



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

PETITION NO. 3 OF 2018

(FORMERLY NRB CONSTITUTIONAL PETITION NO. 544 OF 2019)

IN THE MATTER OF: ARTICLES 10, 19, 20, 23, 27, 40, 47, 165(3)(B) & 258 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: RULES 3, 4, 10, 11 AND 20 OF THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) PRACTICE AND PROCEDURE RULES 2013.

AND

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 27 AND 40 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: PART V111 OF THE LAND ACT NO 6 OF 2012

BETWEEN

FRANCIS KAMAU NJOROGE.....PETITIONER

AND

THE CABINET SECRETARY, MINISTRY OF PUBLIC

SERVICE, YOUTH AND GENDER AFFAIRS..... 1ST RESPONDENT

THE CABINET SECRETARY, MINISTRY OF INTERIOR

AND COORDINATION AND NATIONAL GOVERNMENT.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGEMENT

By a Petition dated 27th October 2017, the Petitioner herein sought for Judgment against the Respondents for the following orders;-

- a) A Declaration that the act of trespassing onto the Petitioner's property and the threatened forceful acquisition of the Petitioner's parcel, or part of his parcel of land registered as L.R No.Kiambaa/Waguthu/2316, is a gross violation of the Petitioner's constitutional right to private property and the infringement of the protection afforded by Article 40 of the Constitution.***
- b) A Declaration that the Respondents have no right in law to interfere with the Petitioner's private property without following due process of law in compulsory acquisition as set under Article 40(3) of the constitution and part viii of the Land Act No. 6 of 2012.***
- c) General Damages for trespassing onto the Petitioner's property and interfering with the Petitioner's right to quiet and***

peaceful enjoyment of his property registered as L.R No.Kiambaa/Waguthu/2316, and from preventing the Petitioner from accessing and using his property.

d) *A Declaration that the Respondents are liable to compensate the Petitioner for the unlawful acquisition of and destruction of the Petitioner's property which included mature coffee trees and coffee crop that was ready for harvest and destruction of the piece of land for agricultural purposes.*

e) *Liquidated damages of Six million, Eighty three thousand one hundred and twenty shillings (Kshs 6,083,120/=)*

f) *Interest on (c) from the date of judgement and interest on (e) from the date of destruction till payment in full.*

g) *A permanent injunction restraining the Respondents whether by themselves, their agents, employees and /or servants from interfering with the Petitioners quiet and peaceful enjoyment, possession, use and/or any dealing of the property known as L.R No.Kiambaa/Waguthu/2316.*

h) *Costs of and incidental to this petition.*

i) *Any other relief that this court may deem just to grant.*

In his Petition, the Petitioner averred that on the 31st October 2016, 1st November 2016, and 3rd November 2016, heavy earth moving machines namely a tractor, a roller and an excavator being property of and operated by officers of the National Youth Service invaded the Petitioner's property L.R No.Kiambaa/Waguthu/2316, without his knowledge or approval. That the said operations were sanctioned/ supervised by the area chief Ms. Jane Wambui Gichuhi, and her assistant Mr. Francis Njoroge Njau.

Further that the said operations occasioned extensive damage to the coffee trees planted which was ready for harvest. That upon valuation , the damage was assessed at Kshs.6,083,120/= as follows; the portion wrongfully acquired was 0.148 acres valued at Kshs 3,000,000/= value of 96 uprooted coffee bushes at Kshs. 28,800/=. Loss of profit occasioned as a result of destruction of coffee bushes assessed at Kshs. 2,600,000/= and an additional 15% statutory charge at Kshs.454, 320/=.

It was the Petitioner's contention that he had not been served with any notification of the intended road construction that was to affect his property and that he and other affected persons were not given an opportunity to be heard. Further that he was not compensated for the damages in respect to the loss.

The Petitioner particularized unconstitutionality as failure by the Respondents to honour **Article 2 of the Constitution**, by failing to uphold the provisions under the Bill of rights, Contravening **Articles 40** of the Constitution by the Respondents purporting to compulsorily acquire his property without following due process; the Respondents' actions resulted to violation of **Article 27 of the Constitution**, by failing to offer equal protection and ensure that he benefits from the law by purporting that the states rights supersedes his rights.

The Petitioner further contended that he is entitled to protection and exercise of his Constitutional rights and fundamental freedoms particularly **Articles 10, 19, 20, 23, 27 and 40** . That the circumstances in which the Respondents officers went about the excavation and creation of public road over the Petitioner's private land was a blatant breach of the guiding principles as set out under the Constitution.

In his Supporting Affidavit, **Francis Kamau Njoroge**, averred that the suit property did not lie on any known road reserve and as such the Respondent's officers trespassed on the suit property and their actions deprived him of the use of his land . That the government institution that was interested in his property ought to have issued him with a **Notice** as required by law as he had not received any notification that any government institution intended to acquire his property.

The Petition is contested and the 1st Respondent swore a **Replying Affidavit** on 7th December 2018, through **Thomas Soi**, Chief Inspector in the **National Youth Service** under the Ministry of Public Service, Youth and Gender Affairs. He averred that he was in charge of the unit that was mandated to construct a Public road in **Gachie sub location in Waguthu Location, Kiambaa Division, Kiambu County at the material time of 31st October 2016, 1st November 2016 and 3rd November 2016. That the Government was keen to open up rural areas to enhance economic growth and development and initiated a programme to construct access roads in each constituency. That prior to commencement of the said public road, the then Kiambu Constituency Member of Parliament, Hon. Jude Njomo had consulted his constituents about the most appropriate area through which the public road should be constructed. That the National Youth Service only provided machinery that were manned by its personnel in constructing the said road.**

It was also his contention that KERRA had duly engaged all stakeholders including local administration and the residents who had all agreed on location, span and the extent of the said road and the Petitioner was one of the beneficiaries who listed his name with others and their title numbers. That he was physically present during the construction of the said road and the value of destruction of a few coffee trees was not more than a few thousand shillings. Further that the value tabulated by Keriasac & Co. Ltd Valuation Surveyors in the sum of Kshs.6, 083,120/= is a gross exaggeration. He urged the Court to dismiss the Petition.

The Petitioner Francis Kamau Njoroge, swore a Supplementary Affidavit on 28th February 2019, and averred that the suit property is in Kiambaa Constituency and not Kiambu Constituency where Hon. Jude Njomo is still a Member of Parliament. He denied any engagement was ever done by KERRA, with regards to the suit property. That the operations done by National Youth Service was done in a highhanded and Cavalier attitude ignoring the rights of innocent citizens and the operations resulted in trespass and actual destruction. That he has never received any offer for compensation from the Respondents.

The matter proceeded by way of Viva voce evidence wherein the Petitioner gave evidence for himself and called one witness, and

adopted the Affidavits annexed to the Petition. The Respondents did not call any witness but by consent the Respondents adopted the Replying Affidavit sworn by Thomas Soi.

PETITIONER'S CASE

PW1, Francis Kamau Njoroge testified that he has a title to the suit property having acquired it in 2008. That in October 2016, his brother called him and informed him that there were earth moving equipment making a road on his parcel of land and he grows coffee on that piece of land. That his brother reported the matter to Karuri Police Station and obtained an Abstract and an OB. That when he followed up the matter, he learnt that the machines were operated by the National Youth Service Officers. That he was not issued with any form of communication from KERRA and that he suffered loss as his coffee was uprooted and he obtained an assessment report from a Valuer.

Further that his parcel of land is 3½ acres but that the entire land was not excavated. That he issued a demand letter to the Respondents who stated that the acquisition was done properly. He denied knowledge of the list of names that were consulted and he acknowledged that a public road was constructed and the bodies that deal with the Construction are KURA and KERRA. That the land was acquired by the government and the National Land Commission deals with acquisition of the land.

He further testified that he was not aware of the road that passes through his land as there was no road before. That he issued a notice to sue to the Ministry of Interior Government. That the road is in use and he does not use the part that was excavated.

PW2 Dr. Clement Silonka Keriasac practices surveying and valuation and was the one who prepared the Valuation Report, that he tabled as evidence. He testified that the size that was interfered with was 0.148 acres which is 0.06 ha. That the land value was Kshs.3,000,000/= the value of the coffee bushes was Kshs. 28,800/= as there were 96 uprooted coffee bushes and loss of profit as a result of destruction of the young coffee bushes were assessed at Kshs. 2,600,000/=. That he added 15% statutory charge amounting to Kshs.454,320/= and the total claim was Kshs.6,083,120/= as he used 3 years as reasonable period which is for the owner to look for a substitute. He produced the report as Exhibit in Court. That as per the survey map, there was no road reserve.

He further testified that the Petitioner instructed him and the report was directed at the acquiring body. That he used the Survey map for the sketch map. He stated that the Comparables are outside Kanunga High School. That the value of the property is not the same as the one along the road, but the comparables are still applicable. Further that the plot would be about 70 meters from Kanunga High School.

On 10th June 2019, the Petitioner's Advocate made an Application under Rule 20 of the Constitution Procedure Rules and the Court allowed the Affidavits of the named witnesses in the Petition to be accepted as further evidence.

Further on 3rd October 2019 Ms. Ndundu, State Counsel for the Respondents made an Application to have the Replying Affidavit of Thomas Soi filed in Court on 10th December 2018, be admitted as evidence and by Consent the same was allowed by Court.

Thereafter the parties filed written submissions in support and in opposition of the Petition to which the court has now carefully read and considered and renders itself as follows:-

It is not in doubt that the Petitioner is the registered owner of the suit property having been registered as such on 4th February 2008, and was issued with a title deed. It is further not in doubt that being the registered owner of the suit property, the Petitioner is the absolute and indefeasible owner of the same and enjoys all the right and privileges appertained to it as provided for under the provisions of Section 24 and 25 of the Land Registration Act.

It is further not in doubt that excavation works were undertaken at the Suit property by the **National Youth Service** allegedly on behalf of **KERRA**. This has been confirmed by the evidence of **Thomas Soi** and the Affidavit sworn by various individuals amongst them **Hannah Nyambura Njoroge**, and **Michael Gitau Njoroge**. Though the Respondents have submitted that the works were conducted on behalf of **KERRA**, who the Respondents have submitted were not joined in the suit, the **National Youth Service** has not produced in Court any documents evidencing that it received instructions from the said **KERRA** or that the works were done on its behalf to warrant the court find that **KERRA** was the Contractor of the road. Further from the evidence of **PW 2**, it is not in doubt that damages occurred on the suit property and that only a portion of the suit property was acquired.

Though the Petitioner has alleged that there was acquisition of a part of his property, the same has been denied by the Respondents. The Court thus finds that the issues for determination are;

- 1. Whether there was Compulsory Acquisition of 0.0148ha portion of the Suit property*
- 2. Whether any damages were occasioned on the suit property*
- 3. Whether the Petitioner's rights were Violated*
- 4. Who is liable for any Damages if any*
- 5. Whether the petitioners prayer as sought are merited*

- 1. Whether there was Compulsory Acquisition of 0.0148 ha portion of the Suit property*

In defining **Compulsory acquisition**, the **Land Act 2012** states;

“compulsory acquisition means the power of the State to deprive or acquire any title or other interest in land for a public purpose subject to prompt payment of compensation”

Further the Court in **Patrick Musimba ...Vs... National Land Commission & 4 others [2016] eKLR** summarized the process of Compulsory Acquisition and held that:-

“Under Section 107 of the Land Act, the National Land Commission...is ordinarily promoted by the national or county government through the Cabinet Secretary or County Executive member respectively. The land must be acquired for a public purpose or in public interest as dictated by Article 40(3)of the Constitution, in our view, the threshold must be met: the reason for the acquisition must not be remote or fanciful. The National Land Commission needs to be satisfied in these respects and this it can do by undertaking the necessary diligent inquiries including interviewing the body intending to acquire the property.

Under Sections 107 and 110 of the Land Act the National Land Commission must then publish in the gazette a notice of the intention to acquire the land. The notice is also to be delivered to the Registrar as well as every person who appears to have an interest in the land. As part of the National Land Commission’s due diligence strategy, the National Land Commission must also ensure that the land to be acquired is authenticated by the survey department for the rather obvious reason that the owner be identified, in the course of such inquiries, the National Land Commission is also to inspect the land and do all things as may be necessary to ascertain whether the land is suitable for the intended purpose.”

Though the Respondents alleged that there was a public access road on the suit property, no evidence was tendered during trial to confirm this position. Further the said allegations are contradictory to the assertions that the residents of the area allowed the access road to be constructed on their properties in conjunction with their area Member of Parliament.

It is the Petitioner’s evidence that the Respondents entered into his portion of land and used some portion of it to construct the access road without his permission. The Court has seen the Valuation Report presented in evidence by the Petitioner and the Court has further considered the evidence of PW2. From the Valuation Survey Report containing the Survey sketch, it is clear that a portion of the suit land has formed the subject access road. The suit property being private land and the Respondents being a Government institution, and the fact that the road was a private land and the same was acquired for public purpose, it is the Court’s considered view that the ingredients of what constitutes Compulsory acquisition were met.

The Court makes the above finding bearing in mind that though the Respondents had contended that the Petitioner had consented to the access road, from the alleged list presented before Court, neither his name nor the suit property were in the list. Furthermore the list is titled ***“Waguthu Residents who want a through Road from Mugumu-ini to Canon Mutonga to Standard,”*** and therefore bearing no evidence that they had consented to the said properties being used as the access road. Further though the Respondents had alleged that there was an access road, the same as rebutted by the evidence of PW2 who testified that as per the map, there was no public reserve for the road.

Though due process as envisaged in the Land Act and as enumerated in the above case of ***Patrick Musimba ...Vs... National Land Commission & 4 others(supra)*** were not followed, the portion of the said property was forcefully acquired for public purpose and therefore depriving the Petitioner the right of use and enjoyment of the suit property. The Court therefore finds and holds that there was indeed Compulsory Acquisition of the said portion of the suit property as the evidence produced in the Valuation report has not been rebutted.

2. Whether any damages were occasioned on the suit property

It is the Petitioner’s contention that while constructing the access road, the Respondents destroyed his Coffee bushes and carried out excavation works on the suit property. The evidence of **Thomas Soi** of the National Youth Service through his Replying Affidavit did not deny that damages were caused on the suit property. His only contention was that the damages were minimal.

The Petitioner has produced in evidence Affidavits by various parties including that of **Dennis Macharia Gitau** that annexed the photographs showing that indeed the tractors did destroy the Coffee bushes. In his report, PW2 testified that there were various loss that were occasioned.

This Court having seen the extent of uproot of the Coffee bushes and with no evidence to rebut the evidence produced by the Petitioner, it further finds and holds that there were damages occasioned on the suit property. See the case of ***Dhalay vs. Republic [1995 – 1998] EA 29*** where the Court held that:-

“Where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected. But if a court is satisfied on good and cogent ground(s) that the opinion though it be that of an expert, is not soundly based, then a court is not only entitled but would be under a duty, to reject it.”

3. Whether the Petitioner’s rights were Violated

Article 40 of the Constitution provides that;

40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own

property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) 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—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

Article 40(3) of the Constitution provides that the State should not deprive a person any interest in land unless the same is done in accordance with Constitution. The Constitution provides that when the states acquires a person's property, due process ought to be followed and that compensation ought to be paid promptly.

The Court having held that the Petitioner's portion of land was compulsorily acquired, and there being no doubt that the due process was **not** followed in acquiring the said portion of land, finds and holds that the Petitioner's right as provided under Article 40 was indeed infringed.

4. Who is liable for any Damages if any

The **National Youth Service** places the blame at the door step of **KERRA**. It is its contention that it undertook the Construction works at the behest of **KERRA**. However, no evidence has been produce to support this claim. The Court concurs with the Petitioner that the National Youth Service having been the party undertaking the Construction and without indication that the same was done on behalf of **KERRA**, it ought to be the authority to take the blame. Further the Petitioner has also sued the Attorney General who acts on behalf of the Government institutions. As the Court has already held that indeed the portion of the suit property was compulsorily acquired and given that it is not clear who the acquiring authority is, the Court finds that the Respondents are all liable for the damages caused and the Attorney General being the principal counsel on behalf of the Government is well capable of covering the damages.

5. Whether the Petitioner's prayer as sought are merited

The Petitioner has sought for various Declarations, including the Declaration that the forceful acquisition of his property was an infringement of his rights; That the Respondents had no right to interfere with his property without following due process;- a declaration that the Respondents are liable to compensate him for the unlawful acquisition and compensation.

The Court has already held above that the Respondents infringed on the Petitioner's right by not following due process and that the portion of land was compulsorily acquired. Therefore, it follows that the Petitioner is entitled to Compensation and the prayers sought in terms of prayers **a, b** and **d** are merited.

The Petitioner has also sought for General Damages for trespass. Trespass has been defined by *Clerk and Lindsell on Torts, 18th edition at Pg.23* as;

“any unjustifiable intrusion by one person upon the land in possession.”

In the case of **Park Towers Limited Vs John Mithamo Njika & 7 others (2014)eKLR**, the Court held that:-

“I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages awardable depending on the unique facts and circumstances of each case.”

Further In the case of **Philip Aluchio...Vs...Crispinus Ngayo [2014]eKLR**, the Court held that;

“..... The Petitioner is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage. It has been held that the measure of damages for trespass is the difference in the value of the Petitioner’s property immediately after the trespass or the costs of restoration, whichever is less”

It is not in doubt that the Petitioner is the registered owner of the suit property. The Court has also held that the Respondents illegally entered onto the suit property and therefore their actions amount to trespass. The Petitioner herein did not adduce any evidence as to the state of his property before the trespass and, the Court proceeds to award a nominal figure of **Kshs.500,000/=** as General damages for trespass considering the length of time that the trespass has occurred.

This court finds that the Petitioner has proved ownership of **L.R No.Kiambaa/Waguthu/2316**, which ownership was not obtained by fraud. The Petitioner is entitled to the rights of a registered absolute proprietor of a parcel of land, which is exclusive, peaceful, unfettered and unimpeded possession, occupation and use thereof as stipulated in the Land Registration Act. Therefore the court orders for a permanent injunction to issue restraining the Respondents, by themselves, agents, servants and/or any other persons claiming through them from interfering with the Petitioner’s ownership and or usage of **L.R No.Kiambaa/Waguthu/2316**.

The Petitioner has also sought for Special damages of Kshs. 6,083,120/= that includes compensation for the portion acquired. The Valuation Report produced in evidence has not been rebutted and therefore the Court finds and holds that having pleaded and proved the same , the Petitioner is entitled to the same.

The Upshot of the foregoing is that the Court finds that the Petitioner has proved his case on the required standard of balance of probabilities and finds the Petition herein is merited and the same is allowed entirely. The Court further orders the Petitioner to be paid by the Respondents Kshs.500,000/= as General Damages for trespass, and further to be paid Liquidated damages of Six Million, eighty three thousand one hundred and twenty shillings (Kshs.6,083,120/=) for the loss incurred. The Petitioner will also have the costs of the suit

It is so ordered.

Dated, signed and Delivered at Thika this 8th day of April 2021.

L. GACHERU

JUDGE

8/4/2021

Court Assistant - Phyllis

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Mugambi for the Petitioner

No appearance for the 1st Respondent

No appearance for the 2nd Respondent

No appearance for the 3rd Respondent

L. GACHERU

JUDGE

8/4/2021