



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MILIMANI**

**ELC PETITION NO. 27 OF 2018**

**IN THE MATTER OF ARTICLES 2 (2), 19, 20, 21, 22, 23, 27, 40, 47,**

**64, 67 AND 162(2) OF THE CONSTITUTION OF KENYA 2010**

**=AND=**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND**

**FREEDOMS UNDER ARTICLES 40, AND 47, OF THE CONSTITUTION OF KENYA 2010**

**=AND=**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 64 AND**

**67 OF THE CONSTITUTION OF KENYA 2010**

**=AND=**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF SECTIONS 5 AND 6**

**OF THE NATIONAL LAND COMMISSION ACT, 2012**

**=AND=**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF PART VII OF THE LAND ACT, 2012**

**=AND=**

**IN THE MATTER OF SECTION 128 OF THE LAND ACT, 2012**

**=BETWEEN=**

**LIBYA OIL LIMITED.....PETITIONER**

**=AND=**

**THE NATIONAL LAND COMMISSION.....1<sup>ST</sup> RESPONDENT**

**KENYA URBAN ROADS AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**RACHUONYO ENTERPRISES LTD.....1<sup>ST</sup> INTERESTED PARTY**

**NATIONAL SOCIAL SECURITY FUND.....2<sup>ND</sup> INTERESTED PARTY**

## JUDGEMENT

### **Background.**

1. This Petition's history can be traced from the events which began in the late 80's. There was land which had been reserved for the expansion of the junction at Jogoo Road and Outering Roads. The Director of Physical Planning planned the land in issue for allocation. The land was then allocated to Rachuonyo Enterprises Limited and Outering Enterprises Limited. Part of the land was also earmarked for a supermarket.
2. The then Nairobi City Commission raised issues over the allocation stating that there were advance road development proposal by the City Commission on the then existing Outering Jogoo Road and a proposed 18 meter road from Kayole Estate and the Lunga Lunga Road and Outering Road. The Commission recommended that the allocation be rescinded.
3. The portion allocated to Rachuonyo enterprises Limited was meant for building of a petrol station. The company later applied to the Commissioner of Lands to allow it to move to another site within the same locality. Once its request was granted, the company proceeded to process title for the new site which was part of the portion which had been allocated to Outering Enterprises Limited. The title processed was LR No.209/11152 measuring 0.2604 hectares on which it erected a petrol station which was leased to the petitioner which was then known as Esso Kenya Limited.
4. The Director of Physical Planning then re-planned the area by amalgamating the remainder of the land that had been allotted to Outering Enterprises Limited, the portion which Rachuonyo Enterprises Limited left upon relocation, together with the portion earmarked for a supermarket. The amalgamated land was 3.53 hectares. The Amalgamated land was then allocated to Endesha Multi-Purpose Co-operative Society Limited.
5. The Kenya Power and Lighting Company Limited was persuaded to re-locate its high voltage power lines from the area next to the 3.53 hectare land. Once the power lines were re-located, additional land was available. The Director of Physical Planning re-planned the area which was now 4.581 hectares. A new allotment letter was given to Endesha Multi-Purpose Co-operative Society for 4.581 hectares. The Co-operative Society then made a request for an informal transfer of the allotment letter to Multi-Purpose Co-operative Centre Limited.
6. The request was granted by the Commissioner of Lands. Multi-Purpose Co-operative Center Limited then processed title LR No.209/11314. The Directors of Endesha Multi-purpose co-operative society limited were the same directors in Multi-Purpose Co-operative Center Limited. The Secretary of Endesha Multi-Purpose Co-operative Society Limited was John Michael Ohas. This is the same person who was the Director of Physical Planning. He is also the same person behind Rachuonyo Enterprises Limited as can be confirmed by an affidavit he swore in ELC 477 of 2018 where he describes himself as chief executive of the company since inception. The company is seeking compensation over the same property which the petitioner herein is seeking compensation.
7. Though the allotment was given for purposes of the allottee putting up a commercial complex in the area, the land in issue was quickly sold to National Social Security Fund (NSSF) for Kshs.124,500,000/= NSSF proceeded to subdivide the land which it sold to various entities.
8. During the improvement of Outering road, Kenya Urban Roads Authority had challenges at the junction of Jogoo Road and Outering Road because there were petrol stations and supermarkets which had been put up at the area reserved for expansion of roads. The Authority made a complaint to the National Land Commissions (NLC) which commenced the process of reviewing grants over land in the area. When the process was completed, it emerged that the grants were acquired illegally as the land had been reserved for road expansion. The NLC recommended for revocation of not only titles which emanated from subdivision of LR No.209/11314 but also all other titles in the same area.
9. The petrol station which was being operated by the petitioner was demolished and that is where the Outering road was expanded to. This is what prompted the petitioner to file this petition in which it seeks the following reliefs.
  - a) ***A declaration that the act of taking possession of the property without following the compulsory acquisition process set out in section 23 of the Kenya Roads Act, 2013 and Sections 112 to Section 121 of the land Act was illegal, unlawful and amounted to arbitrary deprivation of property thereby amounted to an infringement of the petitioner's Constitutional right to protection of its property as enshrined under Article 40(3) of the Constitution.***
  - b) ***A declaration that the 1<sup>st</sup> Respondent's Determination dated 27<sup>th</sup> October, 2015 and subsequent award dated 16<sup>th</sup> November, 2016 were made without conformity to due process and thereby are violations of the Petitioner's right to fair administrative process as enshrines under Article 47 of the constitution of Kenya 2010.***
  - c) ***An order for full, prompt and just compensation for the compulsory acquisition of the property (L.R No. 209/11152) in the sum of Kshs.219,042,571 comprised as follows;-***
    - i. ***Kshs.89,040,000 being the value of the improvements and unexpired term of its leasehold interest in the property; and***
    - ii. ***Kshs.130,002,571/= being the projected loss of future profits on account of its inability to utilize the unexpired term of the lease.***
  - d) ***Interests on (c) at Court rates.***
  - e) ***Such other and/or further relief as this Honourable Court may deem fit to grant.***

f) ***The costs be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.***

10. Though the 1<sup>st</sup> Respondent and the interested parties were served, they did not file a response to the petition despite the fact that they were granted time to do so after a judgement that was set to be delivered on 5/12/2019 was suspended for them to file their responses to the petition.

**Petitioner's Contention**

11. The petitioner contends that the action by the Respondents to take over its property without compensation was a contravention of its rights under Article 40 of the constitution. The Petitioner argues that despite the fact that its property was not gazetted for compulsory acquisition, the 1<sup>st</sup> Respondent went ahead to revoke its title which it confused for LR No.209/11314/1.

12. The petitioner further argues that it leased the property from the 1<sup>st</sup> interested party initially for a period of 20 years which expired on 30<sup>th</sup> June 2009. The lease had a clause for automatic renewal for a further 10-year period. It signed a letter of offer for renewal but before a formal lease could be signed, its attention was drawn to advertisements in the press which called for review of the grants. The petitioner through its lawyers attended the hearing where representations were made but despite the petitioner pleading that its property was not one set for review, the 1<sup>st</sup> Respondent went ahead to revoke title which it maintained was LR No.209/11314/1.

13. The petitioner argues that it came across a letter from the 2<sup>nd</sup> Respondent addressed to the chairman of the 1<sup>st</sup> Respondent in which it had attached a schedule of the compensation which had been processed. According to this schedule, the petitioner was meant to receive Kshs.200,445,000/=. This amount was however reduced to Kshs.41,445,000/=which the Petitioner was asked to accept failure to which the petitioner was to file an appeal to the Environment and Land Court as provided under section 28 of the Land Act.

14. The Petitioner argues that it was discriminated against when the amount which had been earmarked for it was unilaterally reduced but some owners of petrol stations affected in the same area were given compensation as had been shown in the schedule sent by the 2<sup>nd</sup> Respondent. The petitioner pointed at the case of Mohamud Khalif Ali who was paid Kshs.269,675,000/=as had been shown in the schedule whereas the petitioners compensation was reduced to kshs.41,445,000/= . The Petitioner therefore contends that this amounted to discrimination which is an infringement on its constitutional rights protected under Article 27 of the constitution.

15. The petitioner also contends that its constitutional right under Article 47 of the Constitution were violated in that the 1<sup>st</sup> Respondent erroneously associated it with LR No.209/11314/1 and that the Petitioner obtained the lease from the 2<sup>nd</sup> interested party when this was not the case; that the 1<sup>st</sup> Respondent declined to consider the survey maps provided by the petitioner which showed that it was on LR No.209/11152 and not LR 209/11314/1. The petitioner further contends that its submissions on compensation were never considered and that the process of compulsory acquisition was not followed as provided in the law.

**Second Respondents' contention.**

16. The second Respondent contends that the property which the petitioner seeks to be compensated, was found to have been unlawfully obtained through corrupt scheme and is therefore not protected under Article 40(6) of the Constitution. The basis for this contention has been captured hereinabove while giving the background history of this petition. I therefore need not repeat the same here.

**Analysis**

17. I have considered the submissions by the petitioner as well as those of the second Respondent. The issues which emerge for determination are firstly, whether the petitioner had interest in the property for which it claims compensation. Secondly, whether the constitutional rights of the petitioner under Articles 27,40 and 47 were violated. Thirdly, is the petitioner entitled to the prayers in the Plaint. Lastly, which order should be made on costs.

18. On the first issue, it is clear that the petitioner had a lease over LR No.209/11152. This lease was for 20 years LR NO.209/11152 with effect from 1989. This lease expired on 30<sup>th</sup> June 2009. Though the lease provided for an automatic renewal for another 10 years, the petitioner had not signed a formal lease which would have been registered. This therefore means that legally there was no lease capable of being protected. The relationship between the petitioner became that of a month to month tenancy and cannot therefore be the basis of claiming any rights accruing therefrom on the basis of a non-existent lease.

**Article 27 of the Constitution.**

19. The Petitioner contends that it was discriminated against. The petitioner gives an example of Mohamud Khalif Ali who was paid compensation of 269,675,000/= for improvements which were on LR No.209/11314/4 . The petitioner argues that whereas in the schedule which had been sent to the chairman of the 1<sup>st</sup> Respondent indicated that it was to have an award of Kshs.200,445,000/=it was finally offered an award of Kshs.41,445,000/= and that this amounted to discrimination .

20. Black's Law Dictionary 10<sup>th</sup> Edition defines discrimination as follows: -

***“ Differential treatment ; esp; a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favored”.***

The amount arrived at as compensation for improvements on the properties which were affected depended on the developments which were on each property. In the example cited by the petitioner, it is clear that Muhamud who owned Regnol Oil (k) Limited had built two petrol stations, a garage, car wash, a double storey building and a parking lot. This is what the 1<sup>st</sup> Respondent took into account in arriving at a compensation of Ksh.269,675,000 for the improvements. The petitioner has not tabled any evidence as to what kind of developments were on the property where it was operating a single petrol station. There is no evidence that the amount which had been earmarked for the petitioner's improvements was reviewed. There is evidence which was given to show the basis for the review. There is therefore no basis upon which this court can make a finding that the petitioner was discriminated.

#### **Article 40 of the Constitution**

21. I have already indicated hereinabove that the Petitioner had no lease over LR No.209/11152 . This property was still in the name of the 1<sup>st</sup> interested party the lease to the petitioner having expired. Though the 1<sup>st</sup> interested party associated the petitioner with LR No.209/11314/1, in its verdict, the 1<sup>st</sup> Respondent found that all the plots which arose out of subdivision of LR No.209/11314 including the other titles in the same area had been obtained unlawfully. The 1<sup>st</sup> interested party recommended for revocation. Though the 1<sup>st</sup> Respondent indicated that the titles had been revoked, the fact remains that the law provides that the duty of the commission is to recommend to the Registrar to revoke. It does not therefore mean that the decision by the 1<sup>st</sup> interested party is irregular by the mere fact that it stated that titles had been revoked.

22. Materials presented by the 2<sup>nd</sup> Respondent clearly show that the portion over which the 1<sup>st</sup> interested party obtained title was part of the land which had been allocated to Outering Enterprises Limited. This is the same area to which the then Nairobi City Commissions had protested when it was allocated. It is evident that John Ohas who was Director of Physical Planning and who owned Rachuonyo Enterprises limited was behind machinations which returned a false verdict that the area where he finally set up a petrol station was not going to affect the future expansion of Outering Road. These machinations were engineered by him in collusion with officials of the Nairobi City Commission who later benefitted as they were officials of the company which was later allotted the remainder of the land meant for road expansion.

23. There can be no protection under Article 40 of the constitution where the land in issue is found to have been unlawfully obtained. The evidence tabled shows that the land was not available for allocation but because John Ohas was the Director of Physical Planning, he pulled strings which enabled him not only to benefit from LR No.209/11152 but also LR No.209/11314 by virtue of him being an official of Endesha Multi-Purpose Co-operative Society Limited which informally transferred the allotment to a sister company which then sold the land to the 2<sup>nd</sup> interested party.

24. The mere fact that LR No.209/11152 was not gazetted does not invalidate the verdict of the 1<sup>st</sup> Respondent. The 1<sup>st</sup> interested party was clear that the proceedings leading to revocation of the title was land occupied by the petitioner. The wrong description of the same does not invalidate the verdict of the 1<sup>st</sup> Respondent. The fact remains that the land in issue had been unlawfully obtained. Such title cannot be protected as clearly indicated in Article 40(6) of the constitution.

#### **Article 47 of the constitution.**

25. Though the petitioner appeared before the National Land Commission on the basis that the petrol station it was occupying was on LR 209/11314/1, the Petitioner was given an opportunity to be heard. The Petitioner's advocate made representations in form of written submissions. After the first Respondent reached a decision, the decision was communicated to all the affected persons. In that decision, the reasons for arriving at the decision were given. The petitioner seems to be complaining about the merits of the decision. Article 47 pursuant to which the Fair Administrative Action Act was enacted provides instances when a body like the 1<sup>st</sup> interested party can be said to have contravened a party's constitutional rights. There is therefore no basis upon which this court can find that the petitioner's rights under Article 47 were violated.

#### **Disposition.**

26. It is clear from the above analysis that the 1<sup>st</sup> Respondent was not undertaking a process of compulsory acquisition. The affected titles had been found to have been unlawfully obtained. The 1<sup>st</sup> Respondent recommended that the affected parties be paid compensation for the improvements on the land. It therefore follows that none of the prayers in the petition can be allowed. I find that this petition lacks merit. The same is hereby dismissed with costs to the 2<sup>nd</sup> Respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28<sup>TH</sup> DAY OF JANUARY 2021.**

**E.O.OBAGA**

**JUDGE**

In the Virtual presence of:-

M/s Mukiti for M/s Lubano for Petitioner

Mr Eredi for 2<sup>nd</sup> Respondent

Mr Ochieng for 2<sup>nd</sup> interested party

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**