



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

Misc civil Appli 613 of 2006

RODGERS MWEMA NZIOKA PETITIONER/JUDGMENT DEBTOR ON COSTS

VERSUS

THE ATTORNEY GENERAL 1ST RESPONDENT

THE COMMISSIONER OF MINES AND GEOLOGY 2ND RESPONDENT

THE DISTRICT COMMISSIONER, KWALE DISTRICT 3RD RESPONDENT

DISTRICT OFFICER 1, KWALE DISTRICT 4TH RESPONDENT

TIOMIN KENYA LIMITED 5TH RESPONDENT/APPLICANT

PIUS KASSIM 6TH RESPONDENT.APPLICANT

COLIN FORBES 7TH RESPONDENT/APPLICANT

JUMA LUMUMBA 8TH RESPONDENT.APPLICANT

THE CHAIRMAN, KWALE COUNTY COUNCIL 9TH RESPONDENT

COMMISSIONER OF LANDS 10TH RESPONDENT

AND

THE COMMISSIONER OF LANDS GARNISHEE

RULING

In this matter four respondents namely Tiomin Kenya Ltd and three others filed garnishee proceedings to attach the compensation due to the Petitioner from the Commissioner of Lands following a compulsory acquisition of his land in order to pave way for the mining of titanium in his parcel of land Kwale/Maweche/232.

The background to the garnishee proceedings is that the Petitioner had filed a Constitutional Reference on 19th October 2006 challenging the acquisition of his land and also challenging the quantum of the compensation intended to be paid to him. Six other Petitioners also filed similar challenges in respect of their parcels and Counsel agreed that the judgment in respect of this matter would apply to the other petitions namely: p626,-627,p628,p728,p729,p732 and p750 of 2006

The Petitioner had in the same Petition challenged the legality of the Mining Lease signed by the Government and granted to Tiomin Kenya Ltd, because it affected his parcel of land. In the Petition various constitutional infringements were pleaded namely:

- (i) violation of the right of protection from slavery and forced labour
- (ii) violation of the right against inhuman treatment
- (iii) violation of the right of protection from loss of property without compensation
- (iv) violation of the right of protection against arbitrary search or entry
- (v) violation of the right of protection of the right of movement

Substantively, the Petitioner's grievance is that his parcel of land was about to be acquired by the Government for the purpose of a mining project that was to be undertaken by Tiomin, Kenya Ltd. He claimed that his constitutional rights had been infringed or were about to be infringed and he sought the court's protection against the alleged contraventions as set out above. The Petitioner's claim under the Mining Act was that it be declared that the said Special Mining Lease granted by the Government to Tiomin Kenya on 6th July 2004 is null and void for contravening sections 7 and 55 of the Mining act.

By a judgment delivered on 19th December, 2006 the Petition was dismissed by this court and costs awarded against this Petitioner and such costs to be shared with the Petitioners in the other described petitions. The reason for the award of costs was that the Petitioner had in fact entered into an acceptable arrangement with the government concerning compensation and over 50 parcel owners had already accepted compensation and only the 7 petitioners had declined by trying to back out of the previous arrangement with the government. In addition following resistance by the 7 to comply, the government had initiated compulsory acquisition process in respect of the 7 parcels and such acquisition was meant to have them paid prompt compensation in terms of s 75 of the Constitution and the Land acquisition Act and in the event of the compensation being contentious the Petitioner would still be entitled to contest the compensation in this court under s 75 of the Constitution. The Court therefore found that the Petitioner's claims were unmeritorious because they were in this petition trying to defeat what they were seeking in the first place – namely market values of their parcels. As a result the Court refused to stop the compulsory acquisition which did proceed following an Inquiry as required under the Law.

The garnishee proceedings are now aimed at attaching the compensation in respect of the 7 parcels and the costs as per the draft untaxed bill of costs is a colossal sum of approximately Kshs 200 Million (an unprecedented bill by any standard.) On the other hand the combined value of the 7 parcels is not more than 9 million. The claimed or threatened costs would wipe away completely the compensation of Kshs 7 Million (appx) to the farmers which is payable to them under s 75 of the Constitution.

The questions which arise as a result are:

- (1) Can the court garnishee the compensation money lying with the Commissioner of Land before an award is filed or at all
- (2) What is the effect in law of the Petitioner's challenge of the validity of the Mining Lease and was it necessary to challenge the Mining Lease
- (3) In view of the claim based on the Constitution and the Mining Lease what is the correct

value of the subject matter

- (4) Can an order of costs negate or vitiate a constitutional right?
- (5) Is the court functus officio?
- (6) What are the court's findings in view of the above?

S 75(2) of the constitution reads:

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 shall have a right of direct access to the High Court for

- (a) 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 to which he is entitled; and**
- (b) The purpose of obtaining prompt payment of that compensation."**

In other words the Constitution gives an applicant unhindered access to the court.

Sub section 6 states:

- (iv) permits the taking of possession or acquisition of property in execution of judgments or orders of a court in proceedings for determination of civil rights or obligations.**

The question is, are garnishee proceedings for the purpose of determination of civil rights or obligations? In my view garnishee orders arising from an order of costs are outside the subsection and the taking away by way of an order of costs would amount to a contravention of s 75 of the Constitution because such a taking away was not contemplated under the section. And any order or conduct that has any such effect would be void to the extent of conflict with the Constitution as provided for in Section 3 of the Constitution.

The other reason why a court order cannot negate, vitiate, diminish or extinguish a fundamental right is that even the court giving any such order is subject to the Constitution and must in the conduct of its affairs or its mandate guarantee secure and enforce the right, and sanctioning such an order or amount would substantively negate, vitiate, diminish or extinguish a constitutional right to compensation and would be the antithesis of the court's mandate. Any conduct, action or order that threatens or violates a fundamental right falls outside the mandate of the court in view of the court's specific mandate under s 84(2) of the Constitution to make such orders issue such writs and give such directions as it may consider appropriate for the purpose of securing the enforcement of any of the provisions of s 70 to 83. A valid order for costs in a matter involving the enforcement of fundamental right must therefore in all situations never derogate from the mandate of the court to secure and enforce the rights being canvassed by the parties. Even where costs have been awarded they must be reasonable costs taking all the relevant circumstances and must be limited to the determination of the fundamental rights in issue.

In the case in point the value of each parcel is about 1.4 million on average and this is what the Petitioner came to court to safeguard. Reason, therefore dictates that any awarded costs must be based on this value and not on the value of the investment under challenge because this is the actual value of the subject matter, in monetary terms. This being the value threatened under s 84 and it being the market value of the parcel threatened with acquisition. Seen from this standpoint the argument that because one of the challenged parties planned a 12 Billion investment using all the affected parcels, this does not lend itself to be the value of the subject matter of the suit as claimed by the Applicant. In addition, this Court interprets s 75 to say that for a party to compulsorily acquire property of whatever description he is required to do so in terms of the Section – firstly, in this case that the property will be utilized for public benefit and secondly the acquisition must be done under a law passed by Parliament. In the case of land

the contemplated law is the Land Acquisition Act which is what the Government had invoked. Garnisheeing the proceeds of the acquisition is in the view of the court a “taking” not sanctioned under s 75 of the Constitution. In addition there is no evidence of the awards having been filed. It is for this reason that I set aside the garnishee order and dismiss the garnishee proceedings as well. The Judiciary guarantees, secures and enforces fundamental rights and what it is now being asked to do, negates that mandate. The argument that the Petitioner should not have raised the issue of the validity of the Mining Lease and which is what has enhanced the value of the subject matter (the Project being worth 12 Billion) has no substance in that the Government including Tiomin Kenya Ltd had entered into a Mining Lease that affected each parcel of land. The mode of acquisition could not have been effectively canvassed without reference to the Mining Lease. At no time did the Petitioners ask for more than the market value of their parcels and they did not challenge the implementation of the Project, and this must remain the base upon which any reasonable costs must be based or calculated. Moreover the court in its judgment did hold that the applicant ought not to have joined Tiomin (K) Ltd and other individual parties. Tiomin and those other parties could have applied to have their names struck out, very early in the proceedings yet they had not done so before the judgment. On the other hand, the claim on costs as per draft bill in the sum of shs 200 million threatens the Petitioners’ right to compensation and in addition it injects fear in future applicants and it is likely to fetter and inhibit the articulation of Constitutional rights and in particular fundamental rights and enforcement of those rights and deny potential claimants from accessing the court for fear of extra ordinary costs as claimed herein. In this matter it cannot appropriately be argued that the court is functus officio because the State responsibility under s 84 is a continuing duty and each contravention whether it is by a court order or any other contravention has to be dealt with when it arises. It arose when the court’s attention was invited to deal with the garnishee application and a draft bill of taxation in the total sum of over 200 Million was exhibited in support. I interpret the court’s challenge in the circumstances to be, to immediately translate the threatened fundamental right into practice by forthwith securing the threatened right by an appropriate order. Abdication of the courts mandate under s 84 is certainly not an option. Translating human rights into practice and giving the rights the security and the enforcement contemplated has to be done as and when the threat or the violation happens as the case may be. An interpretation of the order for costs in order to give full meaning to the fundamental rights of the petitioners is in my view embraced by the wide powers a Constitutional Court has under s 84 of the Constitution. The Court has a constitutional duty to secure and enforce fundamental rights and should never feel inhibited or fettered in any way.

While I have in this ruling pointed out at the possible benchmarks for the ascertainment of the value of the subject matter, in my view, the above benchmarks are only general indicators because in real terms fundamental rights can never be quantified in monetary terms. They are priceless. Their foundation is human dignity. It is also important to take into account that since the establishment of this Division of the High Court namely the Constitutional and Judicial Review Division the court has refrained from awarding costs in constitutional matters so as to give the fullest meaning to the important principle of the people’s right of access to the courts and in order not to inhibit the fullest articulation of public law issues. In the rare cases where an award has been given the expectation of the Court for the same reason as given above is that the costs would be fair and reasonable and not costs that negate, vitiate, diminish or extinguish substantive rights.

An unreasonable claim or assessment of costs has the potential of denying litigants and victims in this case the right of access to court under s 84 of the Constitution. The right of access is as important as the enforcement of the right. Indeed, the right of access is a fundamental right and an order that impedes it must give way to the extent of inconsistency. Even from a common sense standpoint surely the court cannot in its determination declare as it did in the earlier judgment that the government is entitled to compulsorily acquire the parcels for utilization of public benefit after the payment of compensation to the Petitioners, and at the same time condone the extinguishment of the right to compensation by an order for costs. This would be the antithesis of constitutional justice. The court cannot give with one hand and take with the other hand. A court of law must be a well of justice and not an engine of injustice.

It is sometimes very easy for the court to forget that the notion that the right thinking man out there, of what constitutes justice is what sustains the smooth administration of justice. It is what sustains the dignity and respect of the administration of justice. No civilized system of justice can afford to ignore

this important principle. I have no doubt in saying that the right thinking man out there would be shocked by the size of the claim on costs in this matter. Again for this reason as well, and with the greatest respect to Counsel, the quantum of costs claimed in this matter is an affront to the administration of justice and patently against the public interest in its administration. I would therefore dismiss the garnishee application for this reason as well.

As recent judgments on s 84 of the Constitution have emphasized the Original jurisdiction conferred on the High Court is different from that conferred on the same court under s 60 of the Constitution. The Original jurisdiction under s 84 is aimed at safeguarding fundamental rights and it is exercisable against the State and this includes the Judiciary. The Bill of Rights binds the judiciary and the other arms of a constitutional government.

As I held in the *LABHSON v MANULA HAULIERS Misc Civil Application No. 203 of 2004* the jurisdiction also extends to the guard of the guards that is the judicial officer. I say this because in the initial days of the jurisdiction being seriously invoked in this country it was confused with the unlimited jurisdiction under s 60. It is now firmly established. For those who would like to portray its invocation or exercise as for individuals grandeur, glory or rank, we are not the only jurisdiction invoking it. For example in the case of South African, Section 8 Constitution states:

“The Bill of Rights is binding on the legislature, the executive, the judiciary and all organs of state depending on the nature of the right and of any duty imposed by the right.”

It is quite evident that the jurisdiction is wider and more embracing in South Africa than the Kenyan situation as set out in s 84. We should for the time being content with what has been vested in the High Court for now.

It is exercisable by those obligated to exercise it all the time where and whenever there is a threatened or actual contravention. In the case of the court it is not restrained to move on its own motion in the matters before the court. After all the court has inherent powers also to do justice.

It would be serious abdication of duty or mandate for the court to even countenance or look the other way even for a minute, a threatened contravention or actual contravention of a fundamental right and say that it is helpless. I hold that both the letter and the spirit of s 84 demand that the court promptly deals with any such threatened or actual contravention – this being contravention in the face of the Court or under the instrumentality of the Court. Such contravention should forthwith be stopped in their tracks in the best method known to court. Indeed this court’s primary duty and function is that of a custodian of the rights and liberties of all.

The courts, especially the High Court has a responsibility to uphold and protect the Constitution and the fundamental rights entrenched in it. I believe that this duty includes the court’s constitutional duty to translate human rights into practice especially where the threat stems from a court order. The obligation under s 84 includes the duty to respect, protect, promote fulfill investigate punish and restore the rights in question. These seven levels must be seen to be practiced and this must be the extent of the state obligation under the Bill of Rights provisions, since the remedies are unlimited. The protective provisions of Chapter 5 cannot be effectively given practical meaning or the State guarantee of rights given the same meaning without this broad view of the state responsibility.

In the structure of the Kenya Constitution the Constitution has allocated original jurisdiction twice, that is, under s 60 where the High Court is conferred with unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by the Constitution or any other law.

The Original jurisdiction conferred on this court under s 84 of the Constitution is a special and unique jurisdiction which is deliberately conferred after s 60. It is unique because firstly it is conferred in a separate chapter clearly and exclusively dealing with fundamental rights and freedoms. Secondly it applies to all contraventions enforceable against the government – this includes the Judiciary. Thirdly the

jurisdiction to enforce is Original as regards all threatened or actual contraventions - Fourthly the jurisdiction can still be exercised without prejudice to any other action with respect to the same matter including appeals. In other words it is a parallel jurisdiction and it can be invoked even in the pendency of a matter pursuant to the concurrent jurisdiction under s 60. Fifthly the relief or any other action which the court may give are not limited and any other order capable of enforcing or securing a fundamental right can be given.

The garnishee application and the size of the draft bill in the sum of Kshs 200,307,868 constitutes conduct contravening the Constitution.

The duty of the court is to translate human rights into practice. It is with the above in view that I have no hesitation in exercising the court's jurisdiction under s 84 in this matter so as to secure and protect the right of the Petitioners to compensation awarded under s 75 of the Constitution. An order for costs cannot and should not be allowed to negate vitiate diminish or extinguish the realization of a fundamental right.

The obligation on the Government under s 84 is to protect, promote, fulfill, investigate, prosecute, protect, punish and restore, violation of fundamental rights. This is what is meant by translating human rights into practice. It is not a passive and injunctive obligation but a dynamic obligation. It creates positive obligations enabling all who owe the duty to effectively secure the rights. Since our Constitution is silent on this wider obligations, the State responsibility as defined in international instruments and international law is what gives practical meaning to the obligations under the Bill of Rights. This broader view of the obligation is not inconsistent with any provision of the Constitution – but is in line with the international instruments ratified by Kenya.

Although our Constitution unlike the South African does not provide for economic, social and cultural rights specifically, I have no doubt in my mind that the extent of State obligation as defined with the above levels of responsibilities namely duty to respect, protect, promote, fulfill and restore the rights apply as far as it is applicable to fundamental rights enforceable under s 84. Firstly, the two sets of rights stem from human dignity. Secondly, human rights are in practice linked and interdependent. Thirdly, they now enjoy a universality that militates towards a progressive elimination of the dichotomy and the differences of the two sets of rights.

- (i) The obligation to respect requires the State to refrain from interfering directly or indirectly with the enjoyment of the right
- (ii) The obligation to protect a right requires the State to take measures that prevent third parties from interfering with the rights
- (iii) The obligation to promote means to further it or advance it – by creating an enabling environment where the right can thrive.
- (iv) The obligation to fulfill requires the State to adopt appropriate measures to attain the full realization of the right. In practice due to the interdependency of human rights and the overall goal of protecting human dignity there cannot be any justification for the dichotomy of civil and political rights on the one hand, and economic social and cultural rights on the other hand. In my view under the democratic provisions of the Constitution there is an obligation to provide at least a minimal level of the latter rights.

I think the courts have a responsibility to give effective and practical meaning to the rights because it is the court that have been given the mandate to devise and grant effective reliefs as may be necessary in each situation. Thus, in the Indian case of *MC MEHTA & OTHERS v SHRIRAM FOOD AIR 1987 SC 1026* the Supreme Court observed that its power under s 32(1) is not only injunctive in ambit that is preventing the infringement of fundamental rights but it is also remedial in scope and provides relief for breaches of the fundamental rights already committed. In the case in point the Supreme Court acted on the basis of a letter on enforcing and securing violations.

I adopt the Supreme Court position in the definition of the State obligation.

I am of course not oblivious to the fact that the above wide definition is restricted limited or constrained by municipal Constitutions including that of Kenya due to the wording used in s 84 for example. Thus there will be constraints based on standing or loci standi and whether or not the threatened or actual contravention is in relation to the claimant. However the challenge to the courts in the enforcement of human rights is to deal with the special and unique situations which arise in real life and which defy precise textbook examples whose answers are known. Faced with those challenging and unique situations I would like to suggest that, taking a broad view of the state responsibility in translating human rights into practice does assist in devising solutions and remedies. The reason for this is that some of the rights shall be enforced at the municipal level and the others under the instrumentality of the United Nations monitoring bodies and by the application of international law. It is the interplay between the municipal action and the enforcement by the monitoring bodies, which is likely to bring about practical realization of the human rights and also give them practical universality. This interplay, is indeed the future.

Taking a narrow view, denies human rights their total glow which is evident whenever human dignity is upheld. Real life situations demand a renewal and transformation process that restores that dignity and achieves the common good. Like the biblical commandment of love which expresses the oneness of the ten commandments and the concept that when you break one of the ten you have broken them all, the same concept and notion is true of human right, in that for example where the right to liberty is violated even the enjoyment of the right to life, freedom of conscience and freedom of expression association and assembly are similarly affected. You cannot again separate the right to life from that of the right to a clean environment as the latter does affect the quality of the first. The interdependence of human rights is there on the ground and it poses the greatest challenge to the courts in their daily attempt to translate the rights into realities of the day to day life. The task, I dare say, demands a holistic approach without losing focus on the courts fidelity to the unique provisions of the municipal constitutions.

This is a test case, and as I have said before, extra ordinary wrongs call for extraordinary remedies. The other great reason for the court's active intervention is that even in Constitutional matters or public law generally, the court always has in addition, its inherent powers to do justice in all situations – see ***GITHUNGURI II and R v ATTORNEY GENERAL exparte SAITOTI.***

In human rights law, in my view the duty to give effective and practical remedies on the part of those obligated under the relevant provisions is continuous and never ceases.

In exercise of the power vested in this court by s 84, I dismiss the application dated 31st January 2007 and further set aside the order nisi. The draft bill of costs is quashed forthwith and it is ordered that a further reasonable bill be prepared using the bench marks set out above and that taxation costs if not agreed proceeds on that basis.

However in view of the state responsibility as expressed above the costs in favour of the Government and its officials are hereby disallowed, and the order for costs be and is hereby varied accordingly.

DATED and delivered at Nairobi this 30th day of May 2007.

J.G. NYAMU

JUDGE