



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Constitutional Petition 38 of 2007**

**IN THE MATTER OF SECTIONS 60 AND 84 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALL ALLEGED CONTRAVENTION OF FUNDAMENTAL  
RIGHTS AND FREEDOMS UNDER SECTIONS 75 OF THE CONSTITUTION OF  
KENYA**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 9(SUPERVISORY  
JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND  
FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE RULES, 2006**

**BETWEEN**

**BANK OF INDIA ..... PETITIONER**

**AND**

**THE COMMISSIONER OF LANDS ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

The Chamber Summons dated 24<sup>th</sup> January 2007 is grounded on the Petition which is in turn based on s 75 and s 84 of the Constitution.

The Petitioner seeks conservatory orders to stop the Government from acquiring the described parcels of land namely LR 5031, 5056, 5048, 5009, 12336 and 12335 – Shimoni in Kwale District which belong to the Associated Sugar Company Ltd. This company had charged the six parcels to the Petitioner (the chargee) and the current outstanding balance is Kshs 3.46 Billion (app) according to the affidavit in support of the application.

The Gazette Notices as described in the submission have invited interested parties to appear in Msambweni in Kwale District on 30<sup>th</sup> January 2007 for inquiries. However the Petitioner is against the proposed inquiries and would like the Court to stop the Government/CL from holding the inquiries on 30<sup>th</sup> January 2007 on the ground that the Government has disregarded the rights of the chargee/petitioner. The Petitioner claims that prior to the gazettment of the intention to acquire, the

Government had indicated that all it could offer the Petitioner would be Kshs 40 million and therefore the applicant stands to suffer irreparable loss if the acquisition were to be allowed to proceed.

The court has given the matter considerable thought and as a result takes the view that the words interest/property in s 75 should when interpreted in a broad and purposeful manner include a charge's interest over the parcels in question. Since the parcels are, I understand registered under the Registration of Titles Act Cap 281 the word "Chargee" "means any charge created on land for the purpose of securing the payment of money and also the payment by which the charge is created." - see s 2 of Registration of Titles Act.

The compensation is in relation to property interest or right as per s 75 (2). The court takes the view that it would not be lawful to restrain the inquiries in that the inquiries constitute the commencement of the process of acquisition which is meant or aimed at ascertaining the compensation to be awarded to those whose interests are affected by the acquisition. This include the chargee who must also attend the inquiries. At this stage the Government has not given any values to any interest as required under the law. This application is therefore premature and misconceived in law.

The other reason why this application is incompetent in law is that the process of acquisition is aimed at ascertaining the prices to be paid to the interest holders for the purpose of acquisition.

S 75(2) of the Constitution clearly states that the right of any interested party is to come to this court:

- (a) for the determination of his interest or right, the legality of the taking of possession or acquisition of the property interest or right and the amount of any compensation
- (b) for the purpose of obtaining prompt payment of that compensation

A party cannot therefore restrain a process that is strictly within the ambit of the Constitution.

As regards the purpose for acquisition it is trite law that it must be done on behalf of a public body and for the public benefit as set out in s 75 of the constitution. Prima facie the Petitioner has not fully demonstrated that the intended acquisition will not be for the public benefit – thus s 75(a) includes the utilization of the property so as to promote the public benefit as one of the constitutional purposes for acquisition. A public sugar factory is prima facie well within this constitutional category.

As regards what is the correct/or market price to the parcels this has to be determined in terms of s 75 and the Land acquisition Act failing which this court has jurisdiction to do so under s 75(2) of the Constitution. It cannot do so at this stage and this is clear from the construction or interpretation of s 75. Even on this ground the application for conservatory orders must also fail. The application is both premature speculative and incompetent. A chargees interest is the value of the land and not the debt owed.

In the result the application for conservatory orders is dismissed with no Order as to costs.

DATED and delivered at Nairobi this 25<sup>th</sup> day of January 2007.

**J.G. NYAMU**

**JUDGE**