHORITY
5. NICHOLAS O'DWYER & COMPANY LIMITED OF IRELAND
6. ABDUL MULLICK ASSOCIATES LIMITED (KENYA)... RESPONDENTS

J U D G M E N T

1. The Petition herein is dated 20/9/2011 and is supported by the affidavit of **Sue Leonard**, a Director of the Petitioner Company. The Petitioner also filed further affidavits sworn on 5/6/12 and on 2/1/13 by a current Director of the Company, **Zafrullah Khan**.
2. The case for the petitioner as set out in the said affidavit is that the Petitioner is the registered proprietor of all that parcel of land situate West of **Machakos Municipality** in **Machakos District** measuring 106.83 hectares and known as **LR No. 12498/4** registered as title **No. IR 88874** (herein after suit property).
3. That in the year 2007, it came to the Petitioner's attention that its aforesaid property was earmarked by the Government for compulsory acquisition for the purpose of rehabilitation and/or construction of the **Embakasi – Machakos Turn off** and **Machakos Turn off Sultan Hamud Road**.
4. The Petitioner's complaint is that:-
 - a. **The Petitioner was not served with the mandatory preliminary notice published in the Gazette in pursuance of the provisions of Section 3 of the Land Acquisition Act that the Government intended to acquire 67.45 Acres of the Petitioner's Land for the purpose on construction of Embakasi-Machakos turnoff and Machakos Turn-off-Sultan Hamud Road.**
 - b. **The 1st Respondent neglected, refused and/or failed to serve upon the Petitioner with the notice of acquisition pursuant to provisions of 6 (2) of the Land Acquisition Act that the government intended to acquire 67.45 Acres of the Petitioner's land.**
 - c. **The 1st Respondent neglected, refused and/or failed to serve upon the Petitioner the notice of inquiry pursuant to Sections 9 (1) (b) of the Land Acquisition Act calling upon it to deliver its written claim to compensation.**
 - d. **By reasons of (c) above, the Petitioner was denied a chance to attend the inquiry and therefore denied its right to be heard pursuant to Sections 9 (6) of the Land Acquisition Act.**
 - e. **The final award of compensation of Kshs.9,652,730 issued on 4th March, 2009 4 years later after the purported inquiry of 12th and 13th October, 2006 failed to conform to the principle of prompt and just compensation guaranteed under Article 40 (3) (b) (ii) of the Constitution.**
5. After the Petitioner got wind of the compulsory acquisition, its requests that it be furnished with the proposed road design/ acquisition plan to enable it challenge or see the justification for the acquisition of the enormous piece of its land measuring 67.45 acres and assess how the proposed design caters for the utilization of its remainder of the land fell on deaf ears.
6. The 1st Respondent failed to furnish the Petitioner with details of the inquiry, maps, and/or drawings in regard to the 67.45 acres of the Petitioner's property that was to be acquired. The 1st Respondent also failed to furnish the Petitioner with the valuation report in support of the award of Kshs.9,652,730/=.
7. On 10/3/2009, the Petitioner rejected the award of compensation and filed a reference with the **Land Acquisition Compensation Tribunal** challenging the legality of the acquisition of the Petitioner's property.
8. That the **Tribunal** unanimously found that the 1st Respondent had failed to comply with the provisions of the **Land Acquisition Act** but that the **Tribunal** lacked the jurisdiction to quash the acquisition.
9. The Petitioner seeks the following declarations and orders:-
 - i. **A declaration that the compulsory acquisition of 67.45 of the Petitioner's land by the 1st Respondent without adhering to strict and mandatory provisions of the Land Acquisition Act violated the Petitioner's constitutional right guaranteed under Article 40 (3) (a) & (b) not to be arbitrary deprived of its property by the state.**
 - ii. **A declaration that the failure by the 1st Respondent to comply with the mandatory provisions of the Land Acquisition Act violated the Petitioner's Constitutional right to an administrative action that is lawful, reasonable and procedurally fair guaranteed under Article 47 (1) of the Constitution.**
 - iii. **A declaration that the gazette notices No. 6320 and 6321 dated 11th August, 2006 earmarking 67.45 acres of the Petitioner's property for acquisition and the notice of inquiry respectively**

failing and/or omitting to identify the Petitioner as the registered proprietor of L.R. No. 12498/4 and the public body for whom the land was being acquired were inadequate, invalid and defective.

- iv. A declaration that the initial gazette notice No. 7570 dated 23rd September, 2005 earmarking 6.98 Hectares of the Petitioner's property for acquisition and indicating that the Government of Kenya is the registered proprietor was and is defective.
- v. A declaration that the gazette notices No. 6320 and 6321 dated 11th August, 2006 and gazette notice No. 7570 dated 23rd September, 2005 failing to identify and/or disclose the name of the Petitioner as the Registered proprietor of L.R. No. 12498/4 violated the Petitioner's right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair guaranteed under Article 47 (1) of the Constitution.
- vi. A declaration that the 1st Respondent's unilateral award of compensation dated 4th March 2009 and issued four years after the purported inquiry of 12th and 13th October 2006 is null and void and cannot be regarded as prompt and just compensation contemplated by Article 40 (3) (b) of the Constitution and section 8 of the Land Acquisition Act Cap 295.
- vii. A declaration that the 1st Respondent was under a statutory duty to comply with the provisions of the Land Acquisition Act in compulsorily acquiring 67.45 acres of the Petitioner's property for the proposed construction of Embakasi-Machakos turnoff and Machakos turn-off-Sultan Hamud Road.
- viii. A declaration that the 1st Respondent was under a statutory duty under section 3 and section 6 (2) to serve on the Applicant the notice of intended acquisition and the notice of acquisition.
- ix. A declaration that the 1st Respondent was under a statutory duty under Sections 9 (1) (b) of the Land Acquisition Act to serve on the Applicant a notice of inquiry to enable it prepare a written claim for compensation to be submitted at the inquiry.
- x. A declaration that the 1st Respondent was under a statutory duty to afford the Petitioner a right to be heard at the inquiry under Section 9 (6) of the Land Acquisition Act.
- xi. A declaration that the actions of the 1st Respondent in failing to serve the Petitioner with the notice of inquiry pursuant to Sections 9 (1) (b) and thereby denying it a chance to be present and/or be heard at the purported inquiry of 13th and 14th October, 2006 pursuant to Section 9 (6) of the Land Acquisition Act violated the Petitioner's Constitutional right to an administrative action that is lawful, reasonable and procedurally fair guaranteed under Article 47 (1) of the Constitution.
- xii. A declaration that the 1st Respondent final award of compensation dated 4th March, 2009 awarding the Petitioner Kshs.9,652,730/= for 67.45 acres to be compulsorily acquired is unjust, null and void as the procedures culminating into it were not strictly adhered to by the 1st Respondent.
- xiii. A declaration that the acquisition of the 67.45 acres of the Petitioner's land by the 1st Respondent without complying with the mandatory provisions of the Land Acquisition Act was and is unlawful.
- xiv. A declaration that the acquisition of 67.45 acres of the Petitioner's land by the 1st Respondent for a mere construction of Embakasi-Machakos turnoff and Machakos turn-off-Sultan Hamud Road is excessive and unreasonable by any standard.
- xv. A declaration that the failure by the 3rd, 4th, 5th and/or 6th Respondents to furnish the Petitioner with the proposed road design to enable it challenge and/or assess how much of its physical land requirement, in terms of length and width, would be affected so as to justify the extraction of its enormous portion of land and how the plan caters for it to continue utilizing the resultant two parcels from severance violates its Constitutional right to access information guaranteed under Article 35 of the Constitution.
- xvi. A declaration that the delay and/or laxity of the 1st Respondent in furnishing the Petitioner with a map/plan and valuation report regarding the specific portion of 67.45 acres to be compulsorily acquired contravened the Petitioner's Constitutional right to a fair administrative action that is expedient, reasonable and lawful under Article 47 (1) of the Constitution.
- xvii. Judicial review order of *certiorari* do issue to remove into the High Court and quash the

decision of the 1st Respondent to acquire 67.45 acres of the Petitioner's land without following the mandatory legal provisions of the Land Acquisition Act.

- xviii. **Judicial Review order of certiorari do issue to remove into the High Court and quash the 1st Respondent delayed award of compensation of kshs.9,652,730/= to the Petitioner dated 4th March, 2009 which was arrived at without involving the Petitioner at the inquiry.**
- xix. **Judicial Review order of prohibition restraining and/or prohibiting the 3rd, 4th, 5th, and 6th Respondent and/or their agents or servants from interfering commencing, carrying out and/or supervising any construction work on L.R. No. 12498/4 belonging to the Petitioner.**
- xx. **The court to make, issue and give such further, other and consequential orders, writs and directions as it may consider just, fit and/or appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of Article 40 (1) & (3) and Article 47 (1) of the Constitution of Kenya, 2010 in relation to the Petitioner.**

10. The 1st Respondent, **Commissioner of Lands** and 2nd Respondent the **Attorney General** opposed the Petition as deponed in the replying affidavit sworn by **Elias Gitari Rwigi**, the **Assistant Commissioner of Lands**, on 23/10/12. It is contended in the said affidavit that the land the subject matter of this case was compulsorily acquired vide Gazette Notice **Nos. 7570 and 7571** of 23rd September 2005 and **No. 6320 and 6321** of 11th August 2006. That all the procedures of acquisition were followed and an award of compensation made. That the Petitioner was dissatisfied with the award of compensation and contested the adequacy thereof before the **Land Acquisition Tribunal** in case **No. 32 of 2009**. That in its ruling the tribunal directed the **Commissioner of Lands** to make a new offer of compensation to the Petitioner.

11. It is contended that service was effected upon the Petitioner under **Section 33 (c) of Cap 295** as access was denied and it was not possible to effect personal service on the Petitioner.

12. It was further stated that the **Commissioner of Lands** uses acquisition plans and the same were availed to the petitioner during the **Tribunal** hearings. That the Petitioner appeared before the **Tribunal** which **Tribunal** deals with issues of adequacy of award and determination of rights of those identified for compensation and therefore the presumption is that the Petitioner did not contest the process of acquisition and was only concerned with the adequacy of the compensation.

13. There was no appearance by the 3rd Respondent, the **Chief Engineer Ministry of Lands**.

14. The 4th Respondent, the **Kenya National Highways Authority** opposed the petition through a replying affidavit sworn on 12/1/2012 by the Project Technical Team Leader/Manager, **David Amukhuma Muchilwa**.

It is contended that the 4th Respondent is non suited in this case as it is not charged with the responsibility of acquiring land under the **Land Acquisition Act**. According to the 4th Respondent, they forwarded the proposed outline design to the Ministry of Roads for the relevant government office to determine how much land it would need to acquire for the purpose of the project.

15. For the 5th and 6th Respondents, a replying affidavit was sworn on 25/10/11 by **David Muganda**, the Chairman of the Board of Directors of the 6th Respondent. The 5th and 6th Respondents won the tender for providing the consultancy services for the supervision of the rehabilitation of the proposed road. That under the contract executed with the Ministry of Roads and Public Works, their mandate was expressly stated as supervision of the construction. It is averred that the 5th and 6th Respondents commenced their work in November 2005.

16. I have considered the rival pleadings and submissions of the Petitioner and the Respondents. This case revolves around the issue of compulsory acquisition of the Petitioner's land.

17. The process of compulsorily acquiring the Petitioner's land began before the promulgation of the new **Constitution** in the year 2010. However, any rights provided for under the former **Constitution** were carried over in the new **Constitution** (See **Duncan Otieno Waga -vs- the A.G. - H.C Petition No. 94 of 2011** and section 6 & 7 of the **Sixth Schedule** of the **Constitution 2010**).

18. **Article 40** of the **Constitution of Kenya** provides for the protection of right to property. **Article 40 (1)** provides as follows:-

“Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-

- a. **of any description; and**
- b. **in any part of Kenya.”**

Article 40 (3) 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 in land or a conversion of an interest in 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.”**

19. The **Land Acquisition Act** (now repealed) provided for the procedure to be followed in the compulsory acquisition of property by the **Government of Kenya**. When the compulsory acquisition herein began, the **Land Acquisition Act Cap 295 Laws of Kenya, Section 3** of the **Land Acquisition Act** provided as follows:-

“Whenever the Minister is satisfied that the need is likely to arise for the acquisition of some particular land under section 6, the Commissioner may cause notice thereof to be published in the Gazette, and shall deliver a copy of the notice to every person who appears to him to be interested in the land.”

20. The Petitioner’s contention is that they were not served with the requisite gazette notices as required by the law. The Petitioner has pointed out that he found that a special **Gazette Notice No. 6320** dated 11/8/2006 was issued earmarking 27.3 Hectares (67.45 Acres) of his property for compulsory acquisition. In reply to the issue of notice the replying affidavit sworn on behalf of the 1st and 2nd Respondent asserted that service was effected on the Petitioner under **Section 333 (c)** of the **Land Acquisition Act Cap 295 Laws of Kenya**. The said **Section 33 (c)** provides as follows:-

“A Notice which may be given under this Act may be served on a person-

- a. **By delivering it to the person personally; or**
- b. **By sending it by registered post to the person’s last known address or his last known address in Kenya;**

or

- c. **if the whereabouts of the person or his address cannot, after reasonable inquiry, be ascertained, by leaving it with the occupier of the land concerned or, if there is no occupier, by affixing it upon some prominent part of the land; or**
- d. **If the person is a body corporate, society or other association of persons, by serving it personally on a secretary, director or other officer thereof or on a person concerned or acting in the management thereof, or by leaving it or sending it by registered post addressed to the body corporate, society, or, if there is no registered office, at any place where it carries on business, or, if there is none, by leaving it with the occupier of the land concerned, or, if there is no occupier, by affixing it upon some prominent part of the land”.**

21. Although it was argued on behalf of the 1st and 2nd Respondent that access was denied and that it was not possible to effect service to the Petitioner, the issue of denial of access has not been proved by way of evidence. No affidavit has been exhibited herein to demonstrate that any attempt to effect personal service was made and access denied. There is also no evidence to demonstrate what transpired after the alleged failure of personal service. There is no evidence of service by any of the other methods of service provided for under **Section 33 (d)** of the said Act.
22. The burden of proof of service fell on the Commissioner. **Section 109** of the **Evidence Act** provides as follows:-

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

The first Respondent failed to follow the due process. Consequently I hold that the Petitioner was not served with the notice of compulsory acquisition.

23. The Gazette Notice failed and/or omitted to identify the Petitioner as the registered proprietor of the suit property and the public body for which the land was being purchased. The **Gazette Notice No. 6320** dated 11/8/06 simply stated the Land Reference Number and the area to be acquired.
24. The **Gazette Notice No. 6321** dated 11/8/2006 issued pursuant to **section 9 (1)** of the **Land Acquisition Act** calling on all interested parties to attend an inquiry for the hearing of the claims in compensation also failed to identify the Petitioner as the registered owner of the suit property. The Petitioner was not served with the said Gazette Notice and came to learn of the said inquiry after the same had been concluded.

Section 9 (1) of the **Land Acquisition Act** provides as follows:-

“The Commissioner shall appoint a date not earlier than thirty days and not later than twelve months after the publication of the notice of intention to acquire, for the holding of an inquiry for the hearing of claims to compensation by persons interested in the land, and shall-

- a. **Cause notice of the inquiry to be published in the Gazette at least fifteen days before the inquiry; and**
- b. **Serve a copy of the notice on every person who appears to him to be interested or who claims to be interested in the land.”**

25. As stated earlier on in this judgment, the burden of proving that service of the notice to attend the inquiry fell on the Commissioner. It has not been demonstrated that service of the notice took place. I therefore, come to the conclusion that the notice of the inquiry was not served.
26. Both the **Gazette Notice No. 6320** and **No. 6321** failed to state the registered proprietor of the suit property. This failure or omission rendered the said Gazette Notices invalid. As stated by the **Court of Appeal in Commissioner of Lands & Another – vs- Coastal Aquaculture Ltd – C.A. 252/96:-**

“Unless the notice of acquisition reflects the necessary ingredients of the certificate, the person interested in the land has no means of knowing whether the Minister’s direction to acquire land compulsorily is justified or not.

The notice of acquisition under section 6 (2) of the Land Acquisition Act must disclose the name of the public body for whom the land is being acquired and the public purpose for which it is being acquired.”

27. The evidence before me establishes that the Petitioner after getting wind of the acquisition process made efforts to obtain information from the Respondents regarding the measurement of his land

that was proposed to be compulsorily acquired, the valuation of the same and the amount of compensation. This information was not forthcoming despite the Petitioner's protests that the portion of his land which was being acquired was too large and the compensation irregular in that initially he was informed the figure was Kshs.2,563,810/= but later the figure changed to Kshs.9,632,730/=.

28. According to the replying affidavit sworn on behalf of the Commissioner, the acquisition plans and other documents were released to the Petitioner during the hearing at the **Land Acquisition Compensation Tribunal**. However, this came rather late in the day as the acquisition process had already been conducted without notice to the Petitioner. As stated in **Re Kisima (1978) KLR 36 "The test must be satisfied at the outset and not with the aid of subsequent evidence"**.
29. On the issue of whether a Director of the Petitioner one, Sue Leonard had the *locus standi* to bring this suit, the Petitioner in the further affidavit sworn on 2/1/2013 has exhibited the resolution (annexture "ZK") which gave authority to the said **Sue Leonard**.
30. **Article 22 (1)** of the **Constitution** provides as follows:-

"Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened."

The said Sue Leonard therefore had the *locus standi* to bring this suit.

31. Another issue that has been raised is whether this court has jurisdiction to entertain this petition after the determination of the Petitioner's case before the **Land Acquisition Compensation Tribunal**. On this score I am in agreement with the submissions of the Petitioner's counsel that this court has jurisdiction to hear this petition. **Article 23 (1)** of the **Constitution** stipulates as follows:-

"The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of rights".

32. Under **Article 20 (3) (b)** of the **Constitution**, in applying a provision of the Bill of Rights, a court **"shall adopt the interpretation that most favours the enforcement of a right or fundamental freedom"**.
33. The availability of an alternative remedy is not a bar to a party to invoke these fundamental rights and provisions of the Constitution. (*See Otieno Clifford Richard –vs- Republic 2006 e KLR*).
34. With the foregoing, I have no difficulties in stating that the requirements of the Constitution and of the Land Acquisition Act were not complied with by the Commissioner. Consequently, the rights of the Petitioner not to be arbitrarily deprived of its property by the State as guaranteed under the Constitution were violated. The Petitioner's right to a lawful and fair administrative action guaranteed by the **Constitution** was also violated. The same applies to the Petitioner's right to information.
35. The mandate to carry out compulsory acquisition is bestowed on the Minister through the **Commissioner of Lands**. The **Commissioner of Lands** therefore bore the responsibility of ensuring that all the procedures related to compulsory acquisition of the Petitioner's Land were complied with.
36. The 3rd, 4th, 5th and 6th Respondents have no such responsibility placed on the shoulders by the Land Acquisition Act. From the documents before court, it is clear that the process of compulsorily acquiring land for the road in question commenced in the year 2005. So much water has passed under the bridge and the order of prohibition sought may not be the most efficacious. I say so while also bearing in mind that if the requirements for compulsory acquisition are met the land may be compulsorily acquired. I have understood the Petitioner's case to query the process of acquisition and the issue of compensation. I am of view that the Petitioner's concerns can be addressed without an order of prohibition.
37. I am satisfied that the Petitioner has proved its case. Consequently, I grant all the declarations sought in the Petition in prayer No. 1 to 16. I also grant the orders of judicial review of *certiorari*

in terms of prayer No. 17 and 18 of the Petition. The costs of the petition to be met by the 1st Respondent.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 16th day of September 2013.

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B. THURANIRA JADEN

JUDGE