



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

PETITION NO. 13 OF 2018

IN THE MATTER OF CHAPTER 4, THE BILL OF RIGHTS ARTICLES 1(1),2(1),2(5),2(6),
3(1),10(1)(c),19,20,21,22,23,27(1),(2),35(1)(a),35(1)(b),40, 42,43(1)(b)(c)(d),47(1)(2),35(1)(b),40, 42,
43(1)(b), 46(1), (b), (c), (d), 47 (1), (2), 48, 50(1), 56(a)(d)(e),59, 60,69,70,159,165 AND PART 1
AND PART 2 OF THE FOURTH SCHEDULE OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
UNDER ARTICLES 40,42,43(1)(b) AND 47 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE APPLICATION BY NGUGI MBUGUA.....PETITIONER

VERSUS

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

THE DIRECTOR GENERAL, KENYA NATIONAL HIGHWAYS AUTHORITY.....2ND RESPONDENT

CHINA WU YI COMPANY LIMITED.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

By an Amended Petition dated 7th June 2021, the Petitioner sought for orders that the Court Declare;

- a. Declare That that the Petitioner's rights under Article 42 , 69(a) (d) and (h) of the Constitution of Kenya 2010 are violated and are threatened by gross violations by the Respondents herein
- b. Declare that the Petitioner's rights under Article 35 (1) (a) and (b) and 46(1)(a) and (b) of the Constitution of Kenya 2010 are being violated by the 1st Respondent failing to furnish the Petitioner with the information on how the 1st Respondent arrived at his award of compensation to the Petitioner
- c. Declare that the Petitioner's rights under Article 70 (2) (c) of the Constitution of Kenya 2010 are threatened with violation by the Respondents failure to commensurately compensate the Petitioner for the intended loss of his precious mini forest sanctuary and a family shrine and family heritage site on the Petitioner's parcel of land known as Sigona /1271, situated in Sigona, Kikuyu along the Nairobi –Nakuru highway in Kiambu County in the Republic of Kenya
- d. Order the 1st Respondent to compensate the Petitioner's claim in line with Article 70 (2) (c) of the Constitution of

Kenya 2010 . For the avoidance of doubt , the Petitioner’s well detailed claim for compensation is in the amount of Kshs. 81,948 ,261.12

e. Allow the Petitioner’s humble Petition with costs against the Respondents

f. Give any other Relief this Honourable Court may find fit and just to provide.

In the said Amended Petition, the Petitioner averred that in the **year 2005**, he rallied his neighbours to found the **Sigona Residents Association**, registered on **21st September 2006**, under **Section 10** of the **Societies Act**, with the explicit mission of encouraging Community participation in the maintenance of a clean environment , good infrastructure and the security of members of the community .

That the Petitioner has been actively involved in environmental protection, public awareness campaigns and nature conservation projects, including **re-forestation**, over the last 35 years. That on **19th October 2017**, the **1st Respondent** published Kenya Gazette **Notice No10477**, in which he disclosed his intention to acquire a section of the Petitioner’s land on behalf of the **2nd Respondent** for the expansion of the **Nairobi-Nakuru Highway**, which borders Petitioner’s land.

That as outlined in the Petitioner’s Supporting Affidavit filed in Court in **July 2018**, the Petitioner’s Constitutional and Human Rights are in real danger of being infringed and breached.

The Court recognizes that the Petitioner is a lay person acting in person and his pleadings may not necessarily be at per . The Court will therefore reproduce the contents of the said Supporting Affidavit in which the Petitioner averred that he lives on the suit property and that on **19th October 2017**, the **1st Respondent** published in the **Kenya Gazette Notice No. 10477**, disclosing the **National Land Commission’s** intention to acquire a section of his land on behalf of the **2nd Respondent** for the **National Urban Improvement Project Rehabilitation**, along the **Nairobi-Nakuru Highway**. That the **2nd Respondent** had already deployed to the site the **3rd Respondent**, which Company is ready to trample upon the Petitioner’s environmental and proprietary rights, without properly compensating him for his loss. He contended that his property constitutes his **mini forest**, and it also hosts **Graceland Memorial Park**, a family shrine which actions are a violation of his rights.

That on **24th August 2017**, agents of the **1st and 2nd Respondents** visited his home unannounced and purported to evaluate his assets for forceful alienation, to which he filed his claim for compensation amounting to **Kshs.81,948,261.12**, which claim was acknowledged by the **1st Respondent**. Further that in the **Kenya Gazette Notice No. 10477 of October 19th 2017**, the **1st Respondent** indicated that the area it intends to hive off his property was **0.384ha**, but the actual area marked by the **2nd Respondent** measures **0.053ha**, as per the independent Surveyor’s report dated **22nd November 2017**.

He further averred that on **7th March 2018**, the **1st Respondent** wrote to him an award of compensation which is below his claim and it declined to disclosed to him which factors were taken into consideration to arrive at the award of **Kshs. 16,242,124/=**. Further, that on **28th March 2018**, the Petitioner Appealed against the **compensation** award. It was his contention that the **1st Respondent** did not peruse his claim documents and that his Appeal against the award has not been challenged. He further averred that his Counsel wrote to the **1st Respondent**, but the letter has elicited no response. He contended that the failure by the **1st Respondent** to respond to his Appeal and to his Counsel’s letter contravenes **Article 47 of the Constitution**. Further, by failing to carry out a proper, transparent and verifiable survey, the **1st Respondent** has violated his rights as enshrined in **Article 40**, of the Constitution, which shields him from arbitrary acquisition of his property.

Further, should the Respondents proceed **without** a proper valuation, he will lose the health giving, aesthetic and economic value of his property. That the said **Nairobi-Nakuru Highway Project** will render his home uninhabitable.

The Petition is opposed and on **23rd June 2021**, **Mr. Njagi** for the **Attorney General**, stated that they would rely on the Grounds of Opposition. The said Grounds of Opposition are dated **26th September 2018**, and it was averred that the Government has the right to **Eminent Domain**, upon just compensation of the proprietor for public use and the right of **compulsory acquisition**, is an overriding interest. That part of the property subject of the suit herein was **compulsorily** acquired for the **purpose** of rehabilitation and capacity enhancement of **James Gichuru –Rironi Roads Junction**, and the Petitioner was fully compensated.

It was contended that the computation of compensation for properties compulsorily acquired by the Government is dependent on **Government Valuers** and not **Privately hired Valuers**, for purpose of transparency and accountability. Further, that the **4th Respondent** and the **2nd Interested Party** enjoy **diplomatic immunity** and cannot be parties to these proceedings. That the complaints as to the **Environment Impact Assessment (EIA)** and

Construction plans are a concern of the **National Environment Management Authority(NEMA)** and not this Court.

It was further contended that the right to property is not an absolute right and can be limited in accordance with **Article 24 of the Constitution**. That the instant Petition is thus an abuse of the Court process and a waste of judicial time, since valuation and just compensation has already been done.

Though **M/s Macharia** indicated to the Court on **22nd April 2021**, that the **3rd Respondent** had responded to the Main Petition, what was filed and in the Court record is a **Replying Affidavit** in opposition to the Notice of Motion Application dated **23rd July 2018** . Further **M/s. Gekone** for the **2nd Respondent** also indicated to Court that they had filed a response to the Main Petition, but the same was not in the court’s

record as what are in the Court record are Affidavits in opposition to the Application and no indication that the same are in opposition to the Petition.

The Court directed that the Petition be canvassed by way of written submissions and in compliance with the said directives, the Petitioner acting in person filed his written submissions on 7th June 2021. Despite being given a chance, the Respondents failed to file their written submissions and as the Court had indicated on 23rd June 2021, the Court will proceed without their input.

Having carefully considered the Petition, the Affidavits in support, the grounds of opposition and the written submissions, the Court finds and holds that the matter for determination is ***Whether the Petition is merited.***

The Petitioner avers that the Government sought to compulsorily acquire part of his property for the **Rehabilitation** and Capacity Enhancement of **James Gichuru Road Rironi Junction (A104)**. That without Notice, the 1st Respondent sent out its officers to value his property and vide **Kenya Gazette Notice, No. 10477**, it was gazetted that **0.0384 ha** of his property would be acquired. Further, that he was also asked to set forth his claim.

It is his contention that he engaged the services of a private land valuer who valued the land at **Kshs. 81,948, 261/=** contrary to the valuation that was placed by the 1st Respondent being **16, 242, 124/=**. Further that contrary to the **0.0384 ha** that was set to be acquired, the 1st Respondent acquired **0.053ha**. That when a meeting was called at the Chief's office, the Petitioner put forth his reservations as to the amount that was to be awarded to him., Further that he wrote a letter to the 1st Respondent seeking information as to how the amount that was awarded to him had been arrived at and none was given to him and further that his Appeal was never heard and or responded to.

The Court notes that the Petitioner does not contest the acquisition of his property, However, he contests the amount that was awarded to him as compensation. The process of land acquisition is vested under **Article 40 of the Constitution**. The process through which the 1st Respondent is to compulsorily acquire land is further set forth under the provisions of the Land Act PART VIII on the Compulsory Acquisition of interests in land from **Section 107**. Article **40 (3)** of the Constitution provides that;

“(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— 30 Constitution of Kenya, 2010

(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 is thus not in doubt that the Constitution requires that any award and or compensation that is made to a person whose land is being compulsorily acquired to be prompt, in full and just. The Petitioner is not disputing that the payment was not made in full and or prompt, but he is disputing that the said payment was just and commensurate with the acquired land. In the case of **Patrick Musimba ...Vs...National Land Commission & 4 others [2016] eKLR** the Court 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. As was stated by Scott L.J, in relation to compulsory acquisition, in the case of Horn-v- Sunderland Corporation [1941] 2 KB 26,40: “The word “compensation” almost of itself carries the corollary that the loss to the seller must be completely made up to him, on the ground that unless he receives a price that fully equaled his pecuniary detriment, the compensation would not be equivalent to the compulsory sacrifice”. Effectively Lord Scott’s statement gave rise to the unabated proposition that the compensation of compulsorily acquired property be quantified in accordance with the principle of equivalence. A person is entitled to compensation for losses fairly attributed to the taking of his land but not to any greater amount as “fair compensation requires that he should be paid for the value of the land to him, not its value generally or its value to the acquiring authority”: see Director of Buildings and Lands –v- Shun Fung Wouworks Ltd [1995] AC 111,125. We see no reason why the same approach should not be adopted locally. The Constitution decrees “just compensation” which must be paid promptly and in full. The Constitution dictates that the compensation be equitable and lawful when the word “just” is applied as according to Black’s Law Dictionary 9th Ed page 881 the word “just” means “legally right; lawful; equitable”. In our view, the only equitable compensation for compulsory acquisition of land should be one which equates restitution. Once the property is acquired and there is direct loss by reason of the acquisition the owner is entitled to be paid the equivalent. One must receive a price equal to his pecuniary detriment; he is not to receive less or more. This can be achieved to the satisfaction of the owner of land by Appeal to the market value of the land.’

Therefore, it is not in doubt that once a land has been acquired, the Petitioner is required to be compensated for the equivalent of that which had been acquired. The Petitioner’s contention that the 1st Respondent acquired a larger portion than what was actually gazetted has not

been controverted . Further the Court has seen the letter dated **2nd May 2018**, seeking information from the 1st Respondent on what was considered in arriving at the award and none was forthcoming. Further the Court has seen the Valuation for Compulsory Acquisition that was presented by the 1st Respondent, wherein the Petitioner indeed did raise the issue with regards to the valuation of the suit property. The Court further notes that the said Valuation is not comprehensive to even enable the Court to evaluate whether all factors were considered.

The 1st Respondent having failed to produce a **Counter Valuation** to the one produced by the Petitioner and the allegation by the Petitioner that a larger portion was acquired as opposed to what was gazetted, the Court finds and holds that it could only mean that the award for compensation given to the Petitioner was not **just** nor was it **lawful** as the same is not verifiable. The Court is thus satisfied that a proper valuation into the size of the suit property being acquired and the award for compensation ought to be freshly done to ascertain the just amount payable to the Petitioner.

The Petitioner has also contended that his rights under **Article 42 , 69(a) (d) & (h) . Article 35 (1) (a) & (b) , 46 (1(a) & (b) and &0 (2) (c)** were violated.

The said Articles provide;

35. (1) Every citizen has the right of access to—

(a) information held by the State; and

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

With regards to **Article 35**, it is not in doubt that the Petitioner had the right to access the information on how the Valuation of his property was done. The 1st Respondent is a **state entity**, and it is required to grant access to the Public for information. The Petitioner via a letter dated **March 2018**, and a subsequent one dated **2nd May 2018**, received by the 1st Respondent on **3rd May 2018**, sought the information on the valuation done to his property . The 1st Respondent had an obligation to provide the said information and having failed to do so , the Court finds and holds that the Petitioner's rights under Article 35 were violated.

The other rights allegedly violated are found in the following Articles;

42. Every person has the right to a clean and healthy environment, which includes the right—

(a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and (b) to have obligations relating to the environment fulfilled under Article 70.

Consumer rights. Article 46. (1) Consumers have the right—

(a) to goods and services of reasonable quality;

(b) to the information necessary for them to gain full benefit from goods and services;

69. (1) The State shall— (a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;

d) encourage public participation in the management, protection and conservation of the environment;

70. (1) If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter. (2) On application under clause (1), the court may make any order, or give any directions, it considers appropriate—

(a) to prevent, stop or discontinue any act or omission that is harmful to the environment;

(b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or (c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.

It is the Court's considered view that the Petitioner's Petition was founded on failure to award him just compensation. Indeed, there was an award made to the Petitioner, but the Petitioner did not agree with the award and subsequently filed this Petition with regards to the said compensation. The Petitioner cannot in all honesty claim that his rights under **Article 70** of the Constitution have been violated, while the Petition is before Court and the same is being heard and determined.

No evidence has been produced in Court that the right to ensure sustainable exploitation, utilisation, management and conservation of the environment and to clean and healthy environment has been violated. Further, the Court appreciates that the Petitioner is a lay person

acting in person, However, when a party is acting in person, it is assumed that he is well aware of how to proceed within his case. The Court states so as it has noted that the Petitioner had several grievances against the 3rd Respondent. While the said grievances were raised in the interlocutory Application, the same have not been raised in the Petition. Parties are bound by their pleadings, and the Court cannot be able to determine what is not before it and therefore the issue as to whether there are damages on the Petitioner's property occasioned by the 3rd Respondent having not been raised in the Petition, cannot be determined.

The upshot of the foregoing, is that the Court finds and holds that the Petitioner's Petition is **partially** merited, in that the Petitioner's right under **Article 35** was violated by the 1st Respondent. Further the Petitioner is entitled to a **just** award for compensation and that means that there ought to be a lawful and verifiable Valuation on the portion to be acquired.

Consequently the Court makes the following orders;

- 1. A declaration be and is hereby made that the Petitioner's rights under Article 35 (1) (a) & (b) of the Constitution were violated by the 1st Respondent.**
- 2. The award of compensation in the sum of Kshs 16,242,124/- is set aside.**
- 3. The 1st Respondent be and is hereby directed to conduct a fresh valuation in respect of LR Sigona/1271, bearing in mind the portion acquired and the just value of the suit property belonging to the Petitioner within 60 days from the date hereof.**
- 4. The 1st Respondent to pay the costs of this Petition.**
- 5. Parties be at liberty to apply where appropriate.**

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 30TH DAY OF SEPTEMBER, 2021

L. GACHERU

JUDGE

Court Assistant – Kuiyaki