

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. PETITION NO. 20A OF 2020

(Formerly H.C. Petition No. 22 of 2019)

IN THE MATTER OF ARTICLES 22 AND 258 OF THE CONSTITUTION

OF KENYA 2010

AND

IN THE MATTER OF ARTICLES 2(5) & (6), 10, 35, 67, AND 68(C)

(V) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE GOVERNMENT LAND ACT CAP 280

AND

IN THE MATTER OF VARIOUS INTERNATIONAL & REGIONAL

HUMAN RIGHTS INSTRUMENTS

AND

IN THE MATTER OF THE REPORT OF THE COMMISSION OF

INQUIRY INTO THE ILLEGAL/IRREGULAR ALLOCATION OF

PUBLIC LAND (OTHERWISE KNOWN AS THE NDUNG’U REPORT)

BETWEEN

EAST AFRICA PORTLAND CEMENT

COMPANY LIMITED.....PETITIONER

VERSUS

ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

1. In the Petition dated 3rd July, 2019, the Petitioner averred that on 30th June, 2003, via Gazette Notice No. 4559, the President, in exercise of the powers conferred to him by Section 3 of the Commissions of Inquiry Act, appointed a Commission (*the Ndung’u Commission*) to inquire into the allocation of public land, prepare a list of all land unlawfully or irregularly allocated and to make relevant recommendations. According to the Petitioner, the said report was presented to the President in June, 2004.

2. The Petitioner averred that the Commission (*the Ndung’u Commission*) made several recommendations; that at the heart of the Commission’s report was the recommendation that all titles which were issued in respect to illegally acquired land be cancelled and that such land was to be repossessed or restored to its original purpose.

3. It was averred that the Ndung’u Commission made a number of specific recommendations on all types of public land to help the Government address past wrongs in land allocation and prevent illegal and irregular allocations of public land in the future and that the Commission’s final report was released to the public six (6) months after it had been presented to the President in December, 2004.

4. According to the Petitioner, the Ndung’u Commission categorised its findings under three types of public land namely: Urban, State Corporations and Ministries’ Land; Settlement Schemes and Trust Land; and Forestland, National Parks, Game Reserves, Wetlands, Riparian

Reserves/Sites, Protected Areas, Museums and Historical Monuments. It is the Petitioner's case that the Petitioner being a State Corporation, its land fell under the first category, that is Urban, State Corporations and Ministries' Land.

5. The Petitioner stated in the Petition that the Ndung'u Commission made specific recommendations on 'Illegal allocation of land belonging to State Corporations' and stated that all land belonging to State Corporations that had been illegally acquired should be repossessed by the Government and all titles issued for the land revoked.

6. It is the Petitioner's case that being a public entity, it was legally allocated various parcels of land by the Government at various times within Machakos and Kajiado counties to enable it fully realize its mandate of mining *kunkur*, which is a raw material for the manufacture of cement, the Petitioner's principal business and that at all material times, the Petitioner was the owner of Leasehold interests with respect to the properties stipulated in the matrix situate in Machakos and Kajiado Counties:

LAND NO.	REF. NO.	TITLE NO.	RESERVED/ INTENDED USE	CURRENT USER	AREA IN Ha.	ORIGINAL ALLOTTEE AND DATE OF ALLOCATION	ALLOCATING AUTHORITY
1	LR. 8786		Ranching & Quarrying East African Portland Company Limited	East African Portland Company Ltd	795	Government of Kenya	Commissioner of Lands
2	LR. 337/194		Ranching & Quarrying East African Portland Company Ltd Residential	Residential	2	Mr. Monchery	Commissioner of Lands
3	LR. 337/2810		Ranching & Quarrying East African Portland Company Ltd Residential	Residential	0112	David O. Owuor & Philip O. Mwane.	Commissioner of Lands
4	LR. 337/2809		East African Portland Company Ltd Residential		0112	David O. Owuor & Philip O. Mwane.	Commissioner of Lands
5	L.R 337/2802/2		East African Portland Company Ltd Residential		00971	Philip O. Mwane.	Commissioner of Lands
6	Kajiado /Lorng-usua 944		Ranch & Quarry		4836	Siano Ole Muraya	Commissioner of Lands
7	LR. 337/153		East African Portland Company Ltd Residential		2361	Government of Kenya	Municipal Council
8	LR. 10353		East African Portland	Factory	3.		

		Company Ltd		9		
9	L.R 337/639	East African Portland Company Ltd Factory		4 0 0	Government of Kenya	Commissioner of Lands
10	LR. 337/281 1	East African Portland Company Ltd		0 . 1 1 5 3	David O. Owuor & Philip O. Mwane.	
11	LR. 7815/1	East African Portland Company Ltd Quarrying		2 0 9 5	Mitchel Cotts Estate Limited	
12	LR. 10424	East African Portland Company Ltd Quarrying		4 2 9 8	Mitchel Cotts Estate Limited	Commissioner of Lands
13	LR. No 8783 Mavoko	East African Portland Company Ltd		2 7 1	East African Portland Company Ltd	
14	LR. 8786	East African Portland Company Ltd Quarrying		7 4 5	Government of Kenya	Commissioner of Lands
15	LR. 8785	East African Portland Company Ltd Quarrying		1 6 3	Government of Kenya	Commissioner of Lands
16	LR. 8649	East African Portland Company Ltd Quarrying		9 0 0	Government of Kenya	Commissioner of Lands
17	LR. 10425	East African Portland Company Ltd Quarrying	East African Portland Company Ltd	4 2 7 1	Government of Kenya	Commissioner of Lands
18	LR. 8784 Sub- divided into	East African Portland Company Ltd Quarrying		5 3 8 . 2	Government of Kenya	Commissioner of Lands
19	LR 8784/1	East African Portland Company Ltd		1 5 4 . 7	Government of Kenya	Commissioner of Lands
20	LR 8784/2	East African Portland Company Ltd		1 5 4 .	Government of Kenya	Commissioner of Lands

				6		
21	LR 8784/3	East African Portland Company Ltd		7 2 .9	Government Kenya	Commissioner of Lands
22	LR 8784/4	East African Portland Company Ltd	East African Portland Company Ltd		Government of Kenya	Commissioner of Lands

7. The Petitioner averred that the it acquired the aforesaid properties during the period between 1955 and 1997 either by way of lawful grants from the Government of Kenya or by way of outright purchases from third parties for value; that at all times during the period when the Petitioner acquired these properties, the Petitioner was a State Corporation within the meaning of the State Corporations Act, and that such allocation of land to the Petitioner was done procedurally and with the sole objective of enabling the Petitioner carry out its principal business which was not illegal and/or irregular.

8. According to the Petitioner, the Ndung'u Commission made findings and recommendations without properly and objectively inquiring on how the parcels of land were allocated to the Petitioner hence failing to protect the dignity of the Petitioner, and in the process disregarded the provisions of Article 19 of the Constitution.

9. The Petitioner stated in the Petition that pursuant to Article 35(2) of the Constitution, every person has the right to the correction or deletion of untrue or misleading information that affects the person and that the Commission in its Report impugned the Petitioner's propriety of titles relating to 22 parcels of land and recommended that these grants be either revoked or investigations touching on their propriety be undertaken.

10. It is the Petitioner's assertion that the Commission's reasoning was founded upon the false premise that the Petitioner's land was allocated by the Commissioner of Lands who allegedly did not have the authority to allocate public land, a power that was, in the Commission's view, a preserve of the President at the time and that those findings flies in the face of the President's authority under the Government Lands Act (*now repealed*), Section 7 in particular, which authorized the Commissioner of Lands, by way of an Executive order, to allocate public land on his behalf.

11. The Petitioner averred that any allocation of land by the Commissioner of Lands during the time the Petitioner was allocated land in question was done with the President's approval as required by the law then and that by dint of Article 62 (1)(b)(n) of the Constitution, as read together with Section 10(1) of the Lands Act, No. 6 of 2012, the property in land lawfully held, occupied or used by the Petitioner is Public Land.

12. It was averred that while no coherent state sanctioned legislative, policy or programmatic action to implement the recommendations of the Ndung'u Commission have followed the adoption of the Report, the Petitioner's properties aforementioned have been effectively placed under a cloud of suspicion which has acted as a social bar on the property's transactability, diminished its value in the eyes of the investing public and opened these properties to intrusion by persons intent on riding on the supposed doubtful legality of the Petitioner's properties.

13. The Petitioner finally averred that the Commission's decision to recommend revocation of its titles is drastic and disproportionate and effectively constitutes a taking of property contrary to Article 40 of the Constitution, and without compliance with the legal conditions for forced taking of property in land, and in breach and total disregard to the provisions of Article 47 of the Constitution which entitles every person to administrative action that is, among other things, lawful, reasonable and procedurally fair, that is making prior actual inquiries and research before making any recommendations.

14. The Petitioner has prayed for the following reliefs:

a) A declaration that the recommendation Report by the Commission of Inquiry into the illegal/Irregular allocation of Public Land (also commonly referred to as the Ndung'u Commission Report) impugning the propriety of the suit property being Annexes Volume 1 of the Commission of Inquiry into the Illegal/Irregular allocation of Public Land be purged from the record of the Commission and that it does not have any legal effect and is void to the extent of its invalidity.

b) A declaration that the Commission of Inquiry into the illegal/Irregular allocation of Public Land (also commonly referred to as the Ndung'u Commission's) decision to recommend revocation or investigations of the suit properties was unlawful, punitive, disproportionate, and of no legal basis under the circumstances with regard to the Petitioner's interest in the properties.

c) A declaration that the Commission of Inquiry into the illegal/Irregular allocation of Public Land (commonly referred to as the Ndung'u Commission) failed to discharge its statutory and mandatory obligation to undertake a full, faithful and impartial inquiry with respect to the Petitioner's Properties.

d) Such other orders and appropriate reliefs that the court may deem just.

15. In response to the Petition, the Respondent filed a Notice of Preliminary Objection. The Notice of Preliminary Objection was based on

the fact that the Petition was filed in the High Court and not in this court. The Preliminary Objection challenged the jurisdiction of the High Court to hear the Petition.

16. The Respondent's Notice of Preliminary Objection gave rise to the Ruling of the High Court which transferred this file to this court. Other than the said Notice of Preliminary, which is now moot, the Respondent did not file a response to the Petition.

17. In its submissions, the Petitioner's counsel submitted that two of the renowned sacrosanct principles of the law are *audi alteram partem* – the person who has to be affected by a decision has a right to be heard; (*no one should be condemned unheard*); and *nemo iudex in re sua* – the authority deciding the matter should be free from bias and that these two principles are embodied in the broader principle of natural justice which is the *sine qua non* of a democratic society and a fair and impartial judiciary or body such as the Ndung'u Commission of inquiry.

18. The Petitioner's counsel submitted that there is no evidence to show that the Petitioner was made aware of what was afoot or heard before any alleged findings were made and that the Commission made findings and recommendations without properly and objectively according the Petitioner an opportunity to be heard or inquiring on how the parcels of land were allocated to the Petitioner.

19. It was submitted that during the period under which the Petitioner acquired the aforesaid properties, the procedure for issuance of Government land and Government leases was governed by the provisions of the Government Land Act and that under the said Act, two entities had powers to issue Government land and leases, the President and the Commissioner of Lands.

20. The Petitioner's counsel submitted that the Petitioner's properties were acquired between 1955 and 1997 either by way of lawful grants from the Government of Kenya or by way of outright purchases from third parties for value; that the allocation of land to the Petitioner was done procedurally and with the sole objective of enabling the Petitioner carry out its principal business and that the allocation of the land was done by the authorized state officials and in particular the Commissioner of Lands who had been legally authorized by the President, through an Executive Order, to allocate the tracts of land pursuant to the Government Lands Act (*now repealed*).

21. Counsel submitted that under the Commission of inquiry Act, a Commission has a statutory duty to submit a full, fair and impartial Report and failure to do so may render the Commission's findings, determinations, decisions and recommendations *ultra vires* the Act and in particular Section 7.

22. Based on the circumstance of this case and provisions of the law and cited cases, it was submitted, the Commission, without justification and against the applicable law, listed the Petitioner's lawfully acquired property without availing any evidence to show that any investigations were undertaken or that it accorded the Petitioner an opportunity to be heard before making recommendations in respect to its properties.

23. It was submitted that the Commission failed to take into account the negative effect of making findings and recommendations that would be faced by individuals, companies or State Corporations like the Petitioner and that the manner in which the alleged findings were obtained coupled by the wanting conduct of the Commission before making any recommendations is a clear manifestation of the casual and lacklustre manner in which the Commission handled a very important document, the Ndung'u Report.

Analysis and findings:

24. The Petitioner herein is challenging the recommendations that were made by the Commission of Inquiry into the Illegal/Irregular allocation of Public Land (*the Ndung'u Commission Report*). In the Petition, the Petitioner is seeking to have the recommendations in the said Report impugning the properties listed in Annexes Volume 1 purged from the record for being unlawful, punitive, disproportionate and of no legal basis.

25. It is not in dispute that on 30th June, 2003, via Gazette Notice No. 4559, the President, in exercise of the powers conferred to him by Section 3 of the Commissions of Inquiry Act 1962, appointed a Commission to inquire into the allocation of Public land, prepare a list of all land unlawfully or irregularly allocated and to make relevant recommendations. The Commission completed its inquiry and presented its Report to the President in June, 2004.

26. Section 3(1) of the Commissions of Inquiry Act provides that, the President, whenever he considers it advisable so to do, may issue a Commission under the Act appointing a commissioner or commissioners and authorizing him or them, or any specified quorum of them, to inquire into the conduct of any public officer or the conduct or management of any public body, or into any matter into which an inquiry would, in the opinion of the President, be in the public interest.

27. Section 3(3) of the Commissions of Inquiry Act provides how a Commission of Inquiry should conduct its affairs as follows:-

“Without prejudice to any regulations made under section 18 of this Act, every commission shall direct how the commission shall be executed and, in particular, shall in a suitable case contain the following directions to be observed by the commissioner—

(a) that the commissioner shall conform with the following instructions—

(i) that evidence adversely affecting the reputation of any person, or tending to reflect in any way upon the character or conduct of any person, shall not be received unless the commissioner is satisfied it is relevant to the inquiry, and that all reasonable efforts have been made to give such person prior warning of the general nature of the evidence, and that where no such warning has been given, the general nature of the evidence has been communicated to such person.

(ii) that that person shall be given such opportunity as is reasonable and practicable to be present, either in person or by his advocate, at the hearing of such evidence, to cross-examine any witness testifying thereto, and to adduce without unreasonable delay material evidence in his behalf in refutation of or otherwise in relation to such evidence; (emphasis added)

(iii) that hearsay evidence which adversely affects the reputation of any person, or tends to reflect in any way upon the character or conduct of any person, shall not be received.”

28. Section 7 of the Commissions of Inquiry Act goes further to state as follows:

“(1) It shall be the duty of a commissioner, after making and subscribing the prescribed oath, to make a full, faithful and impartial inquiry into the matter into which he is commissioned to inquire, to conduct the inquiry in accordance with the directions contained in the commission and on completion of the inquiry, to report to the President and to the National Assembly, in writing, the result of the inquiry and the reasons for the conclusions arrived at.”

29. The Petitioner has deponed that it is the registered owner of the twenty-two parcels of land that are listed in the Ndung’u Commission Report namely: L.R. No. 8786, L.R. No. 337/194, L.R. No. 337/2810, L.R. No. 337/2809, L.R. No. 337/2802/2, Kajiado/Lorngusua 944, L.R. No. 337/153, L.R. No. 10353 or Waterege/KikaMnala, Plot 402, L.R. No. 337/639, L.R. No. 337/2811, L.R. No. 7815/1, L.R. No. 10424, L.R. No. 8783 Mavoko, L.R. No. 8786, L.R. No. 8785, L.R. No. 8649, L.R. No. 10425, L.R. No. 8784 sub-divided into, L.R. No. 8784/1, L.R. No. 8784/2, L.R. No. 8784/3 and L.R. No. 8784/4 (hereinafter referred to as the suit properties).

30. According to the Petitioner, the Ndung’u Commission Report made a number of specific recommendations which have breached the Petitioner’s constitutional right to own land and that the Commission made findings and recommendations on the false premise that the Petitioner’s land was allocated by the Commissioner of Lands who allegedly did not have the authority to allocate public land.

31. According to the Petitioner, there is no evidence to show that the Petitioner was made aware of what was afoot or heard before any alleged findings were made and thereafter recommendations disregarding the right and need to hear the Petitioner’s arguments. The Petitioner argued that the findings and recommendations of the Commission without properly and objectively according the Petitioner an opportunity to be heard or inquiring on how the parcels of land were allocated to the Petitioner denied the Petitioner the right to be heard.

32. Although the Petitioner is seeking for an order declaring the recommendations made by the Ndung’u Commission null and void on the premise that it was lawfully allocated the twenty two (22) parcels of land, whose titles the Commission recommended that they should be revoked, the Petitioner did not annex all the copies of the title documents or letters of allotment in respect to the said parcels of land. Instead, the Petitioner only annexed three copies of the titles in respect of L.R. No. 8784/4; L.R. No. 7815/1 and L.R. No. 10425.

33. Having not annexed the titles and or letters of allotment which the Ndung’u Commission Report found as having been illegally allocated to the Petitioner, this court cannot state with certainty that indeed the said parcels of land were regularly allocated or purchased by the Petitioner.

34. Indeed, even in respect of the three parcels of land which have been annexed on the Petitioner’s Director’s Affidavit, the same are not accompanied with supporting documents to show the process that was followed before the said titles were issued to the Petitioner.

35. Furthermore, the issue of whether the suit properties were regularly allocated to the Petitioner or not is a matter that was supposed to be investigated further. The impugned Report contained only recommendations. This is the position that the court observed in the case of **Geoffrey Kiriimi Itania vs. Chief Land Registrar & 3 others [2018] eKLR**;

“Firstly, the Ndung’u report contained only recommendations and not binding resolutions. The raft of recommendations contained in the report were primarily on revocation and repossession of titles, investigations as well as policy developments. A restriction falls under investigations. The onus was upon the defendant to commence investigations as to whether the land in question indeed was public land or not. Defendants have not availed even the slightest evidence to show that they did any investigations... It follows that the Ndung’u Report was to be implemented within the existing legal structures.”

36. This court is in agreement with above pronouncement. The recommendations of the Ndung’u Commission Report, which the Petitioner has not annexed on his Affidavit, were not geared towards making a final determination on the issue of proprietorship of land. Indeed, this court is aware that after the said Report was published, several institutions, including the EACC, launched investigations on the proprietary of the impugned titles and where evidence was available, filed suits in court to have the titles revoked.

37. That being the case, the Petitioner cannot claim that its right to own property pursuant to the provisions of Article 40 of the Constitution have been infringed upon considering that its titles have not been revoked on the basis of the said Report. Indeed, this court is aware of the numerous suits that have been filed by either the Petitioner or third parties in respect to some of the titles that are the subject of this Petition.

38. Although the Petitioner has averred that it was not heard before the Commission made its recommendations, the Petitioner did not produce the full report of the Ndung’u Commission Report and its proceedings. Having not shown that it requested for the full Report and the proceedings, which request was declined, it will be reckless for this court to state that indeed the Petitioner was not invited to make representations to the Commission in respect to the suit property without reading the entire Report.

39. Furthermore, although constitutional Petitions do have a specific timeline within which they should be filed, the Court of Appeal had this to say about the issue of inordinate delay in filing such Petitions in the case of **Wellington Nzioka Kioko vs. Attorney General [2018] eKLR**;

*“On the issue of delay, the learned Judge found that the petitioner was filing his claim 33 years after the cause of action relied on, she considered several persuasive decisions of the High Court for instance **Wamahiu Kihoro Wambugu vs Attorney General**, Petition No. 468 of 2014; **Mugo Theuri vs. Attorney General, Ochieng’ Kenneth Kogutu vs. Kenyatta University and 2 others**, High Court Petition No. 306 of 2012, and several others. The common thread running through those decisions is that whereas there is no time limitation in respect of constitutional petitions, the delay must not be inordinate and there must be plausible explanation for the delay. The learned Judge found that no justification for the delay of over 3 decades had been given in this matter. Can the Judge be faulted for that? We need to look at the logic behind limitation of actions generally in order to place this issue in proper perspective. When a person suffers a wrong at the hands of another and feels the need to redress the wrong, it is reasonable to expect that redress will be sought before the claim gets stale. This enables a person to preserve and adduce the evidence that is necessary to support the claim. It also accords the purported wrong doer an opportunity to address the grievance and if possible remedy it. That way both parties are spared the agony of losing important evidence, or even witnesses. Memory is sometimes transient and it is important that a person adduces evidence when the memory of the incident complained of is still intact. There is also this idea of people moving on in life. If somebody wrongs you, you need to seek redress when the offending act still has an impact on your life, and when the evidence necessary to prove the wrong is still available. There is also the converse situation where the alleged wrongdoer should know that there is a claim against him which he needs to remedy. If a wrong is committed and then the person wronged waits for time on end before even notifying the other party, then a travesty of justice occurs because the claim might be made at a time when the offending party has forgotten about the incident and is no longer in a position to defend himself. There is of course a rebuttable presumption that if you don’t seek redress within a reasonable time, there is a possibility that you have not suffered any loss from the act complained of. That would explain the maxim that equity does not aid the indolent.”*

40. It is common knowledge that the Ndung’u Commission Report has been in the public domain since the year 2004. It is also common knowledge that some of the recommendations in the Ndung’u Commission Report have been acted upon by several state and non-state organs. The Petitioner has not informed this court why, despite the Report having been released to the public in the year 2004, which is more than 15 years ago, the same was never challenged within a reasonable time.

41. Considering that the Petitioner has not given an explanation as to why it took 15 years to challenge the recommendations made in the Ndung’u Commission Report in respect to the suit properties, it is my finding that the delay in filing the Petition is inordinate.

42. For the reasons I have given, it is my finding that the Petition dated 3rd July, 2019 is not meritorious. The Petition is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 7TH DAY OF MAY, 2021.

O. A. ANGOTE

JUDGE