



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC CASE NO. 98 OF 2012**

**1. JAMES MACHENERI ISIGI**

**2. CHRISTINE MORAA**

**3. PAUL NYAMWEYA.....PLAINTIFFS**

**VERSUS**

**1. KENYA NATIONAL HIGHWAYS AUTHORITY**

**2. THE ATTORNEY GENERAL.....DEFENDANTS**

**JUDGEMENT**

**(Plaintiffs' Case)**

James Machenereri Isigi, Christine Moraa and Paul Nyamweya (hereinafter referred to as the plaintiffs) sued Kenya National Highways Authority and the Attorney General(hereinafter referred to as the defendants) praying for an order of injunction restraining the 1<sup>st</sup> Defendant from acquiring, encroaching into, ingression, into all that parcel of land known as Kisumu Municipality/Block 2/110, and from demolishing, pulling down, destroying or in any other way interfering with the developments in the said parcel of land pending the valuation of the acquired land and the developments thereon and compensation for the same.

They further beseeched the court for an order directed at the Defendants jointly and severally directing them to undertake a valuation of the portion of the aforesaid parcel of land to be acquired for the expansion of the said road and the developments thereon and for compensation of the Plaintiff's at the current market value of the same.

Lastly, they prayed for general damages for the unconstitutional and un-procedural way of acquisition of private land and Costs of this suit.

It is not contested that the plaintiffs are registered as the owners of the parcel of land known as Kisumu Municipality/Block 2/110. Prior to the Plaintiffs being registered as proprietors and owners of the said parcel of land, a formal and written application was duly made to the relevant authority/departments in the Government.

The Plaintiffs have since been registered as proprietors/owners developed the said parcel of land by erecting buildings/structures therein which have been in furtherance of the purposes for which the allocation and registration was made in favour of the Plaintiffs. Owing to the expansion and or increase in width of the Nyamasaria-Kisumu Kisian including the Kisumu by pass road (A1/B1), the Plaintiffs' developments on the said parcel of land have been earmarked for demolition to pave way for the expansion of the said road.

It is alleged that the registration of the plaintiffs as owners of the said parcel of land by the Government of the Republic of Kenya bestowed proprietary interest on the Plaintiffs which are protected by the provisions of the Constitution and statutes including the Land Act (2012), the Land Acquisition Act, (Repealed) The Registered Land Act (repealed).

The plaintiffs made an application to the Government for allocation of land and both the Ministry of Lands and Housing and the Municipality of Kisumu acknowledged the application on which they acted by allocating the parcel of land in question. The exchange of correspondence resulted in the issue of both the lease and the certificate of lease document.

The expansion of the aforesaid road has resulted in the acquisition by the 1<sup>st</sup> Defendant a statutory body, of almost the entire parcel of land and accordingly depriving the Plaintiffs of their land/property.

The attempted acquisition by the 1<sup>st</sup> Defendant of the said parcel of land is not in compliance with the Constitution of Kenya (2010) and or

the Land Act (2012), the Defendants have not jointly and or severally followed the due process in doing so hence this suit.

The Plaintiffs' claim against the defendants is for the valuation of the acquired parcel of land as well as the developments on the said parcel of land that are due for demolition for purposes of compensation. Compensation for the parcel of land so acquired and the developments to be demolished at the current market value. Payment of general/damages for being deprived of the use of the said parcel of land.

The Plaintiffs through their learned counsel Richard Onsongo argue that based on the conduct of the defendants since 1993 when the plaintiffs became the registered owners and proprietors of the said parcel of land, the plaintiffs have held on to the representation of the fact that the Government processed the title documents and would not reverse on its own process and take away land that it alienated in favour of the plaintiffs. The plaintiffs rely on the doctrine of legitimate expectation which estops the Government from approbation and reprobating in the same breath.

The plaintiffs further rely on Article 40 of the Constitution of Kenya that protects and guarantees every person the right to property as it protects a person from arbitrary deprivation of his property by state for any reason except as provided by law.

The plaintiffs argue that the government can and is allowed to compulsorily acquire private land. However, it can only do so by following the laid down procedure and due process. The procedure for compulsory acquisition of land is set out in sections 101-133 of the Land Act, No. 6 of 2012. Without following this process, the entire process of acquisition is null and void.

Mr Onsongo presses on that It is common ground that the Plaintiffs are the current registered owners of the suit parcel of land. That the registration was pursuant to a process by the Government. It is the Government that alienated and it the same Government desirous of taking the land back.

According to Mr Onsongo, the National Land Commission is the only constitutional body empowered and authorized to investigate and review all grants, or dispositions of public land to establish their propriety or legality. The Defendants cannot on their own purport to usurp, or allocate themselves the duties and responsibilities of the National Land Commission, a constitutional body. He relies on Section 14 (1) of National Land Commission Act that provides as follows: -

***“Subject to Article 68(c)(v) of the Constitution, the Commission shall, within five years of the commencement of this Act, on its own motion or upon a complaint by the national or a county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.”***

He further refers to Section 14 (5) that provides as follows:

***“Where the Commission finds that the title was acquired in an unlawful manner, the Commission shall, direct the Registrar to revoke the title.”***

He eloquently argues that without a finding by the National Land Commission that the Plaintiffs' parcel of land was ***“... acquired in an unlawful manner...”***, the Defendants are estopped from taking over, acquiring and or repossessing the Plaintiffs' parcel of land.

He relies on Article 40 (6) of the Constitution which provides that the rights to property set out in article 40 do not extend to any property that has been found to have been unlawfully acquired. The Defendants have purported that the acquisition of the suit property was by way of fraud and yet there is no evidence of fraud.

He relies on the case of ***Vijay Moriaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR***, where Tunoi, JA. (as he then was) stated as follows:

***“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”***

He contends that the Defendants have not sought and or obtained a report from the National Land Commission establishing that the Plaintiffs' title to the suit land was through fraud. The Defendants don't have the constitutional mandate to determine the legality or otherwise of a disposition of land. The Defendants have alleged fraud but they have neither pleaded it and nor strictly proved the same. The 2<sup>nd</sup> Defendant has access to and could have availed to the court documents to demonstrate and or establish fraud. The elected not to do so. Their conduct of failing to avail crucial evidence must be construed against them.

Upon acquisition of the said parcel of land, the Plaintiffs have developed the same and erected structures in/on the parcel of land. This was done with or in the full view, knowledge and without any objection, resistance and or protest or demurral of the defendants.

The Plaintiffs have been and are still operating based on the presentations, conduct and exhibition of legitimacy of title by the Defendants which has in turn created a legitimate expectation to the Plaintiffs.

In their report dated 16<sup>th</sup> October 2021 M/s Odongo Kabita & Company Valuers valued the Plaintiffs' developments on L.R. No. Kisumu Municipality/Block 2110 and placed them at Kshs. 21,015,100.00. In his report dated 22<sup>nd</sup> May 2014, the district valuer valued the said developments at Kshs. 18,900,000.00. The difference between the two valuations is Kshs. 3,000,000.00 only.

Accordingly, the Plaintiffs are entitled to compensation for the developments in/on the said parcel of land as per the valuation reports. The plaintiff proposes a figure of Kshs. 19.5 million and costs of the suit.

### **DEFENDANTS CASE**

The Defendants through the honourable Attorney General represented by Grace Essendi, the Senior Litigation Counsel argues that the suit was commenced by a plaintiff dated the 9<sup>th</sup> November, 2012 against the Defendants seeking an injunction against the 1<sup>st</sup> Defendant from interfering with the suit property pending valuation of the acquired land for purpose of compensation, valuation of the portion of the suit property to be acquired and general damages.

According to Grace Essendi, the main protagonists in this case, are the plaintiffs and the 1<sup>st</sup> Defendant, since it is the one sought to be restrained from interfering or demolishing the plaintiffs parcel of land known as Kisumu/Municipality/Block 2/110, which is adjacent to, and shares a common boundary with the road reserve constituting the Nyamasaria-Kisumu-Kisian (B1) Road.

The 2<sup>nd</sup> Defendant was sued as the legal advisor of the Republic of Kenya, without the purpose of why it is sued, being disclosed in the plaint.

The suit revolves on whether the plaintiffs' property is encroaching on a road reserve and whether the Third Party Notice discloses reasonable cause of action or defence in law as against the 2<sup>nd</sup> Third Party.

On whether the Plaintiffs' property is encroaching on a road reserve counsel strongly argues that Kisumu Municipality Block 2/110 is located along Kisumu-Kisian (B1) road section abutting the Kisumu-Busia railway line. Surveys carried out before creation of Kisumu municipality Block 2/110 indicated that the road reserve for Kisumu-Kisian-Road (B1) was 60.69m. The road was classified as B1, measured from the left edge of the reserve to the right side being 200 feet (60.69) as per maps referred to as FR No. 126/11 of March 1973 and FR No. 146/116 of February 1976, this is a clear demonstration of the extent of the road reserve.

The road has not been expanded and its initial gazetted width was and remains 200 feet (60.69) having been first classified in 1962 and reclassified in 1970. The plaintiff allegedly acquired his property in 1993 at the time the road reserve was clearly defined and which took precedence.

It is the 1<sup>st</sup> Defendant's submission that the suit property as shown in FR243/3, surveyed later in 1993 indicates a reduced road reserve of 40m at the said location. Survey of the plot as shown in FR. No. 243/3 did not therefore consider existing maps and information. The allegation by the plaintiffs that they are the registered owners of the suit property remains untrue. Perusal of the Part Development Plan (PDP) sought to be relied upon by the plaintiffs, dated 30<sup>th</sup> March 1993 and purported to have supported the registration of a lease, has no approved Development Plan Number, neither is it signed by the Director of physical Planning and the Commissioner of Lands. The Part Development plan cannot, therefore, be used as an official document.

Further, the letter dated 30<sup>th</sup> March, 1993 submitted by the Plaintiffs and purportedly authored by the Nyanza Provincial Roads engineers Office addressed to the Commissioner of Lands, does not mention the road in question.

Counsel for the 1<sup>st</sup> respondent argues that Kisumu-Kisian-Road (B1) is an international trunk road forming part of the Northern Transport Corridor linking Kenya to Uganda facilitating trade and movement of people with immense benefits to the general public at large

The government has a right to acquire land compulsorily for public purposes or in the public interest provided it complies with the law in which instant, the Defendants herein are not entitled to compensation as they are on an area reserved for road and railway as such the Plaintiffs have no proprietary interests in the suit properties capable of protection by the court.

The Defendants submit that the subject construction project was a public project for the benefit of the public, the Plaintiffs included, and that the balance of convenience tilts in favour of upholding public interest projects given the fact that public interest overrides private interest. She prays that this Honourable Court does dismiss the Plaintiffs' suit herein with costs to the Defendants.

### **ANALYSIS AND DETERMINATION**

I have considered the evidence on record that was agreed upon by the parties herein who took directions that the matter proceeds as ***case stated*** and that parties do rely on evidence on record and rival submissions and that the courts judgment be based on the same. The Legal Definition of case stated is: **a statement agreed upon by the parties to a lawsuit that sets forth the facts of the case and the parties' request for a judgment by the court based on those facts.**

The simple facts of this case are that the Plaintiffs are the registered owners of Kisumu Municipality 2/110 located along Kisumu-Kisian (B1) road section.

According to the Plaintiffs they are registered owners of the suit land and there is no dispute about that fact, however the dispute is whether the parcel of land falls within the road reserve. The Plaintiffs argued that the defendants compulsorily acquired the land does not hold water as the defendants are claiming the same to be a road reserve. It is not logical for the Government to acquire compulsorily what has been gazetted as a road reserve.

I do not agree with the plaintiff's argument that their parcel of land has been compulsorily acquired by the government, as the process of

compulsory acquisition by Government before the advent of the Constitution of Kenya 2010 was so elaborate as was set out in the Land Acquisition Act Cap 295 laws of Kenya repealed. This is the applicable law at the time of the alleged acquisition. Even if the court was to apply the Land Act no 6 of 2012 that was assented to on 27<sup>th</sup> April 2012 and commenced on 2<sup>nd</sup> May 2012 it will be established that that there is no evidence of compulsory acquisition of the suit land by the government as sections 107 upto 115 of the said Act have never been put into use by the Government.

Section 3 of the act provided that whenever the Minister was satisfied that the need was likely to arise for the acquisition of some particular land under section 6, the Commissioner could cause notice thereof to be published in the Gazette, and was required to deliver a copy of the notice to every person who appeared to him to be interested in the land.

Section 4. (1) provided that the Commissioner could in writing authorize any person, together with servants and workmen, to enter upon any land specified in a notice published under section 3 and to survey the land and to do all things which were reasonably necessary to ascertain whether the land was suitable for the purpose for which it was required.

Section 6. (1) provided that where the Minister was satisfied that any land was required for the purposes of a public body, and that the acquisition of the land was necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of any property in such manner as to promote the public benefit and that the necessity therefor was such as to afford reasonable justification for the causing of any hardship that may result to any person interested in the land, and after certifying in writing to the Commissioner, he could in writing direct the Commissioner to acquire the land compulsorily. On receiving a direction under subsection (1), the Commissioner was to cause a notice that the Government intended to acquire the land to be published in the Gazette, and was to serve a copy of the notice on every person who appears to him to be interested in the land.

I have not seen evidence of this process and therefore it cannot be argued that the land was compulsorily acquired. Moreover, the Defendant denies that the property was compulsorily acquired by the state because it has always been a road reserve. The Plaintiffs have not shown this court the letter of allotment with the Part Development Plan to demonstrate how the property was set apart for allocation.

The principle of legitimate expectation does not apply in this case due to the fact that the Plaintiffs have not demonstrated that they were allocated the land and letter of allotment issued with the Part Development Plan. Legitimate expectation does not apply on land set apart for public use. On the other hand, the defendants have demonstrated that the suit property was a road reserve for the expansion of the Nyamasaria- Kisumu –Kisian highway. The property was public land and therefore not available for allocation.

The plaintiffs rely on sections 24, 25, and 26 of the Land Registration Act that provide as follows: -

Section 24 of the Land Registration Act provides that subject thereto: —

***a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and***

***b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of lease.***

Section 25 of the Land Registration Act states as follows: -

***“(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an Order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject: —***

***(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and***

***(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.***

***(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee”.***

Section 26 states as follows: -

***“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—***

***(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or***

***(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.***

*(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original”.*

In **James Joram Nyaga & Another v the Hon. Attorney General & Another [2007] eKLR**, the court, in reference to sections 3 and 7 of the Government Lands Act stated;

**The above section clearly limits the power of the Commissioner to executing leases or, conveyances on behalf of the President and the proviso to the section specifically limits the power to alienate unalienated land to the President. We find and hold that the Commissioner of Lands had no authority to alienate the disputed plot to the Applicants as he purported to do vide the letter of 18th December, 1997. That was the preserve of the President. It follows that the Commissioner of Lands could not have made any grant under the Government Lands Act Cap 280 Laws of Kenya nor could he pass any registerable title under the Registration of Titles Act Cap 281 Laws of Kenya.**

In a nutshell, the plaintiffs un-procedurally obtained title to the property in issue as the same had been alienated as public land with public utilities being a road and its reserve and not available for conversion to private land. The argument that the land was compulsorily acquired does not water as the government cannot acquire what it owns. The upshot of the above is that the suit is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 30<sup>TH</sup> DAY OF JULY, 2021**

**ANTONY OMBWAYO**

**JUDGE**

*This Judgement has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2019.*

**ANTONY OMBWAYO**

**JUDGE**