



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISCELLANEOUS CIVIL SUIT NO. 169 OF 2000

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

COMMISSIONER OF LANDS AND ANOTHER.....RESPONDENT

EX-PARTE COASTAL AQUACULTURE LIMITED

RULING

Before the Court is an application by Notice of Motion for judicial review made under the provision of order 53 Civil Procedure Rules, part IV of the Law Reform Act (cap 26), the Constitution of Kenya and section 3A Civil Procedure Act.

The applicant seeks orders as follows:

- 1) *Certiorari* to quash Gazette Notice No 3624 in Vol CII- No 37 dated 16/6/2000 of Government's intention to acquire plots Nos LR 17600 and 17601/2 Tana River.
- 2) *Certiorari* to quash Gazette Notice No 3625 in Vol CII- No 37 dated 16/6/2000 of the Commissioner of Lands' intention to hold an inquiry for the hearing of claims for the compensation from person interested in plots LR 17600 and 17601/2 Tana River.
- 3) Order for prohibition against Commissioner of Lands from commencing with the holding of an inquiry for the hearing of claims to compensation by persons interested in plots 17600 and 17601/2.
- 4) *Mandamus* compelling the Ministry of Lands and Settlement to make immediate provision for prompt payment of compensation to the applicant.

The grounds upon which the application is made is that the said Gazette Notices are defective and invalid for the reason that they do not comply with the statutory conditions as provided by Land Acquisition Act, cap 295 or the Constitution of Kenya section 75 thereof. The application is supported by a statement as required by Civil Procedure Rules together with a verifying affidavit of George Papaeliopoulos, a director of the Company.

This is not the first time the Kenya Government has expressed its intention to acquire applicants land, the said plot Nos LR 17600 and 17601/2.

In High Court Misc Civil Application No 201/93 and in High Court Civil Application No 55 of 1994 the parties were disputing the validity of Notices issued by the Government of its intention to compulsorily acquire the plots in question. In Misc Application No 201/93 the Notices were withdrawn by consent of the parties. In Misc Suit No 55/94 the Notices were declared by Court to be invalid. The High Court decision in this case was subjected to appeal and the judgment of High Court (Ringera, J) was upheld. The appeal was decided on 27/6/1997.

In upholding the judgment of Ringera, J, the Court of Appeal reviewed in great detail the law applicable to the dispute between the parties. I need not repeat the provisions here.

In the present application the dispute relates to Gazette Notices published and dated 16/6/2000 of the intention to acquire and on the date of holding of inquiry as to compensation to the interested parties. The orders of *certiorari* are sought to quash the Gazette Notice No 3624 in Vol CII-No 37 and 3625 of the same date on the grounds that the Notices are invalid null and void as they are couched in similar terms as those in the earlier Notices already declared invalid null and void. I will set out the earlier Notices in full.

“Gazette Notice 3590:

Land Acquisition Act, cap 295 Intention to acquire land.

In pursuance of section 6(2) of the Land Acquisition Act, I give notice that the Government intends to acquire the following land for Tana River Delta Wetlands.

Schedule

Plot No Location Approx Area to be acquired in Hectares 17600 Tana River district 4,386.4 17601/2
Tana River district 5,181.6

A plan of the affected land may be inspected at Ardhi House, 3rd floor, Nairobi, during office hours.

Dated 22nd July, 1993.

Wilson Gachanja

Signed: Commissioner of Lands”

This Notice was withdrawn by consent.

The next Notice dated 4/11/93 and numbered Gazette Notice No 5689 reads as follows:-

“The Land Acquisition Act (cap 295).

Intention to acquire land.

In pursuance of section 6(2) of the Land Acquisition Act, I give notice that the Government intends to acquire the following land for Tana River Delta Wetlands.

Schedule

Plot No Location Approx Area to be acquired in Hectares 17600 Tana River district 4,386.4 17601/2
Tana River district 5,181.6

A plan of the affected land may be inspected at Ardhi Hose, 3rd Floor Nairobi, during office hours.

Dated 4/11/93

Wilson Gachanja

Signed: Commissioner of Lands.”

This is the Notice which was subject matter of the suit No 55/94 and the judgment of Ringera, J and the judgment of the Court of Appeal.

On the validity of these Notices the Court (Ringera, J) in his judgment approved by the Court of Appeal had this to say:

“As regards the adequacy and validity of the Notice published under section 6(2) I have come to the judgment that Notice should reflect the Minister’s certificate to the Commissioner under section 6(1), and must accordingly include the identity of the public body for whom the land is acquired and the public interest in respect of which it is acquired. It is only when a notice contains such information that a person affected thereby can fairly be expected to seize right to challenge the legality of the acquisition. That is because the test of the legality of the acquisition is whether the land is required for a public body for a public benefit and such purpose is so necessary that it justifies hardship to the owner. Those details must be contained in the notice itself for the *prima facie* validity of the acquisition must be judged on the content of the notice. The test must be satisfied at the outset and not with the aid of subsequent evidence.”

The present Notice reads as follows:

“The Land Acquisition Act (cap 295)

Coastal Aquaculture Ltd

Intention to acquire land.

In pursuance of section 6(2) of the Land Acquisition Act, the Commissioner of Lands, gives notice that the Government intends to acquire the following land for the conservation of Tana Delta Wetlands.

LR No Locality Registered Owner Area to be acquired in Hectares 17600 Tana River Coastal Aquaculture Ltd 4386.6 17601/2 Tana River Coastal Aquaculture Ltd 5181.6 district

Plans of the affected land may be inspected during office hours at the Commissioner of Lands, Ardhi House, 1st Ngong Avenue, Nairobi.

Dated 6/6/2000

Signed: S K Mwaita

Commissioner of Lands”

It will be seen that there are changes in the manner the Notice is framed namely:

- a) The name of the registered owner is disclosed.
- b) The purpose for which the land is required is stated as:-

“For the conservation of Tana Delta Wetlands.”

Notwithstanding these changes the applicant states that the Notice is clearly defective and invalid. Furthermore that the Notice has not been served upon the applicant as required under section 6(2) of the Act which requires that:-

“The Commissioner shall cause a notice

...to be published in the Gazette and shall serve a copy of the notice on every person who appears to him to be entered in the land.”

The allegation of non service is repudiated by the replying affidavit which shows that the service was effected. I agree with respondent.

The applicant argues further that the Notice does not now specify the public body for whom the land is being acquired only the purpose for which the land is required is stated. Counsel for the respondent states that the Government being included in the definition of public body as given in the Acquisition Act is the body for whom the land is being acquired.

The applicant replies how is the Government going to carry out the conservation unless it appoints a public body to carry out the conservation.

It is such a body that should be disclosed. It is not sufficient just to say the Government is acquiring the land.

For the jurisdiction of this Court in granting orders of *certiorari*, it is necessary to find out if *certiorari* is available to quash the Notice complained of.

It is to be observed that in the case of the *Re Kisima Ltd* [1978] KLR 36 the order sought was for leave to issue prohibition and the Court, Hancox, J, was of the view that the order could issue. Also in the case of *Commissioner of Lands ex-parte Coastal Acquaculture Ltd* Misc Application 55 of 1994, the prayers were for orders of prohibition. In both instances, it was sought to bring to a halt the enquiries which were scheduled to look into the question of compensation.

Orders of *certiorari* on the other hand are issued to quash judicial or quasi-judicial orders or proceedings by removing and adjudicating on the validity of judicial acts and quasi-judicial functions by administrative bodies, tribunals or other authorities or persons obliged to exercise such functions. The grounds upon which *certiorari* may issue are:

- a) Want or excess of jurisdiction.
- b) Violation or disregard of the principles of natural justice.
- c) Error of law apparent on the face of the record.

In publishing the Notice of the Government’s “intention to acquire land” was the Commissioner performing a judicial or quasi judicial function?

Looking at section 75 of the Constitution it will be seen that the protection given is to prevent arbitrary deprivation of property except on certain conditions specified therein. The word compulsory is associated with phrases such as using force, to compel or power of compelling against the will of the person concerned. The decision to compulsorily acquire property is therefore entirely of the Minister of Government and the person interested in the property is not given any opportunity to participate in the process before the decision is reached. This is what Akilano Akiwumi, JA said in his judgment on appeal:-

“.....and I may add, a process in which the person to be affected has absolutely no part to play.....”

At this stage one may say that the act of the publication of the Notice of intention by the Commissioner of Lands is not a judicial or quasi-judicial function. He is simply required to inform members of public that the Government intends to acquire the land. However, it seems to me that the Commissioner’s duties are not limited to the issue of the Notice of intention to acquire land. The whole process involves the issue of the Notice of intention to acquire and the holding of an inquiry to assess compensation to the persons interested in the land. In this respect the Commissioner of Lands is expected to act judicially in

determining the persons interested in land and the award. He is required to hold an inquiry.

Hon Hancox, J, (as he then was) in *Re Kisima Farm Ltd* [1978] KLR 36 case observed:

“I would comment that there appears to me to be defects in the expression of the Commissioner of Lands intention in the respective Gazette Notices. For instance, section 6 requires that the Minister shall be satisfied that the land in question is required for the purpose of a public body. No public body and no particular purpose is specified in the Gazette Notice..... In the circumstances..... this *prima facie* seems to constitute an absence of jurisdiction to acquire the land, and consequently an absence of jurisdiction in the Commissioner of Lands to act in pursuance of a direction given in that behalf.”

My understanding of this comment is that the jurisdiction of the Commissioner of Lands to carry out the full process of land acquisition arises from the validity of the Notice of intention to acquire land. If the Notice is defective then the whole process can be quashed for lack of jurisdiction.

The second order sought therefore depends on whether the first order is granted.

I now proceed to examine the Gazette Notice Numbered 3624 dated 16th June, 2000.

I have already mentioned that this Notice is not similar to the earlier Notices issued. The purpose shown “the Conservation of Tana Delta Wetlands” is it one of the purposes specified in the Constitution section 75 read with section 6 of the Land Acquisition Act, namely:

Interest of defence, public safety, public order, public morality, public health, town and county planning or the development or utilization of property so as to promote the public benefit, and is the necessity such as to afford reasonable, justification for the causing of hardship that may result to any person having an interest in or right over the property.

The declared purpose for the conservation of Tana River Delta Wetlands is too general. If this means the rational protection of the natural resources from destruction, it might benefit the general public.

But it is to be noted that the land in dispute was Government land until 1992 when grants of leases for 999 year term were made to the applicant. It is therefore surprising that after expiration of less than one year (November 1992 and July 1993) and (November 1993) the Government should wish to compulsorily acquire the same leasehold properties thereby terminating compulsorily the 999 term leaseholds granted to the applicant.

Moreover, the applicant states in the statement:

“That it is apparent the Minister of Lands and Settlement was not satisfied that there was need to acquire the applicants’ land for a public purpose.....as they were content to issue Letters of Allotment over the same land to other entities even whilst purporting to acquire the land for public purpose.”

On this issue the allotments of the applicant’s land the learned counsel for the respondents cleared the matter and the applicant does not dispute that these allocations have already been cancelled.

Nevertheless, the applicant states that there is display of lack of good faith on the part of the Government in the manner the acquisition of this land is being handled and such bad faith is a manifestation of the illegality of this land acquisition.

After considering the above matters I am now convinced that in this particular case the Government simply wants to take back what it granted to the applicant for the short period between 1992 and 1993. This then is not acquisition necessary for development or utilization of the land in such a manner as to promote public benefit. The necessity to acquire the land for conservation of Tana River Wetlands cannot afford reasonable justification for the causing of the hardship that will result to the applicants.

This is in view of the Lease Agreement existing between the Government and the applicant (exhibit GP1) special condition numbered 2 of which states:-

The land be used and managed in good husbandry manner and maintaining of the soil to the satisfaction of the Commissioner of Lands and the Director of Agriculture.”

The need to conserve Tana River Delta Wetlands is therefore not hindered or obstructed by the applicants’ ownership or possession of this land. It is my view that in this particular case the Government cannot be said to be “public body” for whom the land is being acquired. The land is already Government land and there exists an agreement on user under which the Government is able to enforce against the applicant.

The necessity for the acquisition does not justify the hardship the applicant is likely to suffer. There is exhibited a valuation report which shows loss of US\$14,500,000.

I therefore find that the Gazette Notice No 3624 in Vol CII No 37 dated 16/6/2000 is invalid null and void. It does not reflect the true position. It fails to comply with the law in that the name and identity of the public body and the purposes for which such public body requires the land are not disclosed. That being my finding the Gazette Notice No 3625 in Vol CII-No 37 dated 16/6/2000 notifying of the holding of inquiry and hearing claims for compensation is also invalid.

The orders sought in respect of the said Notices are hereby granted. It follows also that the application of an order for prohibition is granted as there is no jurisdiction on the part of the Commissioner of Lands to hold such inquiry.

As for the prayer for order of *mandamus* compelling the Minister to make immediate provision for prompt payment of compensation to the applicant, this prayer seems premature. The issue of compensation is dealt with under sections 8 to 13 of the Land Acquisition Act and no grounds have been shown that if the compensation once determined the respondent would be unable to pay. This prayer is therefore dismissed.

The applicant shall have 3/4 of the costs of this application.

Dated and Delivered in Mombasa this 17th day of November 2000.

J.N.KHAMINWA

COMMISSIONER OF ASSIZE