



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURT)

PETITION NO. 641 OF 2008

IN THE MATTER OF SECTION 84(1), CONSTITUTION OF KENYA

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER SECTION 1A, 70 AND 75,**

CONSTITUTION OF KENYA

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION
AND PROTECTION OF FUNDAMENTAL RIGHTS**

AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE RULES, 2006

BETWEEN

BANK OF INDIAPETITIONER

AND

1. THE COMMISSIONER OF LANDS

2. ATTORNEY-GENERAL.....RESPONDENTS

JUDGMENT

1. The petitioner is the registered legal chargee of several parcels of land known as **L.R. Nos. 5009, 5031, 5048, 5056, 1335 and 12336** hereinafter called “**the suit properties**” situate within the Coast Province.
2. By virtue thereof, the petitioner is a person having an interest in and or a right over the suit properties.
3. The petitioner is also the person in law entitled to the possession of the suit properties.
4. The petitioner was registered as the legal Chargee of the said lands by virtue of several charges on various dates as security for loans, overdraft and other banking facilities extended by the petitioner to the

registered proprietor, **Associated Sugar Company Limited**. The petitioner thereby acquired interests and rights in the suit properties, which interests and rights have subsisted at all material times.

5. The suit properties and their titles and aforesaid charges and other encumbrances are registered under, and governed by, **The Registration of Titles Act, Cap. 281**.

6. Subsequently, as at 30th June, 2006, by reason of various non-repayments and other breaches by the aforesaid Chargor/borrower of the terms of the said charges, the sum outstanding by it to the Petitioner stood at **Kshs.3,446,000,000/=** in respect of the principal sum and interest, together with an additional sum of **Kshs.109,000,000/=** for receivership expenses and interest, which latter is continuing to accrue interest until payment in full.

7. In 2006, in pursuance of its rights under the said Charges and relevant documents, the Petitioner in due exercise of its statutory powers of sale duly proceeded to enter into negotiations with a willing buyer for the sale and purchase of the said properties.

8. Subsequently, by a letter dated 31st October 2006, the Permanent Secretary, Ministry of Agriculture, invited the petitioner through its Managing Director, to attend a meeting on 3rd November 2006 for the purpose of negotiations to arrive at a mutually agreed figure which the government would undertake to pay.

9. The petitioner attended the said meeting.

10. By a letter of the same day, 3rd November 2006 from the Permanent Secretary, Ministry of Agriculture, the petitioner was informed that the value of the suit properties proposed to be acquired had been determined by the Government Valuer to be **KShs.40,650,000/=**, and that the Government was offering that amount to the petitioner to release the title deeds therefore. The Permanent Secretary also requested more details of the earlier negotiations for the sale by the petitioner to the willing buyer aforesaid.

11. The petitioner responded to the said letter by its letter dated 6th November 2006 in which it stated that the petitioner had already accepted the offer of the aforesaid willing buyer, **Shashikant P. Shivilal** trading in the name and style of **Glutex Trading Company**, and had taken the decision to sell to it the suit properties. This letter set out, as requested, the particulars of the said buyer including its address.

12. Pursuant to the above, the petitioner, on 20th November 2006, entered into an Agreement of Sale with the said buyer for the sale of the suit properties.

13. The sale price was **KShs.325,000,000/=** and in accordance with the said agreement, the buyer paid a deposit of 10% amounting to **KShs.32,500,000/=**. The buyer undertook to pay the balance of the purchase price as per the terms of the sale agreement.

14. Subsequently, the said buyer paid to the petitioner a further sum of **KShs.81,250,000/=**, making a total part payment of **KShs.113,750,000/=**.

15. On 20th November 2006, the petitioner received a letter dated 17th November 2006 from the said Permanent Secretary, Ministry of Agriculture, informing the petitioner that the Government had decided to commence compulsory acquisition of the suit properties under the Land Acquisition Act, Cap. 295. The Permanent Secretary stated, *inter alia*:

“Please note that the Government intends to pay full compensation for the land in accordance with the Act and Regulations governing such acquisition”.

16. On 4th December 2006 the petitioner replied to the said Permanent Secretary setting out the aforesaid facts.
17. The petitioner pointed out that the Government offer of Kshs.40,650,000/= was too low compared to the market value of the suit properties and the outstanding liability of more than KShs.3.4 Billion.
18. By a letter dated 18th December 2006 the Permanent Secretary reiterated that the Government had started the process of compulsory acquisition of the suit properties and will continue with the same to its logical conclusion. He further stated that any parties who have an interest in the matter will be handled in accordance with the compulsory land acquisition rules.
19. On 15th December 2006, by **Gazette Notice No. 10327** dated **15th December 2006** in the Kenya Gazette, the Commissioner of Lands published a notice of intention to acquire the suit properties “for construction of Ramisi Sugar Factory Project”. Simultaneously, on the same date, by **Gazette Notice No. 10328**, the Commissioner of Lands published a notice that the inquiries for the hearing of claims for compensation under **Section 9** of the **Land Acquisition Act, Cap. 295**, would take place on 30th January 2007.
20. The petitioner, by a letter dated 26th January 2007 addressed to the Commissioner of Lands by Messrs Rachier & Amollo, the then advocates of the petitioner, forwarded the petitioner’s Statement of its written claim for compensation for the sum then due under the aforesaid legal charges to the petitioner as at 20th June 2006 in the amount of KShs.3,446,000,000/= in respect of the principal sum and interest together with the sum of KShs.109,000,000= for receivership expenses.
21. On 30th January 2007 the Petitioner through its then Manager, attended the aforesaid inquiry and informed the Commissioner of Lands of all the foregoing facts and tendered the relevant documents in support thereof.
22. Upon conclusion of the Inquiry on 30th January 2007, the Commissioner of Lands was required under **Section 10** of **The Land Acquisition Act, Cap. 295**, to prepare a written award making awards of compensation to the Petitioner and any other person(s) whom the Commissioner may determine to have an interest in the suit properties.
23. The Commissioner of Lands was further required under **Section 11** of the said **Act** to serve notice of his written award and offer of compensation to the petitioner.
24. Up to 21st October, 2008 when the petition was filed, The Commissioner of Lands had not complied with the aforesaid provisions of **sections 10 and 11** of the **Land Acquisition Act** and no compensation has been paid to the petitioner.
25. On 22nd August 2007, after waiting for six months after the said inquiry the petitioner wrote to the Commissioner of Lands making demand in law for the performance of his statutory duty to make an award. The Commissioner did not respond to the said letter.
26. On 4th September 2007 the petitioner wrote to the Commissioner again reiterating the said demand but the reminder did not elicit any response.
27. By a letter dated 1st October 2007 addressed to the Attorney-General and copied to the petitioner, the Commissioner of Lands sought some advice from the Attorney-General to enable the Government finalize the acquisition of the suit properties. He indicated that all other aspects of the acquisition were complete except the disbursement of the compensation funds.
28. On 28th February and 5th May, 2008 the petitioner sent further reminders to the Commissioner of Lands but the latter did not give any response to the said letters.

29. In view of the foregoing, the petitioner stated that the Commissioner of Lands has contravened the provisions of **Section 75** of the **Constitution of Kenya** (now repealed) by refusing to make an award under **Section 10(1)** of the Land Acquisition Act, having commenced the acquisition process under the said Act.
30. The petitioner further contended that the Commissioner has contravened the provisions of **Section 70(c)** of the Constitution of Kenya, now repealed.
31. The petitioner further contended that the Commissioner's refusal to make an award and pay compensation is a violation of its constitutional right which prohibits compulsory acquisition of property without compensation.
32. The petitioner stated that on 28th April, 2008 it was reported in the media that a company by the name **Kwale International Sugar Company** was clearing the suit land. The petitioner is unaware of the said company's legal capacity to do so.
33. On 30th May 2008 the petitioner carried out official searches on the suit properties which revealed that the Commissioner of Lands has already taken possession of the two main sections of the suit properties without any award having been given, or without satisfaction of the petitioner/chargee's interests and rights, or any notice or award as required by **Section 19** Land Acquisition Act or any other lawful procedure having been followed.
34. In view of the aforesaid matters, the plaintiff sought the following prayers:

“(a) An order of mandamus under Section 84 of the Constitution of Kenya directed to the Commissioner of Lands forthwith to prepare a written award and make his award of compensation to the applicant in respect of its interest as Chargee as required by and in accordance with the provisions of the Section 75 (3), Section 70 and Section 1A Constitution of Kenya and all other consequential applicable laws including Section 10 (1), Land Acquisition act, Cap. 295, for the acquisition of the plots of land set out in Gazette Notice No. 10327/2006 (in the Kenya Gazette of 14th December 2006) pursuant to the said Gazette Notice and to the consequent inquiry.

(b) A declaration that the Petitioner is entitled as the holder of an interest in or a right over the said properties to all the rights and protection provided by Sections 75, 70 and 1A of the Constitution of Kenya.

(c) Alternatively, a declaration that the Petitioner is entitled as chargee of the said mortgaged properties under the provisions of Section 73, Transfer of Property Act of India, to any monies awarded.

(d) A declaration that the taking of possession of the said properties under acquisition by the Commissioner of Lands prior to the pending award under the Inquiry held under Gazette Notice No. 10328/2006 has been and is a contravention of Section 75(1), Constitution of Kenya and is illegal.

(e) An order that the Commissioner of Lands do forthwith handover possession of the said lands to the petitioner.

(f) An order that the Commissioner of Lands do pay to the petitioner damages for contravention of the petitioner's constitutional rights by unlawful entry and continued occupation of the said properties in a sum per day equivalent to the continuing daily interest on the total sum due and payable to the petitioner under the aforesaid Charges (as at the date of this order by the court), from the date possession was taken away from the petitioner until the date the Commissioner of Lands restores vacant possession of the said properties to the petitioner or until full compensation

by the Constitution and law applicable is fully paid to and received by the petitioner, together with all costs and interest lawfully due to the petitioner.”

35. The petitioner’s averments were well supported by a detailed affidavit sworn by **Anil Kumar Jalota**, the petitioners Chief Executive Director in Kenya, to which he annexed various documents.

36. The respondents did not file any affidavit in response. They only filed grounds of opposition and stated as hereunder:

“1. The petitioners seek to amalgamate in one petition a Judicial Review remedy, a civil claim for damages arising from contract and a reference for constitutional interpretation on claim for alleged breach of fundamental rights.

2. The petition is fatally defective.

3. The right to the protection from deprivation of property under Section 75 of the constitution of Kenya allows for the compulsory taking of property for work that relating to agricultural development or improvement (being work relating to the development or improvement that the owner or occupier of the land has been required and has without reasonable excuse refused or failed, to carry out).

4. The petition should be dismissed with costs”

37. **Mr. Bailal Patel** and **Mr. Nowrojee** advocates appeared for the petitioner while **Mr. Onyiso** appeared for the respondents. Mr. Nowrojee made brief submissions in support of the petition and told the court that the petitioner was seeking judgment in terms of prayers (b), (c), (d), (e) and (f) of the petition as cited hereinabove. The prayer for an order of mandamus, (prayer (a)) was abandoned.

38. Mr. Onyiso simply told the court that the respondents were relying entirely on the grounds of opposition as aforesaid and had nothing to add.

39. The petition was filed before the **Constitution of Kenya, 2010** was promulgated. It follows therefore that the sections of the Constitution cited in the petition are of the repealed Constitution. **Section 75(1)** thereof provided as hereunder:

“No property of any description shall be compulsorily taken possession of, and no interest in or right of a property of any description shall be compulsorily acquired, except where the following conditions are satisfied –

(a) the taking of possession or acquisition is necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit; and

(b) the necessity thereof is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and

(c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation”.

40. Subsection (2) thereof gives every person having an interest or right in or over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired a right of direct access to the High Court for –

- “(a) the determination of his interest of right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled; and**
- (b) the purpose of obtaining prompt payment of that compensation”.**

41. The Land Acquisition Act Cap 295 makes provision for compulsory acquisition of land for public benefit and matters related thereto. It is the implementing Act of **Section 75** of the Constitution. The Act empowers the Commissioner of Lands, upon due notice in the Kenya Gazette and upon payment of full compensation to all persons having an interest in a property to acquire any parcel of land which the Minister is satisfied that it is required for public use.

42. **Section 8** of the **Land Acquisition Act** states as follows:

“Where land is acquired compulsorily under this Part, full compensation shall be paid promptly to all persons interested in the land”.

43. Under **Sections 9** and **10** of the Act the Commissioner is required to hold an inquiry for the hearing of claims to compensation by persons interested in the land and upon conclusion of the inquiry the Commissioner has to prepare a written award of compensation to each person whom he has determined to be interested in the land.

44. There is an implied conditionality that the award should be prepared within a reasonable time after conclusion of the inquiry. That award and offer of compensation should be served on all persons who have an interest in the land. The compensation should be paid promptly and in full in terms of **Section 8** of the **Act**. Compensation is usually the market value of the land and an additional 15% of that value. In **KANINI FARM LIMITED vs COMMISSIONER OF LANDS [1986] KLR 310**, it was held that the market value as a basis for assessing compensation is the price which a willing seller might be expected to obtain from a willing purchaser. The purchaser may be a speculator provided that the speculator is neither wild nor unreasonable.

45. It is only after the award has been made that the Commissioner can take possession of the land by serving on every person interested therein a notice that on a specified day, which is not later than sixty (60) days after the award has been made, possession of the land and the title to the land will vest in the Government. See **Section 18(1)** of the **Act**.

46. There is no dispute that after conducting the inquiry in respect of the suit properties, the Commissioner of Lands refused, failed and/or neglected to perform his statutory duty of making an award and offer of compensation to the petitioner despite several reminders to that effect.

47. By so doing, the respondents violated provisions of **Section 75(1)** of the Constitution as well as various provisions of the Land Acquisition Act.

48. There is no dispute that the petitioner is the registered legal Chargee of the suit properties, having advanced huge sums of money to the registered proprietor of the same, Associated Sugar Company Limited. As at 30th June, 2006 the outstanding sum stood at KShs.3,446,000,000/=. There was also an additional sum of Kshs.109,000,000/= for receivership expenses and interest.

49. The Government was aware that the petitioner, in exercise of its statutory power of sale, had entered into a sale agreement with Shashinkant P. Shivilal in respect of the suit properties at a consideration of Kshs.325,000,000/= and the said purchaser had paid a deposit of Kshs.113,750,000/=.

50. By the act of its compulsory acquisition of the suit properties without paying any compensation to the petitioner, the respondents not only breached **Section 75(1)** of the Constitution but may have also exposed the petitioner to legal claims at the instance of the aforesaid buyer.

51. The Government acquired possession of the suit properties unlawfully and the unlawful act has caused loss, injury and damage to the petitioner by making it impossible to dispose of the suit properties in order to mitigate its losses.

52. The respondents did not offer any reasonable explanation for the acts complained of by the petitioner and there can be no valid defence to such serious violation of a constitutional right.

53. The court is satisfied that the petitioner has established its claim and hereby grants **prayers (b) and (e)**. For avoidance of doubt, it is hereby declared that it is the petitioner as the legal Chargee of the suit properties, who is entitled to compensation for the suit properties which have been compulsorily acquired by the Government and not the registered proprietor thereof, Associated Sugar Company Limited.

54. As regards prayer (e) which seeks an order that the Commissioner of Lands do forthwith handover possession of the said lands to the petitioner, the prayer can only be granted if the respondents fail to make an award and offer of compensation to the petitioner within a reasonable period from the date of this judgment. If the Commissioner of Lands fails to do so within the next six (6) months from the date hereof the petitioner should be given possession of the suit lands.

55. Prayer (f) which seeks damages for contravention of the petitioner's constitutional right by payment of a sum equivalent to the continuing daily interest on the total sum due was not proved and the prayer is therefore disallowed.

56. The respondents shall bear the costs of this petition.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF APRIL, 2011.

D. MUSINGA

JUDGE

In the presence of:

Nazi – court clerk

Mr. B. Patel for the petitioner

No appearance for the respondents