



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MACHAKOS

PETITION NO. E 013 OF 2021

IN THE MATTER OF

ARTICLES 1, 2, 3 (1), 19,20,21,22,23,27,40, 47, 50 (1), 60(1) (b), 165(3), 259 OF

THE CONSTITUTIONAL OF KENYA, 2010

AND

IN THE MATTER OF

CONTRAVENTION OF THE PETITIONER'S PROPRIETARY RIGHTS TO LAND ENSHRINED IN

ARTICLE 40 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF

VIOLATION OF PART VIII OF THE LAND ACT NO. 6 OF 2012

AND

IN THE MATTER OF

THE LAND (ASSESSMENT OF JUST COMPENSATION) RULES 2017 OF

THE NATIONAL LAND COMMISSION VIDE LEGAL NOTICE NO. 283

AND

IN THE MATTER OF

SECTION 13 OF THE ENVIRONMENT AND LAND COURT ACT NO. 19 OF 2011

AND

IN THE MATTER OF

THE NATIONAL LAND COMMISSION ACT, NO. 5 OF 2012

AND

IN THE MATTER OF

THE COUNTY GOVERNMENT ACT

AND

IN THE MATTER OF
VIOLATION OF FAIR ADMINISTRATIVE ACTION CONTRARY TO
ARTICLE 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF
THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF
FAILURE BY THE NATIONAL LAND COMMISSION TO MAKE PROMPT AND/OR
FAIR COMPENSATION ON ACCOUNT OF COMPULSORY ACQUISITION
OF L.R.NO. 7815/8 MACHAKOS COUNTY

AND

IN THE MATTER OF
RULES 4, 10, 11, 23 AND 24 OF THE CONSTITUTION OF KENYA
(PROTECTION OF RIGHT AND FUNDAMENTAL FREEDOMS)
PRACTICE AND PROCEDURE RULES, 2013

IGAINYA LIMITED.....PETITIONER

VERSUS

THE NATIONAL LAND COMMISSION1ST RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL3RD RESPONDENT

AND

THE COUNTY GOVERNMENT OF MACHAKOS.....INTERESTED PARTY

R U L I N G

What is before Court for determination is the Petitioner's Notice of Motion application dated the 29th July, 2021 seeking the following orders:-

1. That this Honourable Court be pleased to certify this matter as extremely urgent and hear it exparte in the first instance.
2. That pending inter partes hearing and determination of this application, this Honourable Court be pleased to issue conservatory orders in the nature of an injunction restraining the Respondent, their representatives, servants, agents and/or any persons(s) deriving authority therefrom from carrying out any construction works with respect to the Second Carriageway of Athi River-Machakos Turnoff (A109) Road Project on /through the suit property.
3. That pending the hearing and determination of the substantive Petition, this Honourable Court be pleased to issue conservatory orders in the nature of an injunction restraining the Respondent, their representatives, servants, agents and/or any persons(s) deriving authority therefrom from carrying out any construction works with respect to the Second Carriageway of Athi River-Machakos Turnoff (A109) Road Project on /through the suit property.
4. That this Honourable court be pleased to issue an order suspending Gazette Notice No. 9536 of 29th September, 2017 and

Gazette Notice No. 11424 of 17th November, 2017 in so far as the same relates to compulsory acquisition of the suit property pending the hearing and determination of this Application.

5. That this Honourable Court be pleased to issue an order suspending Gazette Notice No. 9536 of 29th September, 2017 and Gazette Notice No. 11424 of 17th November, 2017 in so far as the same relates to compulsory acquisition of the suit property pending the hearing and determination of the Petition herein.

6. That this Honourable court be pleased to issue an Order preserving the suit property pending the hearing and determination of this application.

7. That this Honourable Court be pleased to issue an order preserving the suit property pending the hearing and determination of the Petition.

8. That his Honourable Court do grant any other order that it may deem just and expedient in the circumstances of the case.

9. That the costs of the Application be provided for.

The application is premised on the grounds on the face of it including the supporting affidavit of **Engineer Isaac Wanjohi**. The Petitioner claims to be the registered proprietor of Land Reference Number 7815/8 (original number 7815/6/1) hereinafter referred to as the 'suit property'. It explains that in the year 2017, the 1st Respondent kick-started the process of compulsory acquisition of the said suit property on behalf of the Kenya National Highways Authority (KENHA) for purposes of construction of the Second Carriageway of Athi River-Machakos Turnoff (A109) Road Project. Further, the said intention to acquire the suit property and several neighboring parcels of land for purposes of construction of second carriageway of Athi River-Machakos turnoff Road (A109) was gazetted vide Gazette Notice No. 9536. It confirms that an inquiry was commenced by the 1st Respondent through a Notice of Inquiry vide Gazette Notice No. 1142 which provided that the 1st Respondent, on behalf of the acquiring body KENHA would hold the hearing of claims to compensation on the published dates and venues. It contends that during that period, it had concluded a Kshs. 6 Billion deal of erecting a Cement Grinding Plant on the suit property, which was projected to generate an annual income of Kshs. 500,000,000/= for it, based on a feasibility study. Further, it was to engage in the Cement Project under a Joint Venture vehicle by the name Global Choice Cement Limited. It avers that it consulted their joint venture partners and consequently rescinded the Cement Plant deal to pave way for construction of the road through its property. It confirms that upon verification, the 1st Respondent made an award of compensation dated 23rd January, 2018, to it, for Kshs. 646,316,243/=, which it accepted, with the 1st Respondent paying it 10% of the Award Sum immediately. It insists since 2018 when the 10% deposit was paid to date, the 1st Respondent has failed to pay the remaining 90% balance of the due compensation. Further, despite its numerous reminders to the 1st Respondent, there is no indication as to when or if at all the 90% balance of the compensation Award sum will be paid.

The application is opposed by the 1st Respondent who filed a replying affidavit sworn by FIDELIS K. MBURU its Ag. Director, Valuation and Taxation where he confirms the Petitioner's suit property was identified for compulsory acquisition for purposes of the Athi River (Machakos) Turnoff Sections of Nairobi – Mombasa Road (A 109). Further, the 1st Respondent caused to be published a Notice of Intention to acquire the said property vide Kenya Gazette being Legal Notice No. 9536 of 29th September, 2017 with a Notice of Inquiry Number 11424 published in the Kenya Gazette dated 17th November, 2017. He insists the Petitioner duly attended the inquiry and presented its claim of compensation and upon conclusion an Award was prepared for Kshs. 646, 316, 243/= with the 1st Respondent paying 10% of the compensation award. He explains that before the 1st Respondent could process and release the Compensation, it received a letter from Ethics and Anti Corruption Commission (EACC) dated 16th August, 2019 indicating they were investigating cases of fraud emanating from the said process of compensation including compulsory acquisition. Further, EACC advised it to withhold payments of compensation until the project affected persons were verified and re – evaluation of the properties affected by the 20 – kilometer stretch conducted. He avers that the 2nd Respondent vide its letter dated 30th July, 2019 informed it of the revision of the road design at Athi River and the same entailed omission of service roads and review of the main road alignment with minimal acquisition of land. Further, some land marked for acquisition were left out and in line with this position a revised acquisition map including schedule of properties was subsequently gazetted vide Gazette Notice No. 1919 of 6th March, 2020. He reiterates that the project affected persons were notified with the suit property revalued at Kshs. 123, 537, 645 for 2.2220 hectares compulsorily acquired. He states that it carried out a comprehensive valuation after which it made an award of Kshs. 148, 245, 174/=. Further, that the due outstanding amount is per the re – evaluation made on 25th June, 2021. He reaffirms that the Petitioner will not suffer any loss as it has been substantially compensated and its claim for compensation is erroneous. Further, the compensation funds have since been deposited with the 1st Respondent and the Petitioner is welcome to collect it. He further contends that the instant Petition is not necessary and a gross abuse of the court and it is ready to pay the balance in line with the re- evaluation. Further, no constitutional issues are raised.

The 2nd Respondent opposed the application by filing a replying affidavit sworn by MILCAH MUENDO its Assistant Director, Survey Mapping, Survey Department, Directorate of Highway Planning and Design where she deposes that the instant application is misconceived, ill advised, misplaced and ought to be dismissed in limine. Further, the Petitioner has failed to the 2nd Respondent is undertaking construction of second carriageway of the Athi River - Machakos Turn off Bypass project and part of the suit property is under acquisition. She refers to the procedure adhered to by the 1st Respondent during the process of compulsory acquisition and confirms that awards were made to the rightful owners of the land. She explains that upon finalization of the inquiries, inspections and valuations of all properties affected by the road construction, the 1st Respondent forwarded a compensation schedule to the 2nd Respondent indicating amount payable for the suit property is Kshs. 646, 316, 243. Further, that the 2nd Respondent revised the road alignment resulting in review of the land required for the project. She was aware of the 2019 recommendation by the EACC where 1st Respondent was directed to withhold payments. Further, they received a revised schedule of the payments from 1st Respondent and avers that Petitioner was paid 10% compensation sum and will be compensated in accordance with the law. She denies knowledge of the profitable venture abandoned by the Petitioner and states that the Court should not grant conservatory orders as this is a liquidated claim. Further, if the court grants the same, they will be greatly prejudiced.

The 3rd Respondent filed Grounds of Opposition to oppose the instant application and contended that the Government had a right of eminent domain and the right to property is not an absolute right. Further, that public interest supersedes private interest.

The Petitioner filed two further affidavits sworn by Engineer Isaac Wanjohi in response to the replying affidavits where it reiterated its claim and denied knowledge of the revised acquisition process. It insisted it was not granted an opportunity to be heard and that the 1st and 2nd Respondent violated the law. It contended that it has not been justly compensated

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 29th July, 2021 including the respective affidavits and rivaling submissions, the only issue for determination is whether the Petitioner is entitled to conservatory orders restraining the Respondents from interfering with the suit property pending hearing and determination of this Petition.

The Petitioner in its submissions reiterated its claim and averred that it is entitled to conservatory orders sought. To buttress its averments, it relied on the following decisions: **Mrao Ltd Vs First American Bank of Kenya & 2 others (2003) KLR; Board of Management of Uhuru Secondary School V City County Director of Education & 2 Others (2016) eKLR; Centre for Rights Education and Awareness (CREAW) & Another V Speaker of the National Assembly & 2 Others (2017) eKLR; Simeon Kioko Kitheka & 18 Others V County Government of Machakos & 2 Others (2018) eKLR; Law Society of Kenya V Office of the Attorney General & Another, Judicial Service Commission (Interested Party) (2020) eKLR; Paul Kiprono Chepkwony V the Attorney General of the Republic of Kenya Application No. 17 of 2018 East African Court of Justice; Benjamin Temut Kerema V Michael Kihambuli Lugwili & 3 others (2020) eKLR; Nguruman Ltd V Jan Bonde Nielsen (2014) eKLR and Supermarine Handling Services Ltd V Kenya Revenue Authority (2010) eKLR.**

The 1st Respondent in its submissions insist it is not obligated to remit the funds as per the initial award. Further, the Petitioner ought to make a claim in an ELC Court in the event that the award made is challenged but not a Petition to compel the 1st Respondent to pay more than the adequate compensation. It avers that the public interest outweighs private interest. To support its arguments, it relied on the following decisions: **Giella V Cassman Brown Co. Ltd (1973) EA 358; East African Development Bank V Hyundai Motors Kenya Limited (2006) eKLR; Studertek Power System (EA) Ltd & Another v Housing Finance Company of Kenya Ltd (2019) eKLR and Patrick Musimba V National Land Commission & 4 Others (2016) eKLR.**

The 2nd Respondent in its submissions insist the Petitioner has not established a prima facie case to warrant the conservatory orders sought. It avers that the Petitioner will not suffer irreparable harm which cannot be adequately compensated by way of damages. Further, the Petition will not be rendered nugatory if conservatory orders are not granted. To support its averments, it relied on various decisions including: **Gatirau Peter Munya V Dickson Mwenda Kithinji & 2 Others (2014) eKLR; Kenya Association of Manufacturers & 2 others V Cabinet Secretary, Ministry of Environment and Natural Resources & 3 Others (2017) eKLR; British American Tobacco (K) Ltd V Attorney General & 3 Others (2016) eKLR; Andy Forwarders Services Ltd V Capital Markets Authority & Another (2011) eKLR; Mrao Ltd Vs First American Bank of Kenya & 2 others (2003) KLR and Multiple Hauliers East Africa Limited V Attorney General & 10 others (2013) eKLR.**

In its submissions, the 3rd Respondent reiterated its Grounds of Opposition and contended that the Petitioner had not established a prima facie case to warrant the orders sought. To support its arguments, it relied on the following decisions: **Giella V Cassman Brown Co. Ltd (1973) EA 358; British American Tobacco (K) Ltd V Attorney General & 3 Others (2016) eKLR; Mrao Ltd Vs First American Bank of Kenya & 2 others (2003) KLR; Andy Forwarders Services Ltd V Capital Markets Authority & Another (2011) eKLR; Multiple Hauliers East Africa Limited V Attorney General & 10 others (2013) eKLR and Republic Vs Kenya National Commission on Human Rights Ex parte Uhuru Kenya HC Misc. App. No. 86 of 2009.**

In line with the principles established in the case of **Giella Vs Cassman Brown (1973) EA 358**, I will proceed to interrogate whether the Petitioner has established a prima facie case as against the Respondents to warrant the conservatory orders sought. I will further proceed to refer to the definition of a prima facie case as stated in the case of **Mrao Ltd Vs First American Bank of Kenya & 2 others (2003) KLR**

In the current scenario, the Petitioner's property including other parcels of land had already been gazetted for compulsory acquisition as per the aforementioned gazette notices for purposes of constructing the Athi River (Machakos) Turnoff Sections of Nairobi – Mombasa Road (A 109). After inquiry, wherein the Petitioner participated, the 1st Respondent prepared an Award which was later revised as the road design changed. From the Petitioner's averments, it seems it is disputing the revised Award. The Land Act makes provisions in instances where compulsory acquisition is to be undertaken and stipulates that in absence of a consensus on the amount of compensation, the Court can adjudicate on the same. In this instance, the Petitioner sought for an injunction to bar the Respondents' from interfering with suit property pending the outcome of the Petition. I note the Petitioner had already been paid 10% of the initial Award. Further, the fulcrum of the dispute herein revolves arounds the revised award which the Petitioner seems to have declined and seeks to be paid the balance of the initial Award. It is trite that once the state or designated state agency has issued a notice in the Kenya Gazette of their intention to compulsorily acquire private property for public utilities, the principles enshrined in the doctrine of eminent domain kicks in and private rights are thereby extinguished. Further, it is trite that after gazettelement, the State is expected to provide just and prompt compensation in line with the Constitutional principles. From the averments of all the Respondents herein, I note they confirm that the Award was revised due to the change of design of the road and reduction of the Petitioner's land to be acquired. Further, they are ready to pay the balance of the revised amount. The Petitioner insists its right to property is being violated as the balance of the compensation is yet to be paid. I note the issue herein is the payment of the balance of the revised compensation and I find that it is indeed the Respondents that will suffer irreparable harm if the project is delayed.

In the case of **Dupoto Farms Limited v Kenya Electricity Transmission Company Limited & 121 others [2021] eKLR** the Court of

Appeal observed as follows:’ **However, under Article 40(3) (b) where the State requires land for a public purpose or in the public interest, it may lawfully deprive a person of his land, provided that there is payment in full, of just compensation to the person. The right to property is therefore not absolute. From the affidavits that were filed before the trial court, it is evident that the 1st respondent genuinely required an easement over the suit property and was prepared to pay just compensation to the applicant and to many other persons whose properties were also affected by the public interest project it was undertaking. There are on-going negotiations regarding the quantum of compensation payable. If no agreement on the quantum is eventually arrived at, the law grants the National Land Commission power to determine the amounts payable.’**

In relying on this decision and applying it to the circumstances at hand, I find that the Petitioner will eventually be compensated for loss of use of suit property which had already been gazetted, I hence see no reason why an injunction should issue as it will culminate in the delay of the project. I further find that the damages the Petitioner portends to suffer will actually be compensated for once they reach a consensus on the right amount. Further, in associating myself with the decision in **Multiple Hauliers East Africa Limited V Attorney General & 10 others (2013) eKLR**, I find that the Respondents interests outweigh the Petitioner’s interest.

Based on the facts before me and in relying on the above cited judicial authorities, I find that the Petitioner has not established a prima facie case to warrant the conservatory orders sought.

In the case of **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, it was held that in instances when a party fails to establish the first limb on injunctions, the court need not proceed to make a determination of the other two and I will hence decline to do so.

In the circumstances, I find the Notice of Motion application dated the 29th July, 2021 unmerited and will disallow it.

Costs will be in the cause.

DATED SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 1ST DAY OF FEBRUARY, 2022.

CHRISTINE OCHIENG

JUDGE