



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

Petition 38 of 2011

IN THE MATTER OF: ARTICLES 22, 23 & 40 (3) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

BETWEEN

TORINO ENTERPRISES LIMITEDPETITIONER

AND

THE ATTORNEY GENERAL RESPONDENT

JUDGMENT

TORINO ENTERPRISES LIMITED, which company is the petitioner herein, claims that on 26/4/2001, it acquired all that parcel of land known as L.R. No. 22524, Grant Number IR 85966 ('the suit land'), situate within the City of Nairobi, for a term of 99 years, which term commenced on 1/1/2000. It also claims to have so acquired it by way of transfer for value at a consideration of *K.Shs. 12,000,000/-* from Renton Company Limited, which company had also acquired it for value from the Nairobi City Council ('NCC').

It now states that though it acquired the suit land (which measures 83.910 hectares on equivalent of 207 acres), with the intention of developing residential quarters for commercial sale, Sometime in the year 2005 the Department of Defence ('DOD'), encroached on the suit land, hived off and fenced of a total of 90 acres there from, and that though, it wrote and requested DOD to desist from trespassing on the said land, DOD however persisted and actually proceeded to construct a demining college on the land, and that it has now been denied its right to develop the suit land.

Given the above, the petitioner is of the view that the said encroachment and total dispossession of 90 acres of the suit land by DOD was illegal, as it was done without following the laid down statutory procedures for there was no indication whatsoever, that the same had been acquired under the land Acquisition Act (Cap 295). It is also aggrieved by the fact that there had been no prior indication by the Government or any of its arms that there would be need to compulsorily acquire the said portion of 90 acres, and in the circumstances it is of the view that the said action is unlawful and amounts to illegal dispossession of its land, especially because it never consented to the occupation, neither has its Title to the suit land been revoked or cancelled, nor has DOD compensated it or paid it any mesne profits for the said use and occupation.

The petitioner which also pleads Article 40(3) of the Constitution of Kenya ('the Constitution') has now moved this court by way of the petition in which it prays for the following orders:

1. *A declaration that the said acquisition of the its 90 acres, of the suit land was done in contravention of Article 40(3) of the Constitution;*
2. *A declaration that the said occupation, retention and detention of its said 90 acres, amounts to compulsory acquisition;*
3. *A declaration that any continued occupation of the said portion of the suit land without compensation amounts to acquisition contrary to Article 40(3) of the Constitution;*
4. *That it be restored possession of its land in the same condition as it was when it was unlawfully acquired by the Government; alternatively, an order for the payment of K.Shs 1,530,000,000/- being the current value of the said 90 acres with interest thereon at prevailing central bank rates from the date hereof till payment in full;*
5. *An order that the respondent do pay it mesne profits from the date of occupation until restoration.*

It also prays for the casts of this petition.

The petition is however opposed and according to ALFANI MWAMBOGA, the Staff Officer II at DOD, who has deposed on its behalf; sometimes in 1984, DOD, intimated that it intended to acquire land in the area where the suit premises are situated; that because the said land was then registered in the name of NCC, DOD requested its permanent secretary to intervene in the matter, as a result of which, a meeting of the relevant parties chaired by its permanent Secretary was convened on 24/5/1984, to discuss the proposed acquisition and subsequent developments thereon; that following the said meeting, the Defence Ministry identified the land, had it surveyed, beaconed and fenced sometime in 1986, which action seemed to have triggered a series of correspondence between the Defence Ministry and NCC, leading to a joint meeting on 5/4/1993, at which meeting he deposes, a resolution was passed to the effect that the Defence Deputy Secretary do make the relevant follow ups with a view to propelling the matter to its conclusion, after which the Commissioner of Land wrote to confirm his commitment to concluding the matter, and in his letter of 11/8/1999 the Commissioner of Lands stated as follows:

“Mr. Francis K. Tiliteei

*Deputy Secretary,
Department of Defence,
P.O. Box 40668
NAIROBI*

LAND FOR EMBAKASI GARRISON

Thank you for your letter Ref. No. DOD 28/18A/Vol. V/(15) of 8th July, 1999.

I agree with you that this matter has taken too long to resolve. We discussed on several occasions with

the Gen. (Rtd.) Mohammed and also your officers who were handling the land schedule on the issue at hand. Let me observe the following:-

1. The Survey plan depicted as No. 179/18 is a consolidated plan of two parcels of land.
2. It is a combination of both Government land and Nairobi City Council land.
3. The NCC portion is part of larger parcel known as Kayole Estate which was purchased privately by the Council. The Grant for the land is still in force and out of it several parcels have been carved out by the council and leased out. The subleases are registered against the Head Title.
4. We have been monitoring the excision activity by Nairobi City Council to ensure that your portion is not affected.

Recommendation:

- (a) In order for the Survey plan 179/18 to be valid for the purpose of issuing a title to you, the portion of land you are occupying and which is still in Nairobi City Council Grant should be excised and surrendered to the Government. This has to be agreed between you and the Nairobi City Council. Your records will indicate that there have been meetings to this effect.
- (b) We shall then consolidate the two parcels to produce one title for Department of Defence.
- (c) Meanwhile the Director of Survey will be requested to reconfirm the survey as shown in the Survey plan above.

Signed
W. Gachanja

COMMISSIONER OF LANDS'

As stated earlier the letter was issued as a follow up of meetings, one of which was held on 5/4/1993 and whose minutes are as follows:

1. INTRODUCTION

The Chairman Mr. M.M. Khamisi told the meeting that the meeting would have been chaired by Mr. A.K. Sawe DS DOD but he had just gone to treasury for other pressing issues. He had therefore directed Mr. M. Khamisi to chair the meeting. The meeting was also informed of his apologies.

2. ACQUISITION ISSUES

The meeting went through minutes as per ref DPD /689/2/Wks dated 25th May 1984. The meeting also established that the P.S. DOD did not follow up the action points thus no formal acquisitions of land had been undertaken. Mr. Kuria Gathoni (NCC) pointed to the meeting that the land in question was bought by NCC from a private Ranching Company. He also told the meeting that the council has already planned a residential area next to GSU area. He further informed the meeting that all along the NCC was only discussing issues of Soweto village and not boundary issues.

3. SOWETO VILLAGE SQUATTER ISSUE

NCC representative informed the meeting that even the Soweto Village squatters who paid for the plots had to be compensated across the river by the NCC free of charge. He further told the meeting that if DOD is interested with the land, it has to be compulsorily acquired by the commissioner of land'.

Given the above, the respondent is thus of the view that the land should have been registered in its favour

and not in the petitioner's favour, and it opines that the transaction leading to the ownership of the suit land by the petitioner is illegal; that the petitioner does not have a clean title to the suit property, and that the said proprietorship goes against public interest and policy.

It is evident from the above minutes that NCC was the registered proprietor of the property in question at that material time, having bought it from a private company. That in my view negates the respondents contention that the land had been allocated to NCC. It is also evident that those present appreciated the fact that any acquisitions of the said property would have to be formalized and that compensation would have to be paid for such acquisition.

I have considered the pleadings herein as well as the submissions by both able counsel, and I do note that the petitioner has availed proof that it is the registered proprietor of the suit land, which comprises of the subject 90 acres portion. It is also evident that DOD currently occupies the said portion, which it also admits it intended to acquire and develop, and that the occupation thereof is exclusive.

There is no doubt that the company's right to enjoy the suit properly is galvanized under section 23(1) of the RTA wherein it is provided that the certificate of Tiles issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.

The respondent does not allege, nor does it allude that the issue of impropriety has ever been alleged against the petitioner and in the circumstances the Tiles to the suit land remains indefeasible; in favour of the company. Therefore, and needless to say, the company can only be deprived of its right over the suit land through lawful procedure under that Land Acquisition Act.

But that is not all, for Article 40 of the Constitution provides that:

'(1) 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.

(2) Parliament shall not enact a law that permits the State or any person-

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(3) 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.
- (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
- (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.
- (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

Article 65, which is referred to hereinabove provided that:-

- (1) A person who is not citizen may hold land on the basis of leasehold tenure only, and any such lease, however granted, shall not exceed ninety-nine years.
- (2) If a provision of any agreement, deed, conveyance or document of whatever nature purports to confer on a person who is not a citizen an interest in land greater than a ninety-nine year lease, the provision shall be regarded as conferring on the person a ninety-nine year leasehold interest, and no more.
- (3) For purposes of this Article-
- (a) A body corporate shall be regarded as a citizen only if the body corporate is wholly owned by one or more citizens; and
- (b) Property held in trust shall be regarded as being held by a citizen only if all the beneficial interest of the trust is held by persons who are citizens.
- (4) Parliament may enact legislation to make further provision for the operation of this Article.

Being a locally registered company, the provisions of Article 65 above will not apply.

Having moved and taken possession of the suit premises, without the authority of the petitioner, which has ably demonstrated that it is the registered proprietor of the same, it is obvious that the Department of Defence, has illegally acquired the suit land, illegal I say because, though it was well aware that it would have to compensate the owner of the property, it has not compensated the petitioner. I find that DOD has contravened not only the requirements as laid down in the land Acquisition Act but more so the guarantee as enshrined per the above provisions of the Constitution.

Mr. Karanja relied on my decision in case of **Halal Meat Products Limited vs Attorney General [2005] eKLR**, where I stated that *'the fact the company has never been allowed into the premises, which the court learnt, are guarded by the General Service Unit, I find that the Government is still in possession of the subject premises, and the continued occupation, without compensation despite several requests for handling over, does in my mind amount to acquisition contrary to section 75 of the Constitution.'* Though the said Constitution was repealed the guarantee has now been reinforced in Article 40 above, and I find that the same finding would readily apply to this case, for the simple reason that there is no doubt the suit property, which the Commissioner of Lands readily conceded in his letter of 11/8/1999, that *'the NCC (Nairobi City Council) portion was part of larger parcel known as Kayole Estate which was purchased privately by the Council, and whose Grant for the land was still in force then.'* Was later acquired for value by this petitioner the said Council.

In view of the above I find that this petition is meritorious and I declare that the acquisition of the suit property by the respondent was done in contravention of Article 40(3) of the Constitution of Kenya and the Land Acquisition Act, and thus the occupation, retention, detention and any continued occupation of

the said portion of the suit land amounts to compulsory acquisition, without compensation contrary to Article 40(3) of the Constitution of Kenya.

The respondent shall therefore within the next thirty days, restore the possession of the suit land back to the petitioner in the same condition as it was when it was unlawfully acquired or alternatively to pay to the petitioner the sum of K.Shs. 1,530,000,000/- being the current market value of the said land, as per valuation report produced in court, which valuation and figure was not disputed, by the respondent.

In urging the court to award interest at the rate of 15% p.a., Mr. Karanja relied on the decision in the case of **New Munyu Sisal Estates Ltd., vs The Attorney General [1972] E.A. 87**, Where the court held that ‘the law which provides for the acquisition of land and the prompt payment of full compensation under the Constitutions. 75 is the Indian Land Acquisition Act of 1894 up to 23 August 1968, and thereafter the Land Acquisition Act 1968; that ‘if the land had not been lawfully taken over, damages at the market value of the land plus 15 per cent would be payable.’ Though the said request was not seriously opposed by the respondents, but given the fact that interest rates have reduced drastically since the date when the decision in the cited case was delivered, in my view the rate of 15% p.a. would be on the higher side. I do thus order that interest shall accrue on the award at court rates till payment in full.

The petitioner also prays for mesne profits, which is ideally a claim for special damages, which would have to be specifically pleaded and proven, but this was not done for it was not specifically pleaded and counsel made no specific reference to it in his submission and it can be safely assumed that the petitioner had no wish to pursue it, in which case I decline to make any award under that heading.

The petitioner shall otherwise have the costs of this cause.

Dated and delivered at Nairobi this 4th day of July 2011.

JEANNE GACHECHE
Judge

Delivered in the presence of-
For the petitioner – Mr. Karanja
For the respondent – No appearance