



Muchene (the sole Executrix of the Estate of George Muchene Kirumba and petitioning through Nancy Wanjiru Kirumba) v Attorney General & 4 others (Environment & Land Petition 14 of 2017) [2022] KEELC 3110 (KLR) (28 July 2022) (Judgment)

Neutral citation: [2022] KEELC 3110 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION 14 OF 2017**

**LN MBUGUA, J
JULY 28, 2022**

BETWEEN

**GOAMATTIE BARBARA MUCHENE PETITIONER
THE SOLE EXECUTRIX OF THE ESTATE OF GEORGE MUCHENE KIRUMBA
AND PETITIONING THROUGH NANCY WANJIRU KIRUMBA**

AND

**ATTORNEY GENERAL 1ST RESPONDENT
DIRECTOR OF SURVEY 2ND RESPONDENT
KENYA URBAN ROADS AUTHORITY 3RD RESPONDENT
MINISTRY OF LAND ,HOUSING AND URBAN DEVELOPMENT 4TH
RESPONDENT
NATIONAL LAND COMMISSION 5TH RESPONDENT**

JUDGMENT

1. This suit was filed vide a Petition dated 11th April 2017 and amended on 25th June 2020 to substitute the original Petitioner who passed on in 2018. The Petitioner states that on or about February 2014 while inspecting his property parcel no. Nairobi/Block/115/23, he realized that the Government of Kenya had constructed the Eastern bypass Road through the suit property. He claimed that he was the registered proprietor of the said property measuring approximately 0.0432 Ha pursuant to a Certificate of Lease dated 11th November 2008.
2. The Petitioner contends that he petitioned the 3rd Respondent for compensation vide a letter dated 27th January 2014 but he was not compensated contrary to the provisions of Article 40(3) of *the Constitution*, Section 115 of the *Land Act* and Section 8 of the Land Acquisition Act (repealed). The



Petitioner further states that the 5th Respondent neither served him with a notice of acquisition nor with a notice of inquiry as per provisions of Section 107(5) and Section 112 of the Land Act.

3. The petitioner seeks the following orders:

- i. An order of declaration that the Respondents were under Constitutional and Statutory duty to comply with Article 40(3)(b) of the Constitution, 2010, Sections 107(5), 112, 113 and 114 of land Act No. 6 of 2012 as well as Sections 3, 6(2), 8 and 9 of the Land Acquisition Act (now repealed) in compulsory acquiring the Petitioner's property for the construction of the Eastern Bypass.
- ii. An order of declaration that the compulsory acquisition of the petitioner's land by the 5th respondent without adhering to strict and mandatory provisions of the Land Act No. 6 of 2012 and Land Acquisition Act (now repealed) violated the Petitioner's constitutional right guaranteed under Article 40(3)(a) & (b) not to be arbitrarily deprived of his property by the state.
- iii. An order of declaration that the acquisition of the Petitioner's land by the 5th respondent without complying with the mandatory provisions of the law was and is unlawful.
- iv. An order of declaration to be issued to declare that the failure by the 5th Respondent to comply with the mandatory provisions of the Land Act No. 6 of 2012 and Land Acquisition Act (now repealed) violated the Petitioner's constitutional right to an administrative action that is lawful, reasonable and procedurally fair guaranteed under Article 47 of the Constitution.
- v. An order of declaration that the action of the 3rd Respondent in entering upon, occupying and constructing the road on the Petitioner's property Nairobi/Block/115/23 is unconstitutional, illegal and amounts to unlawful and / or arbitrary deprivation of property.
- vi. An order of declaration that the 2nd Respondent failed in its statutory duty to carry out and/or conduct proper survey on how much the construction of the Eastern Bypass Road would affect adjacent ad/ or nearby properties, specifically Land Ref. Nairobi/Block/115/23 of its physical mass in terms of both width and length thereby leading to unlawful deprivation of the Petitioner's property.
- vii. An order of declaration that the 1st Respondent failed in its duty as the Government Principal Legal Advisor to properly advise the 2nd, 3rd, 4th and 5th Respondents on the proper procedure of compulsory acquisition of land.
- viii. An order of declaration that the Respondents are jointly and severally liable to compensate the Petitioner by way of damages for the loss of user and other infringements of his rights and privileges as registered owner of land parcel Nairobi/Block/115/23 on account of the acquisition of the part of the property thereon for purposes of Nairobi eastern Bypass.
- ix. General damages for breach of the Petitioner's rights and freedoms under Articles 27, 40, 47 and 50 of the Constitution.
- x. The costs of this petition be awarded to the Petitioner.
- xi. The Honourable court do issue such orders and further directions as it may deem fit to meet ends of justice.



4. This Petition was supported by the sworn affidavit of Nancy Wanjiru Kirumba dated 11th April 2017 which reinforced the claims in the Petition. It is worth noting that the deponent has authority to act in this matter through a Power of Attorney dated 20.4.2008.
5. The 1st-4th Respondents have opposed the suit vide a Replying affidavit dated 26th April 2017 sworn by Abdulkadir Ibrahim Jatani the Manager Surveys of the 3rd Respondent, where it is averred that the suit property was part of a block of land allotted to Karagita Land Buying and Management Company (herein referred to as the Company) who then subdivided it amongst its members including the Petitioner. During the subdivision, the company was required to surrender an 80 meter road reserve which it complied with but misaligned the road reserve. The error was therefore the Company's fault and not the 3rd respondent's doing.
6. The 3rd Respondent stated that the said misalignment came to the attention of the Petitioner after the road had already been constructed and acknowledged that the Petitioner reached out to them seeking compensation vide a letter dated 27th February 2014. The 3rd Respondent while acknowledging that they constructed the Eastern Bypass through the Petitioner's property stated that they only utilised 60 meters out of the 80 meters surrendered and advised the Petitioner to liaise with the Company to subdivide the remaining land to him. As such the 3rd Respondent stated that they ought not to be parties to the suit and the suit should be dismissed with costs.
7. The Petitioner in a Supplementary Affidavit of Nancy Wanjiru Kirumba dated 13th March 2018 in response to the 3rd Respondent's reply, further stated that there is no evidence of subdivision plans with the 80 metres road reserve or any misalignment as claimed by 3rd respondent and that there is no evidence of any land left for them as the land in question had become public land.
8. In a 2nd Supplementary Affidavit also sworn by Nancy Wanjiru Kirumba dated 9th November 2021, she added that the 5th Respondent on behalf of the 3rd Respondent issued a Kenya Gazette Notice No. 3999 Vol. CXXII- No. 83 on 8th May 2020 for a further compulsory acquisition of additional 0.015 Ha of the suit property for purposes of expanding the Eastern Bypass. She stated that this notice was evidence and proof that due process in the original acquisition of the Petitioner's property was not adhered to. Adding that failure to issue a similar notice and conduct inquiry of the property was a violation of the Petitioner's rights.
9. The Petitioner also stated that even if there was misalignment of the road surrendered as claimed by the 3rd Respondent, they knowingly approved and registered the subdivisions with the said misalignment and the Petitioner should not be prejudiced for their actions or inactions.
10. The 5th respondent did not file any response to the petition.
11. On 10.11.2020, the court gave directions for the suit to be heard by way of affidavit evidence and written submissions.

Submissions

12. It was submitted for the petitioner that being the registered owner of the suit property as per the Certificate of Lease granted on 11th November 2008, the petitioner enjoyed protection against arbitrary acquisition of his land without notice, full and prompt compensation unless it is evident that the property was unlawfully acquired. Reference was made to the High Court cases of *Gami Properties Limited v National Land Commission* [2017] eKLR, *Mike Maina Kamau v Attorney General* [2017] eKLR, and *Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others* (2019) eKLR where William Ouko J.A (as he then was) stated: "... The registration of a person as the proprietor



of land vests in that person the absolute ownership of that land subject only to the leases, charges, conditions and restrictions, if any, shown in the register... the Government, as the keeper of the master record of all land in Kenya and their owners, guarantees indefeasibility of all rights and interests shown in the land register against the entire world; and that in case of loss arising from an error in registration, the Government guarantees the person affected of compensation. ...”

13. Further reference was made to the case of *Charles Lutta Kasamani v Attorney General & another* (2019) eKLR, where it was stated that “... If land is so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined. This is in line with the Constitutional requirement under Article 40(3) of *the Constitution*...”
14. It was also submitted that if there was a misalignment of the road reserve as pleaded by the 3rd Respondent, then the Respondents were aware of the same, yet they still went ahead to approve the said subdivisions. Therefore, the petitioner should not be prejudiced for their actions/inactions.
15. The 1st -4th Respondents did not file submissions on time; they filed an application dated seeking to be allowed to file submissions out of time, of which the said application was allowed by consent on 7.7.2022 and the said Respondents proceeded to file their submissions.
16. The 1st – 4th Respondents do not dispute the provisions of Article 40 of *the Constitution* on right to land. However, in this case, they are challenging the indefeasibility of the Petitioner’s title to the suit land and contend that petitioner’s title cannot be protected by the aforementioned provisions of law. The gist of their argument is that the petitioner could not acquire what was already public land. That the suit land having not been legally alienated from public to private purposes remain public land not subject to the process of acquisition under the law.
17. The Respondents aver that the previous allottee of the block of land had made provisions for a road corridor and therefore the road reserve having been taken prior to the issuance of the lease to the petitioner, this amounted to an encumbrance of the title. That previous owner of the land had knowingly subdivided the land which included the road corridor which corridor was surrendered to the Government of Kenya, thus the illegally processed titles for the road corridor and transfer of the same to the 3rd parties including the petitioner amounted to fraud. The Respondents therefore claim that the suit property was not legally alienated.
18. In support of their claim, the 1st – 4th Respondents have relied on the case of “*kenya National Highways Authority Vs Shalien Masood Mughai & 5 Others* [2017] eKLR, where the Court of Appeal stated as follows on the status of a title procured in relation to an illegal encroachment on a planned public road reserve:

“..... The fact of the matter is that there was in existence road reserve before the disputed plot came into being in 2002 and it was not open for any authority to alienate it further for private development. The whole world ought to have been aware, as was ultimately established, that there was a road reserve of 80 meters and a buffer zone of 30 meters which did not in law have to be noted in any land register, it is an overriding interest and not an equitable interest.”

Other cases relied upon by the Respondents are; Civil appeal no. 283 of 1996, *David Bagine vs Martin Bundi* [1977] eKLR, *Patrick Musimba vs National Land Commission and 4 others* [2016] eKLR.

Analysis and determination

19. This court finds that the issues for determination are:



- i. Whether the Respondents breached constitutional and statutory requirements in their acquisition of the Suit Property.
 - ii. If the answer to the above is in the affirmative, what remedies is the Petitioner entitled to?
20. It is not in contention that the Petitioner was the registered owner of the property Nairobi/Block/115/23 which was taken by the Respondents where the Eastern Bypass road was constructed on part of the said property. The issue for contention is whether that acquisition was done legally.
21. The Petitioner claims that he was never informed of the acquisition, neither given an opportunity to be heard nor compensated for the loss. The Respondents on the other hand aver that the land was public land having been reserved as a road reserve out of the surrender made by the previous owner during the subdivision of the bigger parcel.
22. The Respondents are the ones who are challenging the title of the Petitioner, thus the onus of proof falls upon the said Respondents. In *Galaxy Paints Company Ltd V Falcon Guards Ltd* [2000] eKLR the court held as follows;

“It is trite law, and the provisions of O.XIV of the Civil Procedure Rules, are clear that issues for determination in a suit generally flow from the pleadings,....”.
23. In the case of *In R. G. Patel v. Lalji Makanji* (supra), the former Court of Appeal for Eastern Africa stated thus:-

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”
24. The Respondents have made serious allegations of fraud in the acquisition of the Petitioner's land, contending that the said land had been surrendered as a road reserve during the subdivision of the larger parcel. However, they did not raise the issue of fraud in their pleading (read the Replying Affidavit of 3rd Respondent). and, no evidence was adduced to support such a claim. If the Respondents were sure that the title held by the Petitioner was questionable, nothing could have been easier than to seek a platform before the court to adduce such evidence. However, when the matter came up before the court on 10.11.2020, Counsel for the Petitioner had addressed the court as follows;

“We request for the opportunity to present oral evidence”.

Counsel for the Respondents had stated thus;

“We prefer Affidavit evidence. The issue relates to an acquisition by KURA”.
25. Thus it is crystal clear that the Respondents are the ones who set in motion the hearing of the case through affidavit evidence.
26. In their pleadings, the 3rd Respondent have averred that; “The suit land was initially part of a big block that had been allotted to m/s Karigita Land Buying and Management Company (KARAGITA), which company then subdivided it amongst its membership, which included the petitioner. That KURA'S investigations had shown that Karagita's subdivision of the land was subject to or conditioned upon a surrender of an 80 meter road reserve, which condition Karagita did comply with though it ended up misaligning the road reserve. The 3rd Respondent went on to blame Karagita for the faulty subdivision.



27. I find that despite the elaborate submissions by the Respondents on how subdivision of a chunk of land ought to be carried out, they have not availed any iota of evidence of how the subdivision of Karagita's land was done, and whether the surrender was effected. There is also no evidence of the alleged misalignment. The Respondents did not avail the results of their investigations. Finally, the affidavit of Abdulkakadir Ibrahim Jatani which is the primary pleading of the Respondents does not contain even one single annexure to support their above mentioned claims.
28. In light of the above analysis, the Respondents are estopped from adducing evidence through submissions.
29. I also find that the case of "Kenya National Highways Authority Vs Shalien Masood Mughai & 5 Others [2017] eKLR, cited by the Respondents is distinguishable from this case since in the cited case, there was scientific evidence adduced through a non-partisan report filed by professional surveyors to the effect that the land in question had encroached on the road reserve. The acquisition had taken place way back in 1972. In the current dispute, there is not the slightest evidence that the Petitioner's land is what had been reserved as a road corridor.
30. I also find that the petitioner has availed a Kenya Gazette, Notice No. 3399 put up on 8th May 2020 by the 5th Respondent on behalf of the 3rd Respondent which reads as follows;
- "In pursuance of Sections 112 of the Land Act, 2012, the National Land Commission on behalf of Kenya Urban Roads Authority (KURA) gives notice that inquiries for hearing of claims to compensation of interested parties for the dualling of the Northern and Eastern Bypass in Nairobi City County..."
31. In that notice George Muchene Kirumba's land Parcel Nairobi Block 115/23 is mentioned where the land to be taken is 0.015 ha. How can the Government be proposing to take more land of the Petitioner if indeed the land already belonged to the Government. The silence from the Respondents on this issue is rather loud ! and only gives credence to the averments made by the Petitioner that the earlier acquisition was unlawful for want of notice and compensation.
32. Article 40 (3) of the Constitution provides that;
- "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."
33. Land is a commodity held dear in this country, perhaps it is the most valuable commodity. Thus issues concerning land are emotive and ought to be handled with grave concern. It was therefore callous for the Respondents to simply through in wild unsubstantiated allegations of fraud in the manner the



Petitioner acquired his title. By dint of the provisions of Article 10 of *the Constitution*, the Respondents had a constitutional mandate to uphold the national values and principles of governance by upholding the rule of law in ensuring that there were transparent and lawful procedures in constructing a road through the land of the Petitioner.

34. In the Supreme Court of Kenya case of *Attorney General v Zinj Limited* (Petition 1 of 2020) [2021] KESC 23 (KLR) (Civ) (3 December 2021) (Judgment), it was stated that;

“The main controversy, revolves around the legality or otherwise, of the manner in which the Government, went about acquiring portions of the suit property, ... The only way the Government could lawfully deprive the respondent of part or all of its property, was through a compulsory acquisition, in conformity with the provisions of article 40(3) of *the Constitution*, and the procedure stipulated in the Land Acquisition Act (now repealed) which was the applicable law at the time. Towards this end, can it be said that the Government acquired the portion of the suit property compulsorily? The facts on record do not point that way. Being the custodian of the Land Register, and the guarantor of titles emanating there-from, the Government was acutely aware that the suit property was privately owned by the respondent.

It follows that any compulsory acquisition process, ought to have commenced with a requisite Notice to the respondent, and any other persons claiming an interest in the land. The public purpose for which the land was to be acquired, ought to have been clearly stated. Most critically, the resultant acquisition ought to have been attended with prompt payment in full, of a just compensation to the respondent.”

35. Guided by the above decision of the Supreme Court, this court finds that the manner in which the suit property was acquired was un-procedural, unlawful and was a violation of the Petitioner’s right to property. I therefore find that the petitioner is entitled to compensation.
36. Sadly, the parties, particularly the claimant have not bothered to quantify the damages. I have not seen any valuation report which could have guided the court on the possible value of the land. The petitioner has simply left it to chance which is a grave mistake on their part. I therefore proceed to give an award of Ksh. 3 million as compensation for the land taken by the Respondents.
37. In the final analysis, judgment is hereby entered for the Petitioner against the Respondents for the sum of ksh. 3 million being damages for compensation in respect of the unlawful acquisition of Petitioner’s land. Each party to bear their own costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Omondi holding brief for Dr. Kabau for petitioner

Mr. Kamau for 1st – 4th Respondents

Court Assistant: Eddel / Benson

