



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**

**PETITION 758 OF 2008**

**KARIKU KIMANI (SUING THRO' JAMES THUO KARIUKI)**  
**POWER OF ATTORNEY NUMBER 45330/1.....PETITIONER**

**VERSUS**

**THE COMMISSIONER OF LANDS.....1<sup>ST</sup> RESPONDENT**  
**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**RULING**

The petitioner herein Kariku Kimani brings this petition through James Thuo Kariku against the respondents in respect of parcel of land known as LR.NO.11618 said to be registered in the name of the petitioner. The said James Thuo Kariuki is the son of the Petitioner.

The said James Thuo Kariku holds a Power of Attorney registered at the Land Registry as No.IR/A45330/1 on 19<sup>th</sup> April, 2007. The 1<sup>st</sup> respondent herein by a Gazette Notice dated 13<sup>th</sup> October, 1972 gave notice of intention to acquire a portion of said parcel of land LR.No.11618 measuring 75 acres. On the same date the 1<sup>st</sup> respondent gave notice of the date and place where an inquiry would be held, that is, Wednesday 8<sup>th</sup> November, 1972 at the Lands Office, Harambee Avenue room No.308.

It is the petitioner's case that the date of the intended inquiry fell on a public holiday and that no inquiry was held on that date or any other date thereafter. Sometimes in May 2005, the petitioner caused his land to be resurveyed with a view to fencing the same which he did, but the respondents' agents destroyed the said fence, damaged the materials and also carried away some fencing posts.

The petitioner subsequently discovered that an entry had been irregularly entered against his title as entry No.4 of 3<sup>rd</sup> March, 1972 absolutely vesting the land in the government.

It is now his case that the 1<sup>st</sup> respondent has not acquired any part of his property as the alleged alienation was contrary to the Constitution in that, the 1<sup>st</sup> respondent has not acquired it for purposes of promoting public interest and no necessity has been demonstrated. As the registered owner, he has remained in possession of the said land to-date and no compensation has been effected at all.

Further to the foregoing, it is his case that no inquiry was held as by law prescribed within 30 days from the date of publication. After the postponement of the hearing on 8<sup>th</sup> November, 1972 the respondents have never held any inquiry and no award has been made in relation thereto. He reiterates that no payments have been effected.

As a result of the actions of the respondents, the petitioner has undergone mental anguish which has resulted in deterioration of his health. Therefore, the petitioner states that the respondents' unlawful action was intended to deprive him of his use of the land and the respondents should be compelled to compensate the him for general damages and also punitive and or aggravated damages.

The petitioner prays for the following orders;

- (a) A declaration do issue that the alienation of the part of the petitioner's land reference No.11618 comprising approximately 30.36 hectares by letter of allotment dated 12<sup>th</sup> June, 2003 and issued by the 1<sup>st</sup> respondent is a violation of the petitioner's Constitutional and fundamental rights under Section 70 and 75 of the Constitution of Kenya and protection from deprivation of property contrary to law and without compensation and protection of the law.
- (b) A declaration do issue cancelling the entry made against the petitioner's title vesting 75 acres of the petitioner's land in the government absolutely.
- (c) A declaration do issue that the petitioner is entitled to compensation from the respondents on account of unconstitutional deprivation of the petitioner property by the respondents as follows;
- i. Cost of damaged fencing materials – Kshs.500,000/=
  - ii. Value of loss of user of land and or mesne profits Kshs.2,500,000/=
  - iii. Cost of medication – Kshs.1,200,000/=
- (d) An order do issue directing the respondents to pay to the petitioner a sum of Kshs.10,000,000/= by way of punitive or aggravated damages.
- (e) Interest on (c) and (d) above at court rates.
- (f) Costs of the petition.
- (g) Such other orders as this court may deem just.

The petition is supported by an affidavit sworn by James Thuo Kariku and in reply thereto, there is an affidavit sworn by a representative of the respondents Mr. Joel Kitili a Senior Assistant Commissioner of Police who in effect justifies the acquisition of the petitioner's of land.

There is no doubt that the land in question is registered in the name of the petitioner. The copy of the annexed title confirms this. There is an entry however, No.4, which indicates that under the Land Acquisition Act of 1968, part of the said parcel of land had been acquired on behalf of the Government of Kenya pursuant to Section 19(3)(4) and the land is accordingly vested in the government absolutely free from encumbrances.

The Land Acquisition Act Cap 295 Laws of Kenya provides at Sections 9 and 23 as follows;

**“Section 9(1)(a). The Commissioner shall appoint a date, not earlier than 30 days and not later than 12 months after the publication of the notice to acquire, for the holding of an inquiry for the hearing of claims to compensation by persons interested in the land shall:**

- a. Cause notice of the inquiry to be published in the gazette at least 15 days before the inquiry.**

**Section 9(4). The Commissioner may for sufficient cause postpone an inquiry or adjourn the hearing of an inquiry from time to time provided that a postponement or an adjournment under this Section shall not extend the inquiry beyond 24 months from the date appointed under subsection (1) for the holding of the inquiry.**

**Section 9(4)(a) where an inquiry is not held within the time prescribed under this Section the Minister shall be deemed to have revoked his direction to acquire the land and Section 23 shall *mutatis mutandis* apply.**

**Section 23(1).The Minister may, at any time before possession is taken of any land acquired under this Act, revoke his direction to the Commissioner to acquire the land, and in that case the Commissioner shall determine and pay compensation for all damage suffered and all costs and expenses reasonably incurred by persons interested in the land by reasons of or in consequences of**

## **proceedings for acquiring the land.**

**Section 23(2). The principles relating to the determination of compensation set out in the schedule shall apply, so far as they are relevant, to the determination of compensation under this inquiry.”**

The petitioner has shown that, after the publication of the date of inquiry the date set, that is, 8<sup>th</sup> November, 1972 was declared a Public Holiday for Idd ul Fitr. There is no evidence that the date of the said inquiry was rescheduled and if the same was rescheduled, the easiest thing was for the 1<sup>st</sup> respondent to gazette the same and notify the persons concerned. I also envisage a situation whereby such an inquiry would involve the taking of some minutes, and the easiest thing to do in disputing the petitioner’s averment that no inquiry was held, was for the respondent to produce copies of the said minutes.

The inquiry must have been postponed and since the law required the respondents to comply with a specific timetable, and there being no evidence that the timetable was complied with, and in particular Section 9(4) and (4a), the Minister is deemed to have revoked his direction to acquire the said land. It follows therefore, that the entry No.4 against the title of the petitioner has no ground to stand on.

Sections 70 and 75 of the then Constitution have now been included in the new Constitution, Article 40 thereof. It provides that no person shall be deprived of property of any description or of any interest or right over property of any description unless the acquisition of land or interest thereof 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 requires prompt payment in full of just compensation to the person, and allows any person who has an interest in or right over that property, a right of access to a court of law.

The petitioner has proved to the required standard that no inquiry was ever held and even if the same were held, no award was made and no compensation was paid to him. He has therefore proved that his rights under the Constitution were breached and he is entitled to the prayers sought. ***See Civil Appeal No.252 of 1996 Commissioner of Land and another and Costal Aqua Culture Limited. High Court Civil Case No.1 of 1981 Kanini Farm Ltd. –Vs- Commissioner of Lands.***

Having so established, I must now address the prayers as set out in the petition. Prayers No. (a) and (b) follow my finding that no inquiry was held and therefore the alienation of the petitioner’s land was a violation of his Constitutional rights and therefore entry No.4 against his title must be cancelled.

The respondents’ witness admitted that the petitioner’s fence was up-rooted and some materials carried away. This was pleaded and proved to the satisfaction of the court and I order that the respondents shall pay Kshs.500,000/= being the cost of damaged fencing materials. The petitioner’s witness Mr. James Thuo Kariku has also proved the loss of user of the land which loss has not been seriously disputed by any counter evidence by the respondents to the tune of Ksh.2,500,000/=.

The adverse medical condition suffered by the petitioner was also pleaded. Several receipts and other documents were produced to prove the said head of damages. However, there was no specific pleading of the figure and whatever has been proved now falls within general damages. The petitioner is an old man of advanced age and from the material presented he suffers from hypertension and diabetes. One may not easily divorce those ailments from old age and at the same time, cannot rule out the disposition of his land affected him. I award him Ksh.1 million under that head.

The respondents must take their victim as they found him. There was no right in law to dispossess the petitioner of his land, the result of which he has suffered damages. He claimed Kshs.10,000,000/= under this head. He was deprived of his land over all this period and I believe that punitive damages should be awarded to the petitioner. Having awarded him Kshs.2,500,000/= for loss of use, I believe a sum of Kshs.7,500,000/= is adequate compensation in terms of punitive damages which I hereby award him.

The plaintiff shall have the costs of this petition and interest of above awards at court rates. Orders accordingly.

*Dated, signed and delivered at Nairobi this 21<sup>st</sup> day of October, 2010.*

**A. MBOGHOLI MSAGHA**  
**JUDGE**