



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION NO. 4 OF 2017

CHARLES COSMAS MDARI.....PETITIONER

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

KENYA RAILWAYS CORPORATION.....2ND RESPONDENT

NATIONAL LAND COMMISSION.....3RD RESPONDENT

JUDGMENT

(Constitutional petition seeking various declarations inter alia for violation of the right to property under Article 40 of the Constitution; petitioner being registered owner of land that was compulsorily acquired for the construction of the Standard Gauge Railway; no compensation paid to the petitioner despite being the registered proprietor; money instead paid to three mysterious persons who apart from mere names being provided, their whereabouts completely unknown and undisclosed by the 2nd and 3rd respondents; clear that the 2nd and 3rd respondents violated the procedure provided for compulsory acquisition under the Land Act and violated the rights of the petitioner under Article 40 of the Constitution; judgment entered for the petitioner against the 2nd and 3rd respondents)

A. Introduction and pleadings

1. This suit was commenced through a constitutional petition filed on 21 April 2017. The petitioner, Charles Cosmas Mdari, has pleaded that he is the registered proprietor of the land parcel Kwale/Mackinon Road Phase1/6 measuring approximately 1.16 ha within Kwale County (hereinafter referred to simply as “the suit land” or “the suit property” or “the suit land”). It is pleaded that on 20 June 2014, the 3rd respondent (the National Land Commission, also herein referred to as “the Commission” or “the NLC”) published in the Kenya Gazette, on behalf of the 2nd respondent (Kenya Railways Corporation), a notice of intention to acquire among other parcels, the suit property, for the construction of the Standard Gauge Railway (SGR). It is pleaded that on 8 August 2014, the 3rd respondent made a further publication in the Kenya Gazette, of a notice of inquiry, which inquiry was to be held at the Chief’s office Mackinnon Road on 2 September 2014. It is pleaded that on the 2 September 2014, the petitioner attended the public inquiry and provided title documents for the suit property and his personal details to the 3rd respondent, for purposes compensation. It is claimed that the 3rd respondent never compensated the petitioner for the suit property, but moved into it and constructed the SGR on part of it. It is averred that this entry into the petitioner’s property without compensation is a breach of the petitioner’s right to property, and the failure by the 3rd respondent to deliver its decision after the public inquiry, was a breach of the petitioner’s right to fair administrative action under Article 47 of the Constitution of Kenya, 2010.

2. In this petition, the petitioner seeks the following orders :-

a) A declaration that the petitioner’s right to acquire and own property guaranteed under Article 40 of the Constitution of Kenya has been contravened by the Government of Kenya, the 2nd respondent and/or the 4th respondent;

b) A declaration that the petitioner’s right to fair administrative action guaranteed under Article 47 of the Constitution of Kenya has been contravened by the 3rd respondent;

c) A mandatory injunction compelling the 3rd respondent to communicate in writing its determination of the value of compensation payable to the petitioner for the acquired portion of the suit property and such communication to be made within seven (7) days of the date of this order;

d) A mandatory injunction compelling the 3rd respondent to pay to the petitioner the full compensation awarded to the petitioner for the acquired portion of the suit property within thirty (30) days of the petitioner's acceptance of the value of compensation determined by the 3rd respondent.

e) Interest on the compensation at such rate as this Honourable court shall deem just with effect from 2nd September 2014 and/or from the date when the 4th respondent entered upon the suit property or such other relevant date as this Honourable court shall deem fit;

f) The costs of this petition; and

g) Such other or further orders or directions as the court may deem fit to grant as to meet the interest of justice.

3. The 4th respondent in the petition was China Road and Bridge Corporation (Kenya), but the petitioner withdrew the suit against her. There are therefore only three respondents left in this petition.

4. The petition is supported by the affidavit of the petitioner. He annexed his certificate of title to the suit land. He also annexed copies of the Gazette Notices mentioned in the petition. The petitioner attached letters that he wrote to the 3rd respondent and 2nd respondent asking to be paid for the acquisition of his land. He never got any positive response to the same. He deposed that he has on numerous occasions visited the offices of the 2nd respondent but was being passed from one officer to another. He has deposed that it is unreasonable for the Government to have published its intention to acquire his land, invite him to make submissions on his claim, yet enter the land without communicating the compensation payable. He wondered why he has not been paid yet his neighbours are enjoying their proceeds.

5. The Attorney General, sued as 1st respondent on behalf of the Government of Kenya, did not file a response to the petition.

6. The 2nd respondent opposed the petition vide two replying affidavits, one sworn on 16 August 2017 by its Corporation Secretary Ms. Hellen Mungania, and the other sworn on 8 September 2020 by its Principal Land Surveyor, Mr. Duncan Mwangi. The two affidavits are drawn in similar fashion and are in fact a replica of each other. What is deposed in those affidavits is that in order to construct the SGR, the 2nd respondent was required to acquire land. The suit land was part of what was to be acquired and it was believed to be owned by the petitioner. It is deposed that the 3rd respondent published Gazette Notice No. 4096 on 20 June 2014, being a notice of intention to acquire land, with the suit land included, and that at that time, it was believed that the petitioner owned the suit property. It is deposed that subsequently, a ground inspection and/or valuation of the suit property was done in August 2014, and it was established that it was Hadija Kache Salim, Ngala Bule and Hussein Mwatate Peter (hereinafter described as Khadija, Ngala, and Hussein), who were the ones in occupation of the suit property. It is deposed that the petitioner was not in occupation of the suit property and declined and/or neglected to appear and point out his land at the time the inspection and valuation was being carried out by the 3rd respondent.

7. It is further deposed that the 3rd respondent published Gazette Notice No. 5503, a Notice of Inquiry, that invited the petitioner and others to ascertain ownership of the suit property. The inquiry was undertaken by the 3rd respondent on 2 September 2014 at the Chief's office Mackinnon Road. It is deposed that the petitioner and the other three persons, Khadija, Ngala, and Hussein, attended and made representations of their ownership of the suit land. It is deposed that the findings of the inquiry were published in Gazette Notice No. 6578 of 19 September 2014 where it was determined that Khadija, Ngala, and Hussein, were the bona fide owners of the suit property. It is contended that the petitioner has never challenged these findings or applied to set aside or quash the same. It is deposed that following the determination, compensation was awarded to the said Khadija, Ngala and Hussein, and that the petitioner did not take measures to object to the award of the said compensation. It is averred that the award of compensation was within the domain of the 3rd respondent and not the 2nd respondent and thus the 2nd respondent is erroneously enjoined. It is deposed that the 2nd respondent took possession and constructed the SGR and received no complaints. It is further deposed that to date, the remainder of the land is still in occupation of the said Khadija, Ngala and Hussein. It is pleaded that on the basis of these findings, the 3rd respondent compensated Khadija Kache Salim, Ngala Bule and Hussein Mwatate Peter, and closed the acquisition process. It is pleaded that during compensation and the entire construction of the SGR, the petitioner did not object to the award decision of the 3rd respondent. It is denied that there was any violation of the rights of the petitioner, and that the petitioner cannot claim that no decision was made, for this was published in Gazette Notice No. 6578 of 19 September 2014.

8. The 3rd respondent filed a replying affidavit sworn on 3 November 2020 by its Acting Director Valuation & Taxation, Principal Land Surveyor, Mr. Mburu F.K. It is deposed that the 3rd respondent did compulsorily acquire the suit land during the construction of the SGR. It is deposed that in strict compliance with Part VIII of the Land Act, 2012, the 3rd respondent published a notice of intention to acquire the suit land vide Gazette Notice No. 4096 of 20 June 2014. It is averred that the 3rd respondent then published a notice of inquiry through Gazette Notice No. 5503 of 8 August 2014, and invited those who would be affected to attend the inquiry and present their claims for compensation. It is deposed that prior to the inquiry, the 3rd respondent had conducted a ground inspection and due diligence to ascertain who the bona fide occupiers and owners of the land were. It is averred that after the inquiry, the 3rd respondent made a determination on who held a compensable interest and eligible for compensation, taking into consideration all representations made at the inquiry, the official records held at the Survey of Kenya and the land registries. He deposed that at the inquiry, the petitioner only produced a title deed that was not supported by any confirmatory search, any cadastral plan, or other documentation. He has deposed that the title deed was more importantly not supported by any official record either at the Land registry or at any other office. He deposed that their inspection further established that the petitioner has never been in occupation of the suit land which was at the time of acquisition, fully occupied by Khadija, Ngala, and Hussein. He deposed that for purposes of ground inspection, the petitioner was invited but failed to attend and point out his land on the ground to the team from the 2nd and 3rd respondents. He deposed that to date the remainder of the land is still in possession of Khadija, Ngala, and Hussein. He deposed that the findings were published vide Gazette Notice No. 6578 of 18 September 2014 and that the 3rd respondent identified Khadija, Ngala, and Hussein, as the persons with a compensable interest over the suit land. He stated that no objections were received from the petitioner. He revealed that Kshs. 597,425/= was paid to Hussein for acquisition of 0.4 Ha, and Kshs. 411,148/= was paid to Ngala for the acquisition of 0.6 Ha. He deposed that the proper avenue for a person aggrieved is to lodge an appeal to this court and not a

petition such as this. He does not think that this petition raises any constitutional issues and believes that it is a disguised claim for money. He has contended that since money has already been paid, the proper avenue is for the petitioner to file a civil suit to recover money from the persons who were compensated, if he insists that he is the bona fide owner. He has further deposed that the petitioner has deliberately failed to enjoin Khadija, Ngala and Hussein. He averred that public policy and principles of financial prudence contained in the constitution militate against double compensation over the same land using public funds.

9. On 4 December 2017, the petitioner filed an application seeking orders inter alia to be supplied with the following information by the 3rd respondent :-

- (a) The national identity card numbers of Hadija Kache Salim (Khadija), Ngala Bule (Ngala) and Hussein Mwatate Peter (Hussein) and copies of the same;
- (b) The KRA Personal Identification numbers of the said Khadija, Ngala and Hussein;
- (c) Their postal and physical address.
- (d) Details of how it came to the 3rd respondent's attention that Khadija, Ngala and Hussein were claiming ownership of the suit land, including copies of any written claims presented to the 3rd respondent;
- (e) Copies of the 3rd respondent's minutes and/or proceedings of the inquiry in which Khadija, Ngala and Hussein, attended and presented their claim as to ownership of the suit land and copies of all documents produced by them to support their claim;
- (f) Copies of the 3rd respondent's determination of the claim by Khadija, Ngala and Hussein, to ownership of and compensation for the suit land;
- (g) Copies of the 3rd respondent's written award for compensation made to Khadija, Ngala and Hussein;
- (h) Copies of the acceptance of the award signed by Khadija, Ngala and Hussein; and
- (i) All and any other document in the 3rd respondent's possession in regard to the compensation claim in respect of the suit land.

10. That application was allowed on 23 January 2018. Despite the orders being granted the 3rd respondent did not furnish the information requested by the petitioner. The petitioner then filed the application dated 8 May 2018 seeking orders to find the Chief Executive Officer of the 3rd respondent in contempt of the orders of the court. To oppose the motion, the petitioner filed a preliminary objection inter alia on the jurisdiction of the court. This objection was dismissed, the court (Omollo J), holding that this court has original jurisdiction to hear disputes related to compulsory acquisition.

11. Nothing however transpired on the application dated 8 May 2018 as I directed the matter to proceed for full hearing of the case *viva voce* for all issues to be determined on merits.

B. Evidence of the Parties

12. The petitioner relied on his supporting affidavits and his statement. He had with him the original title deed and an original search to demonstrate ownership of the suit land. He stated that the allegation that there were other people on the land is false. He further stated that he was never invited by the 3rd respondent over any dispute over the suit land nor any decision determining ownership of it. He pointed out to court that the 3rd respondent failed to avail the documents demanded by him for the particulars of Khadija, Ngala and Hussein, despite the court order to do so. He did not know of any award made by the 3rd respondent for compensation for the suit land. He had photographs of the land. Cross-examined, he testified that he has never seen any persons on the land and he does not know Khadija, Ngala or Hussein, and neither does he recognize them as his neighbours. He mentioned that almost the whole land was taken and what was left was only about a quarter of an acre.

13. Cross-examined on his title deed, he testified that it shows that he became owner on 8 March 2015. He stated that there was an earlier title deed issued in August 2013 but it had a problem as it did not indicate his identity card. He was subsequently re-issued with another title deed with the error rectified. This is what he had with him in court. He testified that he got the land after making an application to the Mackinnon Settlement Scheme. He had no issue with the compulsory acquisition of his land and he attended the meetings as Gazetted. He was told to wait for compensation but when none became forthcoming, he started following up with the 2nd and 3rd respondent but he was not assisted.

14. Cross-examined by Mr. Mbuthia for the 3rd respondent, he testified inter alia that he applied for the suit land in the year 2000 when he was working at Samburu, in Kwale. He received an allotment letter though he did not have it with him in court. He stated that he was to make payment for the land and he did. He did not have the receipt, explaining that it was now a long time ago. At the inquiry, he gave out his title deed and other supporting documents including the allotment letter. He did not see anyone else at the inquiry claiming the land. Neither was anyone residing on the land. He stated that he visited the land with the officials of the 2nd and 3rd respondents during the inquiry. There was no building on the land. After the inquiry, he was told to go and wait for payment but he never received any. He explained that the land is 5 acres and only a quarter acre is now left and nobody is in occupation of this remainder. He stated that he knows his neighbours though he may not know their names. He did not know Khadija, Ngala or Hussein, and he doubted if they even exist. In his view, these were fictitious names. He never lived on the disputed land but he was planning to develop it and live in it before the SGR project came about. He retired in

the year 2005 as a Senior Superintendent of Police with his last station being in Taveta. He is now 70 years old. He denied that he got the land out of his position and influence. Re-examined, he stated that the 3rd respondent never informed him that there was any dispute over the ownership of his land.

15. The 1st respondent did not call a witness.

16. Mr. Duncan Mwangi testified on behalf of the 2nd respondent. He adopted his replying affidavit as his evidence. Cross-examined by Mr. Mbuthia, learned counsel for the 3rd respondent, he stated that he was part of the team that undertook the acquisition process. He stated that they did a ground inspection and also an inspection at the land registry. He testified that the search of the suit property showed the name of the petitioner. He stated that the 3rd respondent issued notice of intention to acquire and notice of inquiry which were published. He testified that they identified developments in form of homesteads on the suit land. None was of the petitioner. He could not however recall those identified on the land. He stated that the role of identifying ownership lay with the 3rd respondent. He affirmed that the land was on a settlement scheme. He stated that he has not visited the property after the acquisition.

17. Cross-examined by Mr. Karega, learned counsel for the petitioner, he stated that before publishing the Notice to acquire, they confirm ownership from the land registry. He pointed to Gazette Notice No. 4096 as the notice of intention to acquire the suit land. In it, the owner was noted to be the petitioner. The second notice issued was the notice of inquiry. It also showed the name of the petitioner as the owner of the suit land. He testified that he was not present at the inquiry. He was questioned on his affidavit, where he deposed that the petitioner and Khadija, Ngala and Hussein attended and made presentations, and he stated that this was information received from the 3rd respondent. He had no evidence that these persons actually attended the inquiry. He was not given any document from the 3rd respondent to show who attended. He stated that he saw the determination by the 3rd respondent though he did not attach it to his affidavit. He also stated that the invitation to visit the ground was done by the 3rd respondent. He testified that he deposed that the petitioner and the other three persons were invited based on information received from the 3rd respondent. He did not know how much was paid as compensation.

18. Re-examined, he stated that it is the 3rd respondent which pays and the 2nd respondent only facilitates the disbursements. In this instance, it was the 3rd respondent which made payment.

19. The 3rd respondent called Fidelis Kamwana Mburu as its witness. He is the Acting Director, and Valuation & Taxation at the National Land Commission. He stated that the mandate of the Directorate is to undertake valuation for compulsory acquisition and assessment of ground rents. He stated that he was involved in the SGR Project, but not directly in charge of acquiring the suit property. He outlined the acquisition procedure. He explained that it starts with a request from the 2nd respondent for the 3rd respondent to acquire land on its behalf; the request is then approved by the 3rd respondent; the 3rd respondent then publishes the land intended to be acquired. In this instance, Gazette Notice No. 4096 of 20 June 2014 was published. An inspection is then done to assess the compensation payable. He stated that it was done for the suit property and there is a record to that effect. He testified that the land fell in an adjudication scheme and there would be record from the adjudication office. He explained that for such land, one would expect a letter of offer, an acceptance, a record of payment to the settlement office, and transfer from the Settlement Fund Trustee (SFT). He testified that for this land, only the title deed was supplied, and that further due diligence did not yield the letter of offer, acceptance, or proof of payment. He stated that when the 3rd respondent published the Notice of inquiry, they had part information on the land and wanted those interested to present evidence to support their claim. The Notice of Inquiry was in Gazette Notice No. 5503 of 8 August 2014. He testified that on the date of the public inquiry, the petitioner only supplied the title, and that he did not supply a search or cadastral maps. He stated that subsequently on 9 September 2014, an addendum was published vide Gazette Notice No. 6578. In this addendum, Khadija, Ngala and Hussein were noted as the owners of the suit land. He testified that this area had issues and they had to do "ground truthing" and that sometimes in a settlement scheme some people who are not on the land hold ownership documents. He stated that during "ground truthing" it was the three persons who were found in occupation. He further stated that compensation was paid to two people, Hussein Mwatate Kshs 597,425/= for 0.4ha and Ngala Bule Kshs 411,148/= for 0.6ha of the suit property. He stated that the land being part of a settlement scheme, there were people in occupation and others holding title documents of the same land. He stated that in a settlement scheme the first priority for issuance of title is on the person in occupation, and in this case, when they conducted "truthing" of the suit property, those who were found in occupation were the ones named in the addendum Notice. He stated that the records for payment are with the 2nd respondent as they were delegated by the 3rd respondent to disburse the compensation for phase 1 of the SGR project. He further stated that where a party is discontented with the decision of the 3rd respondent, they lodge an appeal to the Commission, and if not satisfied, they come to this court. He stated that the land is being used for the purposes that it was acquired, and it is now public land, thus the petitioner cannot have it back. He stated that they cannot now pay a second time due to prudence in use of public funds. He stated that where the 3rd respondent has paid in error, the money can be recovered and restituted to the rightful owner.

20. Cross-examined by Ms. Opondo, counsel for the 2nd respondent, he stated that he did not have the records to demonstrate how the assessment for the amount of compensation was arrived at. He reiterated that the compensation money was disbursed directly to the 2nd respondent for payment.

21. Cross-examined by Mr. Karega, counsel for the petitioner, he conceded that he did not bring to court the determination upon inquiry. He testified that where there is a competing claim of ownership of the land, each party signs that they attended the inquiry, and affirms what transpired. He stated that there is a record of this. He did not bring the record to court and neither did he bring the inquiry notes. He did not bring any written claims for compensation. He testified that the Commission serves to the persons interested with a notice of the award and an offer for compensation. He had neither the award nor the offer for compensation. He did not have the record to present that there was a competing claim and that there were some people on the ground. He acknowledged that the law provides that where there is a competing claim, the money is to be put aside. He conceded that in this instance, the money was paid. He stated that payment cannot be processed without an award. In this instance, he claimed that the award was with the 2nd respondent. He however did acknowledge that the law provides that the award be filed with the Commission. He agreed that it was not clear from their records whether Khadija, Ngala and Hussein, attended the inquiry. He could not tell whether they attended or not. He was not sure whether there was any ground inspection record. He stated that where there is a competing claim, each party signs that they attended the inquiry and it is recorded in the inquiry notes.

He contended that the suit property had competing interests as the petitioner had title documents while there were others in occupation, and in such an instance, the law requires the money to be put aside. He stated that the 3rd respondent does not publish the award as the parties know of it from the inquiry attended. He reiterated that he did not attend the inquiry hearing, or the ground inspection, or the “ground truthing” exercise.

22. Re-examined he stated that where there is a competing claim, this is heard at the public inquiry sitting, but the determination made is not published, since it is not a requirement of law. He stated that the 3rd respondent’s determination, which is an award made, remains confidential and details pertaining payment are held by the 2nd respondent. He stated that the names of the three did not appear in the Notice of intention to acquire but in the addendum which is used to publish issues that come up from the inquiry.

23. A few questions were posed by court, and he stated that he was not sure if Khadija, Ngala and Hussein had title to land. He testified that payment was made to them on the basis that they were in occupation, not for holding title. He was not sure why only two (Ngala and Hussein), out of the three claimed occupants, were paid. He further stated that a quarter of the suit property remained after acquisition. With that the 3rd respondent closed its case.

24. Counsel were invited to file written submissions and I have taken note of the submissions presented.

C. Analysis and Determination

25. I will start by dispensing with some preliminary points raised by the respondents. In her submissions, Ms. Opondo, learned counsel for the 2nd respondent, submitted inter alia that the suit against the 2nd respondent ought to be struck out summarily, firstly because the petition is time barred as against the 2nd respondent, and secondly, that no 30 days notice was issued prior to the filing of this suit. I was referred to Section 87 of the Kenya Railways Corporation Act, Cap 397, Laws of Kenya, which provides as follows :-

87. Limitation

Where any action or other legal proceeding is commenced against the Corporation for any act done in pursuance or execution, or intended execution, of this Act or of any public duty or authority or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect—

(a) the action or legal proceeding shall not be commenced against the Corporation until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceeding, has been served upon the Managing Director by the plaintiff or his agent; and

(b) the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuing injury or damage, within six months next after the cessation thereof.

26. Counsel submitted that the above provision is couched in mandatory terms. She submitted that the requirement for written notice of one month under Section 87 (a) was upheld in the case of *Peter Nzioka Mani & Another vs Kenya Railways Corporation (2012) eKLR* and *Joseph Nyamamba & 4 Others vs Kenya Railways Corporation (2015) eKLR*. She also relied on the case of *Satellite Aviation Telecommunications Systems Limited vs Kenya Railways Corporation & Another (2020) eKLR* where a suit against the Corporation was struck out as being out of the limitation period of 12 months provided in Section 87 (b).

27. Mr. Karega’s response was that the suit herein relates to the 2nd respondent’s breach of the petitioner’s constitutional right to property and that Section 87 is restricted to acts done pursuant to the 2nd respondent’s incorporating statute. To support his submission, he relied on the case of *Ahmed Mohamed Mwinyihaji vs Attorney General & 3 Others (2018) eKLR*.

28. I have considered this objection and read the authorities provided to me by counsel. In the case of *Peter Nzioka Mani & Another vs Kenya Railways Corporation*, the plaintiffs filed suit to contest the intended increase of rent by the defendant of premises that they occupied. The notice for increase of rent was issued on 19 December 2011 with the increment of rent due to take effect on 1 February 2012. A suit was filed on 1 February 2012 without the 30 day notice having been issued. The court (Mwera J, as he then was) held that the suit concerned a dispute envisaged under Section 87 and therefore the 30 day notice was mandatory. He found that there was sufficient time to issue the notice and proceeded to strike out the suit.

29. In the case of *Joseph Nyamamba & 4 Others vs Kenya Railways Corporation*, the appellants filed a plaint in the High Court complaining that the respondent had demolished its structures. What had happened was that the respondent had placed a mark ‘X’ on their property and three days later proceeded to demolish the buildings therein. Contemporaneously with the plaint, they filed an application seeking orders of injunction. A preliminary objection was raised that the suit was fatally defective for failure to serve the 30 day notice under Section 87 (a). The High Court upheld this objection. The plaintiffs appealed. At the Court of Appeal, they argued inter alia that Section 87 (a) was unconstitutional for it contravened Article 48 of the Constitution on access to justice. On this, the Court of Appeal, appreciated that this could be an impediment to access justice, and indeed, in principle, upheld the reasoning of Majanja J in the case of *Kenya Bus Services Limited & Another vs Minister of Transport & 2 Others (2012) eKLR* where Majanja J found Section 13A of the Government Proceedings Act, which also requires a 30 day notice before filing suit, as violating Article 48 of the Constitution of 2010. The Court of Appeal however reasoned that the matters in issue had taken place in 2008, before the 2010 Constitution, and there could not be retrospective application of Article 48 of the Constitution. The appeal was thus dismissed.

30. In the case of *Satellite Aviation Telecommunications Systems Limited vs Kenya Railways Corporation & 2 Others*, the plaintiff filed suit inter alia complaining of actions undertaken by the Corporation which resulted in flooding of their land. The Court found that the action arose in 2016 but the suit was filed in 2019, about three years later, thus out of time, given the limitation period of one year provided for in

Section 87 (b) of the Kenya Railways Corporation Act.

31. The case of *Ahmed Mohamed Mwinyihaji vs Attorney General & 3 Others* was a constitutional petition where the petitioner claimed a violation of various rights in the Constitution. The Corporation was sued as 2nd respondent. An objection was raised that the suit offends Section 87 of the Act. This was dismissed, with the court (Omollo J), holding that the petition was filed pursuant to rights and interests conferred by Article 40 of the Constitution and the Land Act, and not under the Kenya Railways Corporation Act, thus it was not mandatory to issue the notice before commencement of suit.

32. I have analysed the above decisions. In my opinion, the cases cited by Ms. Opondo are all distinguishable. The case of *Peter Nzioka Mani* was a rent dispute and the court found that it was a dispute under the Kenya Railways Corporation Act for which the 30 day notice was required. In *Joseph Nyamamba*, the holding was that the appellants could not escape the 30 days period notice as they could not avail themselves refuge under Article 48 of the Constitution because it could not be applied retrospectively. In *Satellite Aviation*, the court also found the dispute to be one falling within the Act thus the limitation period of one year. This petition is more or less in line with the case of *Ahmed Mohamed Mwinyihaji* which was also a constitutional petition claiming a violation of Article 40 of the Constitution. What is in issue here is similarly a complaint regarding violation of the Constitution and not a violation of the Kenya Railways Corporation Act. I therefore do not see how the 2nd respondent can avail herself of Section 87 of the said Act. The said Section, being in statute, cannot be used to override a right and/or remedy granted by the Constitution, and cannot be used to defeat a complaint where a person alleges a violation of the Constitution by the Corporation.

33. In any event, on the issue of the 30 day notice, I have seen that through the letter dated 30 March 2016, written by M/s Mwangi Njenga & Company Advocates on behalf of the petitioner, the petitioner did give a 30 days notice to both the National Land Commission and the Kenya Railways Corporation of his intention to sue. That letter was received by Kenya Railways on 8 April 2016. I wonder why the 2nd respondent is now claiming that no 30 days notice was ever issued. Further on the question of limitation, it is now settled that the issue of limitation, when it comes to constitutional petitions, is not as strictly applied as the case may be when the cause of action is based on statute. So long as the delay is not inordinate, and can be explained, courts would generally be less stringent on the issue of limitation when the subject matter relates to a violation of constitutional rights. In the Court of Appeal decision of *Wellington Nzioka Kioko vs Attorney General (2018) eKLR*, the Court of Appeal after reviewing the authorities on this point stated as follows :-

“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.”

34. In the instance of this case, I do not find the delay to be inordinate, and if there can be said to be any delay, then it is well explained. The publication of the inquiry was in September 2014. The petitioner has explained that he waited for a decision to be handed over to him and none was forthcoming. The respondents cannot, after failing to communicate to the petitioner, now use their lapse to deny the petitioner access to the seat of justice. The petitioner did testify that he kept following with the offices of the 2nd and 3rd respondents but he was being tossed from one officer to another without being assisted. He has displayed letters that he wrote in the years 2015 and 2016 hoping that his issue will be addressed. In those letters he has pointed out that he has not received any award or any word after the inquiry. I have looked at the replies received and none mentioned that an award has been made to other people and that the matter is therefore closed. This suit was filed in 2017. I do not think that there was any inordinate delay. The suit is therefore properly before this court.

35. It was also raised in the submissions of Ms. Opondo, that the petitioner ought to have exhausted his remedy under statute and Section 116 of the Land Act was cited. It provides as follows :-

116. Payment in error

If a person has received any money by way of compensation awarded for an interest in the land being acquired, either in error or before it has been established that some other person is rightfully entitled to the interest, the Commission may, by notice in writing served on that person, require that person to refund to the Commission the amount received, and the amount shall be a debt due from that person to the Commission.

36. I have read the above provision and it cannot be used to argue that this is a remedy available to the petitioner. This clearly is a remedy given to the Commission to recover money wrongfully paid. The same is not an impediment to the petitioner. I need not say more on that.

37. It was submitted by both Ms. Opondo, and Mr. Mbutia for the 3rd respondent, that this petition does not raise constitutional issues. My short answer is that it does raise issues regarding the constitutional right to property under Article 40 of the Constitution. The complaint of the petitioner is that the State took away his land without compensation, contrary to Article 40 of the Constitution. The petition is thus properly before court.

38. Finally, there was an argument by Mr. Mbutia that this court has no jurisdiction. I need not say any more on that because it was already the subject of a ruling by Omollo J. If the 3rd respondent was aggrieved by that, then it ought to have appealed. I do not have jurisdiction to sit as an appellate court on a decision rendered by my colleagues.

39. Having dismissed the preliminary contentions to this petition, I will delve into the merits of it.

40. The petitioner contends to be the owner of the suit land, and despite the same having been acquired for purposes of the SGR project, he complains that he has not been compensated for the acquisition. To demonstrate ownership of the suit land, the petitioner has availed the certificate of title to the suit land and the official search.

41. This is a case for compensation for land that has been acquired compulsorily. The Constitution at Article 40 protects the right to property.

Part of this protection is the bar to the expropriation of property without just compensation. The whole of Article 40 provides as follows :-

40. Protection of right to property

(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.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

42. It will be seen, particularly at Article 40 (3), that the State is directed not to deprive a person of property unless there is prompt payment, in full, of just compensation. The actual process of compulsory acquisition is set out in the Land Act, at Part VIII, which runs from Section 107 to Section 133. For brevity, I will not print out all these sections, unless where necessary, and I will only, in passing, highlight the provisions that apply in the particular circumstances of this case. It is also important to note that there have been amendments to the Land Act, Act No. 6 of 2012, in 2016 and 2019, (through Act No. 28 of 2016, and Act No. 15 of 2019) but these amendments will not apply, as the procedure that was to be followed in the acquisition herein was that which was stipulated in the Act as at the year 2014. It is therefore the Land Act, as it was in 2014, which applies.

43. Under Section 107, of the Land Act, the acquiring authority was to make a request to the National Land Commission, for the Commission to acquire land on its behalf. If the request was accepted, the Commission, under Section 107 (5), was to publish a notice to that effect in the Kenya Gazette and the County Gazette. This notice was to be delivered to the Land Registrar and every person who appeared to the Commission to be interested in the land. This is what is described in the Act as “the preliminary notice.” For our case, the preliminary notice, which is more or less equivalent to the notice of intention to acquire land, was published in the Kenya Gazette of 20 June 2014 as Gazette Notice No. 4096. For the suit land, it is noted that the area to be acquired is 1.026 Ha and under the name of the petitioner is published under the heading “parcel owner.” No other person is shown to have any interest in the suit land.

44. What ought to have followed was an “inquiry as to compensation” under Section 112 of the Land Act. This is an important section for our purposes and I will set it out in full. It provided (and still provides) as follows :-

112. Inquiry as to compensation

(1) At least thirty days after publishing the notice of intention to acquire land, the Commission shall appoint a date for an inquiry to hear issues of propriety and claims for compensation by persons interested in the land, and shall—

(a) cause notice of the inquiry to be published in the Gazette or county Gazette at least fifteen days before the inquiry; and

(b) serve a copy of the notice on every person who appears to the Commission to be interested or who claims to be interested in the land.

(2) The notice of inquiry shall call upon persons interested in the land to deliver a written claim of compensation to the Commission, not later than the date of the inquiry.

(3) At the hearing, the Commission shall—

(a) make full inquiry into and determine who are the persons interested in the land; and

(b) receive written claims of compensation from those interested in the land.

(4) The Commission may postpone an inquiry or adjourn the hearing of an inquiry from time to time for sufficient cause.

(5) For the purposes of an inquiry, the Commission shall have all the powers of the Court to summon and examine witnesses, including the persons interested in the land, to administer oaths and affirmations and to compel the production and delivery to the Commission of documents of title to the land.

(6) The public body for whose purposes the land is being acquired, and every person interested in the land, is entitled to be heard, to produce evidence and to call and to question witnesses at an inquiry.

45. From the above, it will be noted that the Commission was supposed to embark on an inquiry as to the compensation payable. The Commission was obligated to give notice of the inquiry to every person who appeared interested, or who claimed to be interested, in the land. The notice was also to be published in the Kenya Gazette or County Gazette at least 15 days before the inquiry. Under Section 112 (3) the Commission, at the hearing, was to make a full inquiry and determine who are the persons interested in the land. It was also supposed to receive written claims of compensation from those interested in the land. In undertaking this process, the Commission is empowered to call witnesses and persons are entitled to be heard and question any witnesses. In our case, there was indeed published a notice of inquiry through the Gazette Notice No. 5503 of 12 August 2014. In that Gazette notice, the Commission did elaborate that it was giving notice that it will hold inquiries and hear claims as to compensation for those interested in various land parcels which were identified. The suit land is among the land parcels identified with the affected area again noted to be 1.026 Ha. Under the heading “parcel owner” the name of the petitioner was published. The inquiry over the suit land (and other parcels around that area) was to be held on 2 September 2014 at the Chief’s office Mackinnon Road from 8.30am. What is interesting in our case, is that the respondents contend that apart from the petitioner, the three persons, Khadija, Ngala and Hussein, also appeared at the inquiry. However, there is no record produced of the inquiry, and what exactly these three people, if at all they exist, appeared and stated. The petitioner did state that he appeared and handed over his title documents, and this is not disputed by the respondents, and that nobody else appeared to lay any interest in the suit land. I will get back to this issue of ownership and title a little later for I need to continue laying down the procedure that was to be followed.

46. After the conclusion of the inquiry, the Commission was supposed to prepare a written award. This is under Section 113 which was drawn as follows :-

113. Award of compensation

(1) Upon the conclusion of the inquiry, the Commission shall prepare a written award, in which the Commission shall make a separate award of compensation for every person whom the Commission has determined to have an interest in the land.

(2) Subject to Article 40 (2) of the Constitution and section 122 and 128 of this Act, an award—

(a) shall be final and conclusive evidence of—

(i) the size of the land to be acquired;

(ii) the value, in the opinion of the Commission, of the land;

(iii) the amount of the compensation payable, whether the persons interested in the land have or have not appeared at the inquiry; and

(b) shall not be invalidated by reason only of a discrepancy which may thereafter be found to exist between the area specified in the award and the actual area of the land.

(3) If an interest in land is held by two or more persons as co-tenants, the award shall state—

(a) the amount of compensation awarded in respect of that interest; and

(b) the shares in which it is payable to those persons.

(4) Every award shall be filed in the office of the Commission.

47. It will be seen from the above that the award of compensation was supposed to be in writing {Section 113 (1)} and was directed to be filed with the commission {Section 113 (4)}. There is therefore supposed

to be a document that evidences the award which ought to be with the Commission. That award ought to have various particulars, including the amount of compensation payable, and whether the persons interested in the land have or have not appeared at the inquiry.

48. In our case, the Commission never availed the award. This is however a document that is supposed to be in the offices of the Commission. It is this award which would have shown whether there were any persons who appeared at the inquiry and laid any claim to the land. In other words, the Commission failed to avail a record which by law it was required to have and keep. There is nothing to show what sort of inquiry the Commission undertook or what sort of award it may have made.

49. What should have followed thereafter was the notice of the award under Section 114 (1) of the Land Act, which provided as follows :-

Notice of award

On making an award, the Commission shall serve on each person whom the Commission has determined to be interested in the land, a notice of the award and offer of compensation.

50. It will be seen from the above that the Commission was supposed to serve upon each person who had been determined to have an interest in the land the notice of the award and the offer for compensation. In our case, the petitioner states that he has never received any award nor any offer for compensation. The Commission and the 2nd respondent have not presented any evidence of any award. All they have stated is that compensation was paid to Khadija, Ngala and Hussein. They say that they were paid because they were in occupation, but without any record of what transpired at the inquiry, and without the written award being presented, there is no evidence, which the 2nd and 3rd respondents have provided, as forming the basis for the making of payment to Khadija, Ngala, and Hussein.

51. What happened in this case is that after the notice of inquiry, the Commission went and published what it called an “*addendum*” in the Gazette Notice No. 6578 of 19 September 2014. That notice states that the Commission “*intends to add the following parcels of land for the construction of (the SGR)*” and the suit land is published. It is now for the first time that the names of Khadija, Ngala and Hussein, appear under the heading of “*registered land owner.*” Now, there are several problems with this notice. First, it is definitely inaccurate to say that the suit land was being added for acquisition, for it had already been identified and published as among the parcels of land to be acquired in the first Gazette Notice No. 4096 of 20 June 2014. It could not therefore fall under the definition of “*land intended to be added.*” This is land that had already been earmarked and published for acquisition in the first notice. Secondly, that Gazette Notice makes a note that it is Khadija, Ngala and Hussein who are the “*registered land owner.*” Nothing could be further from the truth, because even in their replies, the 2nd and 3rd respondent have not pretended that Khadija, Ngala and Hussein, were ever the registered owners of the land. What they claim, putting aside for the moment whether or not there is any proof of such claim, is that the three were occupants of the suit land, and that by virtue of that occupation, they were found to be eligible for compensation. It was never said that they were registered owners of the suit land. Thus, the description that they were registered land owners was misleading. Thirdly, that Gazette Notice, though it does not state so in its heading, gives a date, presumably for inquiry, of 15 October 2014 at the Assistant County Commissioner’s Office – Samburu. Assuming that this was an inquiry, again no minutes, and nothing has been presented as the proceedings of the inquiry. There is no record that Khadija, Ngala and Hussein ever appeared at that inquiry, and whether they presented any claim for compensation, written or verbal. Neither is there any record of what the findings of such inquiry, if ever one was done, were. Nowhere is there any record of whether or not the Commission thought that there were competing claims of ownership of land and what their analysis of these competing claims were. There is simply nothing presented by the Commission and the 2nd respondent over the inquiry and the award.

52. The petitioner has certainly laid material before this court that there was a violation of the process of acquisition for failure to comply with Sections 112 (inquiry as to compensation), Section 113 (award of compensation), and Section 114 (Notice of the award) of the Land Act. It is only after notice of the award is made that payment may be made pursuant to Section 115 of the Act, which at that time, was drawn as follows :-

115. Payment of compensation

(1) After notice of an award has been served on all the persons determined to be interested in the land, the Commission shall, promptly pay compensation in accordance with the award to the persons entitled thereunder, except in a case where—

(a) there is no person competent to receive payment; or

(b) the person entitled does not consent to receive the amount awarded; or

(c) there is a dispute as to the right of the persons entitled to receive the compensation or as to the shares in which the compensation is to be paid.

(2) In any of the cases referred to in paragraphs (a), (b) and (c) of subsection (1), the Commission may at any time pay the amount of the compensation into a special compensation account held by the Commission, notifying any persons interested accordingly.

53. We have no evidence of whether or not the Commission thought that there was any dispute as to who was entitled to compensation. Despite the petitioner presenting his title documents, we have no material

to demonstrate on what ground the Commission thought that the petitioner is not deserving of compensation. We have no evidence of any occupation by Khadija, Ngala and Hussein of the suit land. We have no evidence that Khadija, Ngala and Hussein ever appeared to demonstrate their interest in the land. We have no basis for the publication of the names of Khadija, Ngala and Hussein as owners of the suit land.

54. Matters relating to compensation for land are serious issues. They are serious, not only because a legitimate owner of property ought not to be left high and dry, but also because public funds are involved. That is why there needs to be documentation concerning the process of acquisition and compensation for land that has been compulsorily acquired. It is not enough, as the Commission and the 2nd respondent have done in this suit, to simply say, through words that are completely unsupported by any tangible and/or documentary evidence, that a particular person is owner of land, or was found to be in occupation of land. Mere statements, I am afraid, are not sufficient, and that is certainly not what the law obligated the 3rd respondent to conduct itself.

55. It is disappointing, deeply disappointing, when persons entrusted by the public to conduct affairs touching on public funds, go rogue and decide not to follow the law as it is stipulated. That is exactly what happened in this case. The Commission deliberately went out of its way to avoid making payment to the petitioner but proceeded to pay out money to “ghost” persons, for there is no other way of describing Khadija, Ngala and Hussein, who have been mentioned in this case. Despite this court having ordered the Commission to give out the national identity cards, PIN numbers, the postal and physical addresses, of Khadija, Ngala and Hussein, none were forthcoming. If at all these documents ever existed, then they would have been presented. The only conclusion any reasonable person can reach, and that is the conclusion that this court reaches, is that these three persons do not exist at all. I come to the sad conclusion that these were nothing but fictitious names conjured up for purposes of corruptly siphoning public funds. There is in fact no record that any money was ever paid out to these three people. It was said that Ngala and Hussein were paid the sums of Kshs. 411, 148/= and Kshs. 597,425/=. Why the so called Khadija was not paid is not elaborated. No record was provided that any such people were paid this money. Payment of money must have a record, and if any existed, then the same would have been provided. What I suspect happened, is that personnel within the Commission, either by themselves or in collusion with some malefactors out there, simply thought of a way of stealing from the public this amount of money and pretended that it was paid to some persons who had interest in the land. If this were not the case, then the Commission and the 2nd respondent would have presented before this court the records tabling reasons why the three persons were thought to be deserving of compensation. They would also have presented their particulars and the payment records. None were provided.

56. There is absolutely no reason, in my view, why the Commission and the 2nd respondent declined to make payment to the petitioner. He was the registered proprietor of the land. Despite Ms. Opondo, counsel for the 2nd respondent, in her submissions stating that the petitioner could not be having title in 2014 because the title of the petitioner was issued in 2015, the petitioner explained that this was a replacement title, as the earlier one had an error. No evidence has been given by the respondent to challenge this. In fact, the 2nd and 3rd respondents in their affidavits and evidence have stated that the petitioner did avail his title document at the inquiry.

57. Mr. Mbuthia, counsel for the 3rd respondent, tried to argue that the petitioner could not have gotten a good title because the settlement scheme was for the landless poor. This is the classical red herring. The fact of the matter is that the petitioner has title to the suit land. If the respondents wished to challenge his acquisition of it, they ought to have filed suit for the cancellation of the petitioner’s title. The respondents cannot try to argue that all that the respondent has is a title that is not backed up by the appropriate evidence, such as an allotment letter and payment for it. The petitioner is already the registered proprietor and he has an official search that demonstrates as much. That title, pursuant to Section 26 of the Land Registration Act, Act No. 3 of 2012, is to be taken as prima facie evidence that it is the petitioner who is the registered owner of the suit land. If the respondents’ case was that the title is not backed up, then it was the duty of the respondents to provide evidence that the petitioner’s title is not genuine. For example, this being a settlement scheme, the respondents could as well have presented the Scheme records to show that no title was ever issued to the petitioner. None was provided. There was no basis upon which to say that the petitioner held no good title to the suit land. In any event, the State has not presented any evidence that there is any other person with title to the same land. This court cannot speculate, in absence of cogent evidence, that the petitioner is not the owner of the suit land while he has a Title deed and an official search that are not disputed by the respondents. Moreover, at least the petitioner had a title that he presented. What did Khadija, Ngala and Hussein present, that was superior to what the petitioner had? Absolutely nothing. How do you pay someone who has absolutely nothing, yet overlook a person who has presented a title and search? Whichever angle you want to look at it, the petitioner certainly had something that was superior to the purported persons named Khadija, Ngala and Hussein, forget for a moment that I am not even persuaded that such persons actually exist.

58. Mr. Mbuthia had the nerve to argue in his submissions that the petitioner conveniently failed to sue the persons who were compensated. I am taken aback by such misplaced boldness. How was the petitioner expected to sue persons who do not exist? If at all they existed, why didn’t the 3rd respondent forward their particulars? The petitioner from the word go stated that he does not know any persons bearing such names, and that no such persons were on the land or the neighbourhood. He challenged the 3rd respondent to avail their particulars if any existed. The 3rd respondent who is the party who knows the whereabouts of the three people could not avail the same despite a court order to do so. I am surprised that the 3rd respondent now argues that the petitioner “conveniently failed” to sue them. What cheek! The reality of the matter is that the 3rd respondent is the one who “conveniently failed” to disclose that such persons do not exist in the first place. The further audacity by the 3rd respondent’s counsel to argue that the remedy of the petitioner is to sue the three persons is pitiful, if not out rightly absurd and illogical.

59. There is no doubt that the petitioner was the person who ought to have been compensated. His land was expropriated by the State without any payment of compensation. This was a clear violation of Article 40 of the Constitution.

60. What then should this court do in the circumstances? I am aware of the prayers that the petitioner asked for which I laid out earlier in this judgment. The first two prayers (a) and (b) are declarations of violation of the Constitution. I grant these two prayers as against the 2nd and 3rd respondents. The third prayer (c) is for a mandatory injunction to compel the 3rd respondent to communicate in writing its determination of the value of the compensation payable for the suit property. This is what the Commission ought to have done pursuant to Section 114 of

the Land Act. I issue this order, only that I give the period of 21 days for the execution of it. In other words, within 21 days, the 3rd respondent to communicate to the petitioner, through his advocate on record, the amount of compensation that is awardable for the acquisition of the suit land. I further order that if the amount communicated is acceptable, then payment be made within 30 days of the acceptance in accordance with prayer (d) of the petition. If the award is not acceptable, then the process of determining such dispute over the amount of compensation under the Act be followed. Whichever the case, the petitioner is entitled to the money that will be awarded with interest from 2 September 2014, which was the date of inquiry of the award payable. The only issue left is costs. In my view, the 2nd respondent was no less culpable than the 3rd respondent. In fact, I am of the opinion that there was collusion between the two parties to obfuscate the issues herein and ultimately justice to the petitioner. They will jointly and/or severally bear the costs of this petition.

61. Before I close, I am alive to Article 201 (d) of the Constitution. It was actually raised in the submissions of Mr. Mbutia to try and argue that if this court allows the case, then it will result in double compensation and therefore it will fly against public interest and public policy. It is very clear to me that it was personnel from the 2nd and/or 3rd respondent who proceeded to violate the law on compulsory acquisition and made a very questionable payment to persons who to date remain a mystery. It was them (2nd and 3rd respondents) who actually contravened Article 201 (d) of the Constitution and went against public policy and public interest. They cannot use that to deny compensation to one who is fully entitled to the same. The public does not have to suffer on account of the acts of the personnel of the 2nd and 3rd defendants. In that regard, I direct the Ethics and Anti-Corruption Commission (EACC) to proceed and commence investigations into how the moneys herein were paid. Any person found culpable to be surcharged of such money or a suit for recovery of the money against such person be instituted. This is without prejudice to any criminal action that may be pursued. This judgment therefore be served upon the EACC for their action.

62. Judgment accordingly.

DATED AND SIGNED THIS 18 DAY OF JUNE 2021

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JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

DELIVERED AT MOMBASA THIS 24 DAY OF JUNE 2021

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BY JUSTICE CHARLES K. YANO

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA