



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**PETITION 13 OF 2012**

MARGARET MUTHONI KINUTHIA.....PETITIONER/  
APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL.....1<sup>ST</sup>  
RESPONDENT

THE COMMISSIONER OF LANDS.....2<sup>ND</sup>  
RESPONDENT

PERMANENT SECRETARY, MINISTRY OF ROADS.....3<sup>RD</sup>  
RESPONDENT

**R U L I N G**

1. The Applicant, Margaret Muthoni Kinuthia is aggrieved by the decision taken by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to compulsorily acquire part of her land viz; L.R. No.6295/7 (originally part of L.R. No.11739/R) for purposes of constructing a water drain channel for surface water runoff to drain into Mbaruk River.
2. By her Chamber Summons dated 18<sup>th</sup> January 2012 and premised on the provisions of **Articles 23(3), 40(3) and (4) and Section 19 of Schedule 6 to the Constitution**, she seeks the following Orders;
  - “(i) That the Application be certified as urgent and be heard ex-parte in the first instance.***
  - “(ii) That an early date be appointed for parties to appear for directions regarding the expeditious hearing and determination of the Petition filed herein.***
  - “(iii) That pending the hearing and determination of this Application inter-parties, the Court do issue a conservatory order to restrain the Respondents by themselves, their servants or agents from wasting or encroaching into and interfering with the Petitioners land comprised in L.R. No.6295/7 (originally party of L.R. No.11739/R).***
  - “(iv) That pending the hearing and determination of this Petition inter-parties, the Court do issue an injunction restraining the Respondents by themselves, their servants or their agents from wasting or encroaching into the Petitioner’s land comprised in L.R. No.6295/7 (originally part of L.R. No.11739/R).***

(v) *That the Application be served on the Respondents.*

(vi) *That the Application be heard inter-parties on such date and at such time as this Court may direct.*

(vii) *That the costs of the Application be awarded to the Petitioner/Applicant.”*

3. The grounds in support are that;

(a) *By virtue of its constitutional competence, this court has the power to redress for violations of the Constitution.*

(b) *The Respondents have forcibly encroached on and detained part of the Petitioner’s land comprised in L.R. No.6295/7 (originally part of L.R. No.11739/R) and the Petitioner is apprehensive that unless the Respondents are restrained by this Court, the Respondent’s actions will result in the destruction of the encroached portion of land and the Petitioner’s adjoining lands.*

(c) *The said encroachment was done irregularly and contrary to the Land Acquisition Act and Articles 40(3) and (4) of the Constitution of Kenya. This is in contravention of the constitutional provision that no person shall be deprived of their land without prompt payment in full and just compensation.*

(d) *The Respondents are using the Petitioner’s land without compensating the petitioner either for value or rent as the beneficial owner of the land.*

(e) *Due to its possession of the State’s coercive powers and authority, the Petitioner is totally helpless as against the Respondents and is only protected by this Court.*

(f) *The Respondents have failed to provide an Environmental Impact Assessment Report detailing the effects their encroachment will have on the Petitioner’s remaining land owing to diversion of two heavy flowing streams through the encroached piece of land.*

(g) *The purpose and effect of the encroachment is clearly intended to deprive the Petitioner of her land without just and proper compensation.*

4. In her Supporting Affidavit sworn on 18<sup>th</sup> January 2012 and Further Affidavit sworn on 14<sup>th</sup> March 2012 she has raised the issue that without proper consultation with her and without a lawful Environmental Impact Assessment being conducted on the proposed acquisition of her land, then the whole process was unlawful and ought to be stopped until her Petition is heard and determined.

5. Thomas Gicira Gacoki, a Manager Surveyor with the Kenya National Highways Authority by his Replying Affidavit sworn on 6<sup>th</sup> March 2012 has opposed the Chamber Summons principally on the following grounds;

(i) *That the land acquisition was necessitated by the need to resolve the surface run-off problem on the Lanet-Dondori Road and the Applicant’s land was identified for that purpose. That only **0.6506 acres** was required as opposed to **0.821 acres** as indicated by the Applicant.*

(ii) *That upon the land being identified, a physical inspection was carried out; an Environmental Impact Assessment was carried out; the land was surveyed and valued; the necessary consultations and consents were obtained; the acquisition was gazetted and an inquiry was conducted and compensation to the Applicant was prepared.*

*That therefore the acquisition was lawful and the Application was without merit and ought to be dismissed.*

6. Having considered the rival Submissions by advocates for the parties and noting the evidence on record, I wish to opine as follows;

7. In Giella vs Cassman Brown Ltd [1973] E.A. 358, the issue revolved around a contract of employment between the parties. One of the clauses of the contract was that upon determination thereof, the Appellant would not engage in a similar undertaking within a radius of 10 miles from the Central Post Offices of various towns in East Africa including Kampala and Jinja. Once the contract was determined, it was alleged that the Appellant had been engaged to work for a company on the same street in Kampala as his previous employer. The Respondent then filed a Chamber Summons to stop the Appellant from continuing with his employment and on those facts, the Court of Appeal sitting in Kampala, by the words of Spry V-P set out the immortalized grounds for grant of temporary injunctive Orders. He stated as follows;

***“The conditions for the grant of an Interlocutory Injunction, are now, I think, well settled in East Africa. First, an Applicant must show a prima facie case with a probability of success. Secondly, an Interlocutory Injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an Application on the balance of convenience. (E.A. Industries vs Trufoods, [1972] E.A. 420)”***

8. The above exposition of the Law would then lead me to consider whether the Applicant has met the conditions for grant of a temporary injunction.

9. **Firstly, is there a prima facie case with a probability of success?**

I think not. I agree with the Respondents that all the steps were taken leading to the acquisition of the land. In fact, reading between the lines, the Applicant’s singular issue of complaint is that whereas her private valuers M/s Prime Valuers have indicated that the actual value of the land to be taken away is Kshs.1,652,600/-, the Respondents have valued it at much less. All the other complaints, with respect, seem to rotate around that one issue.

10. I have read the Environmental Impact Assessment Report and whether or not it was prepared in May 2010, as opposed to any other date, does not invalidate it and the Applicant has shown no tangible reason why it is invalid. In fact, her argument that a fresh report be undertaken is defeatist of her argument and clearly shows in fact she really has no genuine grievance against it.

11. **Article 40(3) of the Constitution** provides a remedy where a party is unhappy with the compensation given to it upon land being compulsorily acquired. It 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.” (Empasis aded)***

12. Prayers 6, 7, 8 and 9 of the Petition dated 18<sup>th</sup> January 2012 seek the following Orders;

***“(6) An Order that the Government do pay to the Petitioner mesne profits of Kshs.10,000/- per acre***

**of the area to be effected by the drain from the date of occupation until restoration or legal acquisition by the Government.**

**(7) In the alternative to Prayer (5) above, an order for the payment of Kshs.1,231,500/0 being the current value of the 0.821 acres plus Kshs.1,500,000/- for each additional acre, or part hereof, that shall be found will be effected after the carrying out of the Environmental Impact Assessment Report with interest thereon from the date hereof until payment in full.**

**(8) A declaration that the Petitioner is entitled to General and Exemplary damages and compensation for the violations and contraventions of her fundamental rights and freedoms under Section 40(3) of the Constitution of Kenya.**

**(9) General Damages and exemplary damages on an aggravated scale under Section 73 and 75 of the Constitution of Kenya for the unconstitutional conduct by Government servants and agents.”**

13. The Prayers are quite in line with **Article 40(3)** and reinforce my argument that a temporary injunction will serve no purpose as the Petition will address the real grievance by the Applicant.

14. On the issue of damages, I have shown above that indeed it is conceded by the Applicant that damages are an adequate remedy and I need say no more.

15. It is obvious to me also that on a balance of convenience, between the Applicant's private interests which can be adequately addressed by payment of compensation and the wider interests of the public, her Application must fail. The Lanet-Dondori Road is for the long term interests of those who reside adjacent to it. She is one of them and I see no greater pain that she will suffer if the road is in the best condition.

16. It is obvious that I see no merit in the Application dated 18<sup>th</sup> January 2012 and it is dismissed with no orders as to costs. If any advise is needed, let the Petition herein be fixed for hearing immediately.

17. The interim Orders issued on 20<sup>th</sup> January 2012 are discharged.

18. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 2<sup>nd</sup> DAY OF AUGUST, 2012**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

*Irene – court clerk*

*Mr. Gachuhi hold brief hold for Mr. Limithi for Applicant*

*Miss Muchiri for Respondent*

**Order**

*Ruling duly read.*

**Order**

*Mention on 24/9/2012 for directions on the Petition.*

**ISAAC LENAOLA**

**JUDGE**

**2/8/2012**