



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

PETITION NO. 9 OF 2019

IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLES

19, 22, 23, 40, 47, 50 AND 64

AND

**IN THE MATTER OF BREACH OF FUNDAMENTAL RIGHTS AND FREEDOMS CONTRARY TO ARTICLE 40,43 & 47
CHAPTER 4 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF CONTRAVENTION OF RIGHTS TO OWN PROPERTY CONTRARY TO ARTICLE 40 OF THE
CONSTITUTION OF KENYA**

AND

IN THE MATTER OF REGISTRATION OF TITLES ACT CHAPTER 280 OF THE LAWS OF KENYA

AND

IN THE MATTER OF REGISTERED LAND ACT CHAPTER 300

LAWS OF KENYA

AND

**IN THE MATTER OF ENFORCEMENT OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER CHAPTER FOUR
ARTICLES 22 AND 23(1) AND 3 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF JAMES GICHURU JUNCTION-RIRONI JUNCTION (A104/B3) ROAD PROJECT

BETWEEN

JEDIDAH WANJIRU KANGETHEPETITIONER

VERSUS

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

CHIEF LAND REGISTRAR.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

By a Constitutional Petition dated 25th July 2019, the Petitioner herein brought this suit against the Respondents seeking for the following orders:-

- a. A Declaration that the intended project at James Gichuru Junction–Rironi Junction (A104/B3) road project is unconstitutional and is in breach of the Petitioner’s economic and social rights.**
- b. An order declaring that the Respondents’ actions in seeking to curtail, undermine and/or deprive the Petitioner’s of her right to her property without just cause and adequate compensation is unfair, unlawful and unconstitutional.**
- c. An order preserving the Petitioner’s parcel of land**
- d. In alternative to prayer(c) the Respondents be ordered to adequately compensate the Petitioner at the current market value before compulsorily acquiring her parcel of land.**
- e. An order for the Petitioner and the Respondents to carry out a joint valuation by court appointed valuer of the Petitioner’s property to be acquired compulsorily for just compensation.**
- f. Cost of the petition**
- g. Any other suitable and/or alternative relief this honorable court may deem fit and just to grant.**

In her Petition, the Petitioner averred that she is the bonafide owner of Land referred to as **Dagoretti/Kinoo/1787**. That via Gazette Notices No’s **810 of 12th February 2016, 10477 of 19th October 2017, 2533 of 16th March 2018, 6961 of 13th July 2018 and 2998 of 29th March 2019**, the Government notified her of its intention to Compulsorily acquire a portion of her land measuring approximately **0.0202 Ha** for the extension of the **Nairobi-Nakuru Highway**. That she has improved her property by constructing a double storey building comprised of **30 shops**, a semi-permanent shed and a wall to secure the premises.

That the 1st Respondent through the Directorate of Valuation and Taxation have valued the said property at **Kshs. 7,657,800/=** a figure that is way below the current market value. That the 1st Respondent did not apply public participation in relation to the intended compulsory acquisition. Further, that the Petitioner engaged the services of **DANTU VALUERS LTD** who did their valuation of the suit property which amounted to a total figure of **Kshs. 21, 117,000/=**. That the Respondent’s decision not to indulge her during the decision making and conducting valuation of the property is a contravention of her right to fair administrative action under **Article 47** of the **Constitution 2010**.

Further that her right to peaceful use of her property under **Article 40** will be infringed. That the right to life under **Article 26** will be infringed as her source of livelihood would be taken away. **Article 27** will equally be violated.

In her supporting Affidavit, **Jedidah Wanjiru Kangethe** averred that a compensation of **Kshs.21,117,000.00/=** as per the valuation report would be just and full compensation for compulsory acquisition of her property to avoid miscarriage of justice . That the 5th Respondent is in the process of demolishing the structures she put up so as to pave way for construction.

That it is only fair that the Court declares that her rights have been violated. Further that her attempts to settle the matter amicably have been frustrated by the 1st Respondent.

The Petition is Contested and the 2nd, 3rd and 4th Respondents filed Grounds of Opposition dated **15th August 2019**, on the grounds that the Government has the right of Eminent Domain upon just compensation to a proprietor and the right of compulsory acquisition is an overriding Interest. That **L.R Dagoretti/Kinoo/1787**, was Compulsorily acquired for purposes of enhancement of **James Gichuru Road-Rironi Junction (A104)** and the computation of compensation for properties compulsorily acquired by the Government is dependent on Government Valuers’ and not **privately hired valuers**, for purposes of transparency and accountability.

That the right to property is not an absolute right and can be limited in accordance with **Article 24 of the Constitution**. Further that public Interest in the project superseded Applicant’s private right over the parcel of land.

The 5th Respondent filed its undated Replying Affidavit sworn by **Frank Zhao Xin** on **4th March 2020**, who averred that the Petitioner has no cause of action against the 5th Respondent and the suit against it ought to be dismissed. That the only construction engaged in by the 5th Respondent is the construction of the Highway, specifically being undertaken on the road reserve as demarcated by its contracting principal. Further that any delay in terms of receipt of due and prompt compensation to the Petitioner from the Government of Kenya for the Compulsory Acquisition of the Petitioner’s property is her own creation. That the only question is the aspect of the valuation of the land. That he is advised by his Advocate, which advise he believes to be true that the authority mandated by law to undertake valuation and compensation of land Compulsorily acquired is the 1st Respondent and not **Dantu Valuers**. Further that the Gazette Notice is subsidiary legislation and the same cannot be relied upon.

After close of pleadings, parties filed their respective written submissions in support and in opposition of the Petition.

The Petitioner through the Law Firm of George Wakahiu & Co. Advocates filed her written Submissions on 9th July 2020. The 5th Respondent filed its written submissions on 9th April 2021, through the Law Firm of Ms Law Advocates LLP. The court notes that the 1st Respondent did not participate in the proceedings.

Having now carefully read and considered the Petition, the Affidavits, grounds of opposition, the written submissions by the parties and the provisions of law and decided cases, it is the Court's considered view that the issue for determination is *Whether the Petition is merited.*

The Petitioner has sought for various prayers amongst them a Declaration that the intended project on James Gichuru Road along the Nairobi-Nakuru Highway is in breach of her rights and that the actions seek to curtail her rights. She has also sought for the preservation of her property, adequate compensation or that the Court orders joint valuation to be conducted by both parties.

In her Petition, the Petitioner has majorly dwelt on the issue of compensation and that after receiving the award from the 1st Respondent, she conducted her own valuation through a different valuer to wit Dantu Valuer and the valuation showed that what was awarded was less.

Though the Constitution gives a person under **Article 40**, the right to own property, the said Article further limits those rights. **Article 40 (3) of the Constitution** provides as follows on the issue of compulsory acquisition;

'The State shall not deprive a person of property of a 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 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.**

It therefore follows that Compulsory Acquisition of property can in no way be breach of a right nor can it curtail a person's right to own property, in so far as the same follows due procedure and just compensation is paid to a party.

The question therefore that the Court ought to determine is whether due process was followed when acquiring the Petitioner's property and whether just compensation was duly paid to the Petitioner.

It is not in doubt that the Petitioner is the registered owner of the suit property. It is further not in doubt that on various Gazette Notices the Government published No. 810 of 12th February 2016, 10477 of 19th October 2017, 2533 of 16th March 2018, 6961 of 13th July 2018 and 2998 of 29th March 2019, in respect of land to be acquired for purposes of construction of James Gichuru Road-Rironi Junction (A104) which amongst them was the Petitioner's parcel of land and that the portion to be acquired in the Petitioner's property was approximately 0.0202 Ha. Further it is also not in doubt that the 1st Respondent sent out an award to the Petitioner for of Kshs. 7,657,800/=.

In the case of *Patrick Musimba ...Vs... National Land Commission & 4 Others (2016) eKLR* the 5 Judge Bench observed in extension as follows:-

"85. In summary, the process of compulsory acquisition now runs as follows: -

86. Under Section 107 of the Land Act, the National Land Commission (the 1st Respondent herein) is ordinarily prompted by the National or County Government through the Cabinet Secretary or County Executive Member respectively. The land must be acquired for a public purpose or in the public interest as dictated by Article 40(3) of the Constitution. In our view, the threshold must be met; the reason for the acquisition must not be remote or fanciful. The National Land Commission needs to be satisfied in those respects and this it can do by undertaking the necessary diligent inquiries including interviewing the body intending to acquire the property.

87. Under Sections 107 and 110 of the Land Act, the National Land Commission must then publish in the gazette a notice of the intention to acquire the land. The notice is also to be delivered to the Registrar as well as every person who appears to have an interest in the land.

88. As part of the National Land Commission due diligence strategy, the National Land Commission must also ensure that the land to be acquired is authenticated by the survey department for the rather obvious reason that the owner be identified. In the course of such inquiries, the National Land Commission is also to inspect the land and do all things as may be necessary to ascertain whether the land is suitable for the intended purpose. See Section 108 of the Land Act.

89. The foregoing process constitutes the preliminary or pre-inquiry stage of the acquisition.

90. The burden at this stage is then cast upon the National Land Commission and as can be apparent from a methodical reading of Sections 107 through 110 of the Land Act, the landowner's role is limited to that of a distant bystander with substantial interest.

91. Section 112 of the Land Act then involves the landowner directly for purposes of determining proprietary interest and compensation. The Section has an elaborate procedure with the National Land Commission enjoined to gazette an intended inquiry and the service of the notice of inquiry on every person attached. The inquiry hearing determines the person interested and who are to be compensated. The National Land Commission exercises quasi-judicial powers at this stage.

92. On completion of the inquiry the National Land Commission makes a separate award of compensation for every person determined to be interested in the land and then offers compensation. The compensation may take either of the two forms prescribed. It could be a monetary award. It could also be land in lieu of the monetary award, if land of equivalent value, is available. Once the award is accepted, it must be promptly paid by the National Land Commission. Where it is not accepted then the payment is to be made into special compensation account held by the National Land Commission. See Sections 113-119 of the Land Act.

93. The process is completed by the possession of the land in question being taken by the National Land Commission once payment is made even though the possession may actually be taken before all the procedures are followed through and no compensation has been made. The property is then deemed to have vested in the National or County Government as the case may be with both the proprietor and the Land Registrar being duly notified. See Sections 120-122 of the Land Act.

94. If land is so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined. See Section 111 of the Land Act. This is in line with the Constitutional requirement under Article 40(3) of the Constitution that no person shall be deprived of his property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation."

It is thus not in doubt that during the pre inquiry stage, the 1st Respondent has to satisfy itself that it is acquiring land for public use, publish the intention to acquire in the Gazette Notice and Identify the owner. The Court is satisfied that all the above were undertaken as the Land is being acquired for a public purpose, the owner being the Petitioner was Identified and that the acquisition was duly published in the Kenya Gazette.

Further it is not in doubt that the land owner's role is limited to a distant bystander, that after the Pre inquiry stage, the National Land Commission makes a separate award for compensation and offers compensation and if the same is accepted, it is paid and if not accepted it is paid to a special compensation.

The Petitioner has sought for orders that she be promptly paid, the 1st Respondent having given the award to the Petitioner. It is therefore not in doubt that it was ready and willing to pay the Petitioner. The Court is therefore satisfied that the compulsory acquisition was proper and there was no violation of the Petitioner's rights nor is there need to preserve the parcel of land as acquisition is completed by possession and possession may be undertaken even if compensation has not been fully paid.

The Petitioner has sought for joint valuation in the alternative that the Court does not preserve the suit property. The Court In the case of *Patrick Musimba...Vs...National Land Commission & 4 others [2016] eKLR* held that:-

In our view, a closer reading of Article 40(3) of the Constitution would reveal that the Constitution did not only intend to have the land owner who is divested of his property compensated or restituted for the loss of his property but sought to ensure that the public treasury from which compensation money is drawn is protected against improvidence. Just as the owner must be compensated so too must the public coffers not be looted. It is that line of thought that, under Article 40(3), forms the basis for "prompt payment in full, of just compensation to the person" deprived of his property through compulsory acquisition."

In this instant there is no evidence by the Petitioner on whether she accepted or refused the award granted by the 1st Respondent. The Court has only seen a letter to the 1st Respondent by the Petitioner indicating that she had commissioned her own valuation by Dantu Valuers Ltd which valuation shows that the said premise for acquisition is worth Kshs.21,117,000/= and a written claim for the sum of Kshs.21,117,000/= was subsequently submitted by the Petitioner to the 1st Respondent on 16th July 2019, through her Advocates.

It is the duty of the **National Land Commission** to make an award and if a party does not accept it, then the party ought to approach the 1st Respondent with their reservation. It is the Court's considered view that it is not the duty of land owner to undertake their own separate valuation that is private and lay a claim based on the said valuation. The Petitioner is seeking for a joint valuation of a property whose topography has already changed by the ongoing works, passage of time and demolitions that had already been carried out and the same based on a private valuation. The Court is thus not satisfied that the Petitioner is deserving of the said orders as there is no evidence that she approached the 1st Respondent and that she had declined the award.

Having now carefully considered the instant Petition, the annexures thereto, the grounds of opposition, the written submissions, the cited authorities and the relevant provisions of law and also the circumstances of the matter herein, the Court finds that the said Petition dated **25th July 2019** is **not** merited.

Consequently, the instant Petition is **dismissed entirely** with each party bearing its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 4TH DAY OF JUNE 2021

L. GACHERU

JUDGE

4/6/2021

Court Assistant – Lucy

ORDER

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

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

No appearance for the Petitioner

No appearance for the 1st Respondent

No appearance for the 2nd Respondent Though Notice had issued.

No appearance for the 3rd Respondent

No appearance for the 4th Respondent

No appearance for the 5th Respondent

L. GACHERU

JUDGE

4/6/2021