REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC NO. 351 OF 2015

JAMES KIGEN & JOHANA KIPKORIR KIGEN (Suing as the administrators of the estate of the late ZAKAYO SAWE ARAP NGASURA.....PLAINTIFFS

VERSUS

CHINA HANAN INTERNATIONAL CO-OPERATION GROUP CO. LTD.....DEFENDANT

AND

NATIONAL LAND COMMISSION.....1ST INTERESTED PARTY

THE ATTORNEY GENERAL..... 2ND INTERESTED PARTY

COUNTY OF UASIN GISHU..... 3RD INTERESTED PARTY

JUDGMENT

By an amended plaint dated 30th October 2018, the Plaintiffs herein sued the defendants and the Interested parties jointly and severally seeking for the following orders

a) ***Permanent injunction to restrain the defendant, its officials, servants, agents from trespassing, wasting, damaging, excavating, creating quarry or in any other way dealing with the estate of the parcel of land known as MOIBEN/MOIBEN BLOCK 2 (SEGERO)/712.***

a) ***Mesne profits.***

b) ***Costs.***

d) Interests in (i) above.

e) ***A declaration that Parcel of land known as MOIBEN/MOIBEN BLOCK 2 (SEGERO)/712 is the property of the estate of the late Zakayo Arap Ngasura and for the removal of the restriction registered in the Lands Office against the title.***

f) ***Compensation for the ballast and materials used for the construction of Jua kali-Sugoi-Turbo Road, Limo Hospital Road and Illula Road at the market price of Kshs. 1000 per ton for ballast used less production cost.***

g) ***Ksh. 124, 227, 900/ being the compensation for the ballast and materials used for construction of Juakali-Sugoi-Turbo Road, Limo Hospital Road and Illula Road.***

h) ***Compensation for the 3 1/2 acres of land converted into a quarry by the defendants at the cost of Kshs. 800, 000/ per acre for a period of 2 years Ksh 2, 400, 000/.***

i) ***A declaration that the residue of the materials of the project of Eldoret-Kitale (Kabenes-Kachibora) road is the property of the***

plaintiffs.

j) ***Ksh. 40, 000/ for residue sold by the defendant to different private companies and compensation for underpayment of Kabenes-Kachibora road all at Ksh. 40,000, 000/.***

k) ***An order requiring the defendant to build a perimeter wall around the quarry or in the alternative to pay Ksh. 2, 617, 400/. 1) Interests in (c), (d) (e) and (f) above.***

The defendant filed a further amended Defence whereas the Interested Parties filed their respective Defences and Counterclaims.

PLAINTIFF'S CASE

PW1 James Kigen adopted his witness statement dated 3rd September 2015 and gave a brief background to the case and stated that on 30th October 2014, while acting in his capacity as the administrator of the estate of the late Zakayo Sawe Ngasura the registered owner of the suit parcel of land known as Moiben/Moiben Block 2(Segero)/712 entered into a lease agreement with the Defendant for a portion of the suit land measuring 1.5 acres at a consideration of Kshs. 850,000/ for a period of two years.

PW1 stated that it was agreed between the parties that the quarry was meant to supply materials for constructions of Eldoret - Kitale or Kabenes — Kachibora Road and that upon completion of the project, the residue including the remaining stones, ballast and other materials were to remain the property of the plaintiffs.

PW1 further testified that it was a term of the said agreement that the defendant was to confine its quarry activities to 1.5 acres of land, but in breach of the said agreement, the defendant, unlawfully extended their quarry by encroaching into the plaintiffs' land and curved out another 3 1/2 acres where they converted for their own use without making any addendum agreement with the plaintiffs.

PW1 also stated that the lease Agreement between the plaintiffs and the defendant was solely for the purpose of constructing Eldoret-Kitale road alias (Kabenes —Kachibora) alias Ziwa Kitale road but unknown to the plaintiffs the defendants fraudulently constructed roads that were not part of the lease agreement namely Juakali-Sugoi-Turbo Road, Limo Road and Ilula Road, without compensation for materials used.

PW1 produced a copy Limited Grant, certificate of title and lease agreement as exhibits 1, 2, and 3 respectively. He told the court that the other roads built by the Defendant were valued at Kshs. 124,227,091/- as per the valuation report and further stated that upon completion of the works the defendant did not fence the leased premises resulting into the death of a cow and a child. PW1 stated that the value of fencing was estimated at Kshs. 2, 617,400 as per the fencing report.

It was PW1's evidence that the suit land was not part of the land which the government had acquired as per a copy of a Kenya Gazette Notice No. 6241

On cross examination by Mr. Omondi for the Defendant, PW1 told the court that the limited grant obtained on 10th April 2014 was limited to filing a suit over another property in Kericho. He admitted that the suit land was to be surrendered to the government as per the encumbrance section in the certificate of title, however the land still belonged to the deceased.

PW1 also confirmed that by the time he got the limited grant he had not entered into the lease agreement with the defendant which is dated 30th October 2014 and that this suit was not envisaged when he applied and got the grant. It was further PW1's testimony that he did not have any other grant authorizing him to enter in the agreement.

PW1 stated that according to clause 17 of the agreement, there was nowhere in the agreement that stated that the materials were to be used only on the Kabenes – Kachibora road. Further that clause 10 provided that the land was leased free from any encumbrances.

On further cross examination by Mr. Omondi, PW1 confirmed that there was a restriction by the government and that by the time they entered into the lease agreement with the 1st defendant, the government was claiming the land. PW1 also admitted that there was a letter dated 3rd September 2015 by the Deputy County Commissioner to the 1st defendant to the effect that the suit land belonged to the government hence should use materials for free without payment.

PW1 also confirmed that there was no clause in the agreement that required the 1st defendant to fence the land and further that he disclosed to the Engineer who did the valuation that there had been another Contractor on site TM Africa Group.

On cross examination by Mr. Odongo for the 2nd Interested Party, PW1 testified that the suit land measures 6.475Ha and the government was interested in only 2.441 Ha. He also stated that his late father was issued with a notice dated 15th March 1995 whereby it took possession of 2.441hectares which notice his father never challenged.PW1 also admitted that they neither sued the state over the vesting order nor the removal of the restriction and did not explain why it took them 20 years to do so.

Mr. Mitei for the 3rd Interested Party adopted the cross examination by Mr Odongo for the 2nd Interested party that the suit land had been acquired by the government hence the restriction on the green card

On reexamination PW1 stated that the suit land was not subdivided and that there was no specific portion set aside for the government.

Further that he only became aware of the restriction when he filed this case in 2015.PW1 stated the suit land was not compulsorily acquired by the government.

PW2 Richard Kipngetich Bii equally adopted his statement dated 23rd October 2018 and told the court that the road to be constructed by the Defendant was only Kabenes-Kachibora Road. It was his evidence that the government never fenced the land and further that his father was never given alternative land.

On cross examination by Mr. Omondi, PW2 stated that he was not one of the administrators of the estate of his late father and that he signed the lease agreement as an administrator.

On cross examination by Mr Odongo, PW2 confirmed that he was not aware that part of his father's land had been acquired by the government He further stated that he is not aware whether his father was compensated for the land and that his father did not have any dispute with the government before he died.

PW3 Elijah Kendagor gave evidence and produced a copy of an EIA report which he said that he had prepared after visiting the suit land in 2018. He stated that he found a quarry that had been in use but had been abandoned. That the quarry was not fenced therefore it was a risk to the residents in that area. It was his recommendation that the quarry should be fenced and the contractor to abide by the laws and procedures for operating a quarry.

On cross examination by Mr. Omondi, PW3 admitted that there was a previous contractor on site but did not establish the time of the activity on the quarry. Further that the agreement had no provision on who was to fence the quarry. It was PW3's testimony that he did not measure the depth of the quarry that had been left by the previous contractor and the activities by the current contractor.

On cross examination by Mr. Nabwire for 2nd Interested Party, PW3 stated that he did not have a license issued by NEMA and that he was not given a copy of the title to the suit land before he did the report. He further stated that he did not conduct a search to the property and that he did not indicate the exact acreage under quarry.

PW4 Johana Kipkorir Kigen adopted his written statement and reiterated PW1's evidence and stated that by the time they were signing the lease agreement they had not obtained any grant of representation. According to him, his family was not aware of the alleged compulsory acquisition.

PW5 Engineer Maxwell Boit prepared a report on the quarrying activities on the suit land which he produced as an exhibit in court. He also adopted his statement and stated that he had been given instruction by the plaintiffs to prepare a report on the quarrying activities on the suit land. It was PW5's evidence that the material carted away from the quarry were worth Kshs 40Miliion

On cross examination by Mr. Omondi PW5 stated that he visited the suit land once and observed that the quarry was partly waterlogged and there were previous quarrying activities before the Defendant's. He also stated that he did not see the designs of the roads built therefore he was not able to estimate the amount of materials used. He further stated that he did not know that the portion belonged to the government.

DEFENDANT AND INTERESTED PARTIES CASES

DW1 Stephen Kiprono Chepkwony a Human Resource Manager adopted his statement and testified on behalf of the Defendant. DW1 stated that as per the lease agreement, there was no mention of specific roads to be built and that the excavation was done within the agreed 1.5 acres.

It was DW1's testimony that issues arose when the area Deputy County Commissioner called for a meeting and informed them that the suit land belonged to the government hence they should not pay for the materials.

DW1 also testified that they paid the plaintiffs the amount agreed in the agreement in respect of the materials to be excavated and left the site in 2016. DW1 also confirmed that they did not use any land beyond the 1.5 acres and that they did not sell any materials to 3rd parties.

DW1 also stated that they left 30,000 tons of ballast which they had excavated within the agreement period but were not able to access due to the court injunction. He therefore urged the court to dismiss the plaintiff's case and allow the defendant counterclaim with costs.

On cross examination by Mr. Ngigi for the Plaintiff, DW1 testified that the Defendant obtained further contracts from the government to build other roads but the plaintiffs were not aware of the roads to be built

DW1 also stated that they did not have any written communication that the land had been acquired by the government. On reexamination by Mr Omondi, DW1 stated that the search confirmed that the government had lodged a restriction on the suit property.

DW2 Sheila Muli a Land Registrar testified that the suit land's green card was first registered on 4th September 1985 under the Government of Kenya. The second registration was on 2nd November 1993 in the deceased's name.

DW2 stated that on 28th March 1995, a restriction was placed by the government of Kenya for purposes of land acquisition of 2.441 Ha for Ziwa- Kitale Road and a vesting order notice dated 15th March 1995 was issued to the deceased and a further restriction was placed on 19th November 1997 against the suit land restricting dealings until the government's portion was subdivided.

It was DW2's evidence that the compensation was done to the deceased through the Resident Engineer vide a letter dated 19th November 1997 but the title to the suit land has never been surrendered to the Lands Office for cancellation and subdivision. It was DW2'testimony that the deceased was to surrender the title in accordance with section 20 of the Land Acquisition Act which he never complied with. Further that there was neither an objection to the notice nor to the vesting order of taking possession of the suit land that had been acquired by the government.

On cross examination by Mr. Ngigi for the Plaintiff, DW2 told the court that she did not have the gazette notice for acquisition of the suit land but she produced gazetted notices for vesting orders and that the suit land was yet to be surveyed and subdivided.

On reexamination, DW2 stated that for the land to be subdivided, the original title had to be first surrendered to the lands department but he same is still with the plaintiffs.

PLAINTIFFS' SUBMISSIONS

The Plaintiffs identified 4 issues for determination as follows:

> ***a) Who is the bona fide owner of MOIBEN/MOIBEN BLOCK 2 (SEGERO)/712 the suit land herein and whether the government of Kenya had compulsorily acquired the suit land.***
>
> ***b) Whether the defendant breached the terms of the lease agreement.***
>
> ***c) Whether the defendant encroached on the Plaintiffs' parcel of land by curving out an additional 3 1/2 acres.***
>
> d) ***Whether the plaintiff is entitled to the residue of materials after completion of the project and if yes, compensation for the residue unaccounted for***.

On the first issue as to who is the bona fide owner of the suit land and whether the government of Kenya had acquired the same through compulsory acquisition, counsel stated that it is not disputed that the suit land is registered in the name of the late Zakayo Ngasura and relied on Article 40 of the Constitution of Kenya, 2010 that provides for the protection of right to property. That further Section 3 and 33 of the now repealed Land Acquisition Act Cap 295 makes it mandatory for the Minister to publish gazette notices and issue notices to persons whose lands are affected by an acquisition and submitted that those notices were neither published nor issued to the deceased in the present case.

Mr. Ngigi relied on the case of **Mathatani Limited v Commissioner of Lands & 5 others [2013] eKLR** while holding that the burden of proving service in cases of compulsory acquisition falls on the Commissioner of Lands stated as follows;

> ***"There is no evidence of service by any of the other methods of service provided for under Section 33 (d) of the said Act. The burden of proof of service fell on the Commissioner. Section 109 of the Evidence Act provides as follows: -***
>
> ***"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. "***
>
> ***The first Respondent failed to follow the due process. Consequently, I hold that the Petitioner was not served with the notice of compulsory acquisition. "***

Counsel therefore submitted that there was no evidence that the late Zakayo A. Sawe Ngasura being the registered proprietor of the suit land in which the government of Kenya purported to have compulsorily acquired was ever compensated as per the provisions of the Constitution and cited the case of **Isaiah Otiato & 6 others v County Government of Vihiga [2018] eKLR** where thcourt held that;

> ***"If land is so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined. 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.***
>
> ***From my above observations, the Respondent has not proved in any way shown how their actions are in accordance with the law hence their actions are illegal."***

Counsel therefore urged the court to find that the land belongs to the estate of the late Zakayo Sawe A. Ngasura, the purported compulsory acquisition was illegal for failure to follow the legal process and as such null and void hence the restriction registered against the title of the suit land should thus be removed.

On the second issue as to whether the defendant breached the terms of the lease agreement, counsel submitted that it is not disputed by the parties that vide a lease agreement dated 30 October 2014 between the Plaintiffs and the Defendant, the Plaintiffs while acting in their capacities as the administrators of the estate of the late Zakayo Sawe A. Ngasura the registered owner of land parcel No. MOIBEN/MOIBEN BLOCK 2 (SEGERO) 712 leased out 1.5 acres of the suit land at a consideration of Kshs. 850,000 (Kenya Shillings Eight Hundred and Fifty Thousand Only) for a period of two years only.

Counsel submitted that it was the plaintiffs' case that it was an implied term of the lease agreement between the plaintiffs and the defendant

that the quarry materials that were to be excavated from the part of the suit land measuring 1.5 acres were to be used in the rehabilitation of Kabenes - Kachibora road also known as Eldoret-Kitale alias Ziwa — Kitale road as the defendant and been awarded a tender by the government of Kenya to rehabilitate the said land.

Mr. Ngigi cited the case of **Nancy Wania Waruhiu(Suing as the Legal Representative of the Estate of Nioroge Kaguathi (Deceased) v Trustees of Orthodox Church Karuri [2020] eKLR** cited with approval in the case of **Lulume...Vs...Coffee Marketing Board (1970)EA 155,** where the Court held that:-

> ***"No term should be implied in a contract unless it was intended".***

Similarly, in the case of **Bid Insurance Brokers Limited Vs British United Provident Fund [2016] eKLR** the Court held that;

> ***"According to Chitty on Contracts Vol. I (General Principles), 2009 Edition paragraph 13-001, page 773,***
>
> ***"...express terms are those which are actually recorded in a written contract or openly expressed at the time the contract is made... The implication of a term is a matter for the court and whether or not a term is implied is usually said to depend upon the intention of the parties as collected from the words of the agreement and the surrounding circumstances. "***
>
> ***The "intention of the parties" like the spirit of the Constitution or Statute, must be found within the words of the Constitution or Statute. Chitty on Contracts, paragraph 13004 says —***
>
> ***"In many cases, however, one or the other of the parties will seek to imply a term from the wording of a particular contract and the facts and circumstances surrounding it. The court will be prepared to imply a term if there arises from the language of the contract itself, and the circumstances under which it is entered into, an inference that the parties must have intended the stipulation in question. An implication of this nature, may be made in two situations —***
>
> ***First where it is necessary to give business efficacy to the contract, and secondly, where the term implied represents the obvious, but unexpressed, intention of the parties. These two criteria often overlap and in many cases, have been applied cumulatively, although it is submitted that they are, in fact, alternative grounds. Both however depend on the presumed intention of the parties. "***

Counsel submitted that the it was an implied term under clause 17 of the lease agreement, that the material excavated from the suit premises was intended to be used in building the Kabenes- Kachibora Road only since the Defendant had been awarded that contract by the government.

On the third issue as to whether the defendant encroached on the Plaintiffs' parcel of land by curving out an additional 3 ½ acres, counsel submitted that contrary to the terms of the agreement the defendant fraudulently and in breach of the lease agreement unlawfully extended their quarry by encroaching on the plaintiffs' parcel of land and curving out another 3 $^{1}/2$ acres where it converted for its own use without making an addendum agreement with the plaintiffs over the same.

Counsel further submitted that the Defendant admitted in its defence and counterclaim that it extended the quarry outside the leased premises.

On the issue whether the Plaintiff is entitled to the residue of materials remaining after completion of the project and if yes, compensation for the residue unaccounted for, counsel submitted that the Plaintiffs were entitled as it was provided for under clause 17 of the agreement and according to PW 5's computation in his report.

DEFENDANT'S SUBMISSIONS

Counsel for the defendant identified similar issues as the Plaintiffs' but added two issues as follows:

> ***a) Whether the plaintiffs had capacity to execute the lease agreement between them and the defendant and or file suit on behalf of the estate of ZAKAYO SAWE NGASURA (deceased).***
>
> ***b) Who between the plaintiffs and the defendant is entitled to the 30, 000 tons of ballast and stones detained on the suit land that was blasted and excavated during the pendency of the lease.***

Counsel submitted on the capacity of the plaintiffs to sue and stated that at paragraph 3 of the further amended defence and counterclaim the defendant pleaded that the plaintiff's capacity to agitate this suit was subject to them producing a valid Grant of representation to the deceased's estate.

Counsel submitted that the plaintiffs produced a Limited Grant of Letters of Administration Ad Litem issued in the High Court at Kericho dated 2014 which was limited for the purposes of filing a suit and the same was issued before the cause of action in suit arose. Further that the plaintiffs conceded that they did not have this suit in mind when seeking for the said Limited Grant. Counsel therefore urged the court to find that the plaintiff neither had locus standi to enter into the lease agreement nor file this suit.

Mr Omondi also submitted that the plaintiffs produced a lease agreement between themselves and the defendant executed on 30 th October 2014 whereby they described themselves as administrators to the deceased estate which they were not and relied on the case in

KERUGOYA HCC SUCCESSION CAUSE NO. 292 OF 2015: IN THE MATTER OF THE ESTATE OF ROBERT KANYUA MWANGI alias ROBERT MWANGI KINYUA). Mr Omondi submitted that the plaintiffs did not have capacity to enter into the lease agreement as it amounted to intermeddling with the deceased estate contrary to section 45 of the Law of Succession Act, Cap 160.

Counsel also submitted that the defendant has no interest in the suit land apart from the portion which was the basis of the lease agreement which has since expired and only has a claim for 30,000 tons of excavated ballast which was done during the contract period.

Mr Omondi also faulted the evidence of PW5 BOIT MAXWEL whom he stated that had purported to be an expert witness and cited the provisions of Section 48 of the Evidence Act, Cap 80 Laws of Kenya which defines an expert to be a person specifically skilled in among other things a science of art.

Counsel submitted that the witness was a Civil Engineer whose expertise is limited to planning, designing and execution of civil projects and conceded that it is a quantity surveyor who is skilled in estimation and costing in construction That the witness was not specifically skilled in the science of estimation and costing in construction.

Counsel relied on the case **of NAIROBI HCCC NO. 35 OF 2006: RADHABHAI SHIVJI BHANDERI =VS= JOYTIBHALA S DESAI AND 3 OTHERS** and urged the court to find that the expert was unqualified and the claim was unfounded in view of the agreement of lease.

Regarding the claim for Kshs.40, 000, 000/- the alleged value of the residue sold to other Companies, counsel submitted that the plaintiff did not prove this claim and therefore it should fail.

On the issue on who between the Plaintiffs and the Defendant is entitled to the 30,000 tons of ballast and stones detained on the suit land that was blasted and excavated during the pendency of the lease, counsel submitted that clause 17 of the lease agreement provided that the remaining material at the expiry of the lease was to be given to the Plaintiffs. That the lease was to expire on 30th October 2016., however, on 25th September 2015, this court's orders for injunction prevented the Defendant from accessing the material that the Defendant had stored on a part of the suit land outside the leased premises. It was counsel's submission that the material had already been excavated as at the date of the injunction therefore it was the property of the Defendant since the lease had not expired as at that time.

On whether the defendant had breached the terms of the lease, counsel submitted that parties are always bound by the terms of their contracts unless fraud, coercion or undue influence are pleaded and proved. Counsel submitted that a court cannot rewrite a contract for the parties and that nothing in the agreement limited the Defendant from utilizing the extracted material to one road- the Kabenes- Kachibora Road.

2ND INTERESTED PARTY'S SUBMISSIONS

Counsel for the 2nd Interested Party identified three issues for determination, namely whether the Plaintiffs' suit is incompetent., whether the Court has jurisdiction to inquire into an acquisition that took place in 1990 and whether counterclaim by 3rd Interested Party has merits.

On the first issue on competency of the Plaintiff's suit, counsel relied on section 82 and 80 (2) of the Law of Succession Act which provides that the estate of a deceased person could only be represented in any legal proceedings by a person duly authorized to do so. Such authorization could only be obtained from a grant of letters of administration.

Counsel also cited Section 2 of the Law Reform Act, which provides that a person who is entitled to bring a cause of action in respect to the estate of a deceased person is a personal representative or an executor or administrator respectively. That such a person ought to first obtain appropriate grant so as to have the necessary locus standi

Mr Odongo relied on the cases of **Virginia Edith Wamboi vs. Joash Ochieng Ougo & another (1982-88)1 KAR and Trouistik Union International & ano vs. Jane Mbeyu & another, Civ Appeal No. 145 of 1990).** The grant may be a full grant or a limited grant.

Counsel urged the court to find that the plaintiffs had no locus standi to file suit on behalf of the estate of the deceased.

On the issue whether the Court has jurisdiction to inquire into an acquisition that took place in 1990, counsel submitted that the now repealed Land Acquisition Act Cap 295 provided for dispute resolution mechanism in related matters which the Plaintiffs did not complied with before coming to this court. Section 29 of the Act expressly limited the jurisdiction of the High Court to hearing appeals from institutions created under the Act in the following express words:

> **29. (***1) The right of access to the High Court conferred by section 75 (2) of the Constitution of an interested person shall be by way of appeal (exercisable as of right at the instance of the person interested) from the decision of the Tribunal.*
>
> *(2) There shall be established a Tribunal to be known as the Land Acquisition Compensation Tribunal which shall consist of five members appointed by the Minister by notice in the Gazette of whom— (a) one shall be an advocate of not less than ten years' standing, who shall be the chairman; and (b) two shall be registered valuers of not less than ten years' standing.*
>
> *(c) one shall be a prominent businessman of not less than thirteen years standing; and (d) one shall be a prominent farmer of not less than ten years standing.*
>
> *(3)*

(4)

(5)

(6)

(7) A person interested who is dissatisfied with the award of the Commissioner may apply to the Tribunal in the prescribed manner for—

a) the determination of his interest or right in or over the land; or

b) the amount of compensation awarded to him under section 10; or

c) to amount of compensation paid or offered to him under section 5, 9, 23, 25 or 26.

(8) .....

(9).....

(10) ***A party to an application to the Tribunal who is dissatisfied with the decision of the Tribunal thereon may, in the manner prescribed under section 72(3) of the Constitution, appeal to the court on any of the grounds of the application to the Tribunal and on any of the following grounds, namely— (a) the decision of the Tribunal was contrary to law or to some usage having the force of law;***

Counsel also submitted that the court's jurisdiction is limited to hearing appeals from the tribunal established under the Land Acquisition Act, (now repealed) and relied on the case of **Kenya National Highway Authority v Shalien Masood Mughal & 5 others [2017] eKLR** where the Court of Appeal endorsed the persuasive dictum of Mumbi J (as she then was) in **Cycad Properties Limited & another v Attorney General & 4 others[2013] eKLR.** where it was held that:

"It is not the duty of the court to inquire into whether or not the acquisition process undertaken in the 1970s was done in accordance with the law. The validity or otherwise of that process could only have been questioned and determined within the time frame specified in the Land Acquisition Act, and by the parties from whom the land was being acquired. In this regard, I agree with the respondents that the petitioners cannot at this stage question the process of acquisition undertaken more than three decades before they acquired their interests in the subject properties."

Mr. Odongo submitted that the plaintiffs in their Further Amended Plaint or any other document filed herein did not challenge the allegation by 2nd and 3rd interested parties that in 1990 or thereabouts the Government of Kenya compulsorily acquired 2.441 Ha from the suit property. That the plaintiffs admitted that their father neither challenged the acquisition process nor filed any suit seeking for removal of the restriction that was placed on the suit property by Government in spite of knowledge of its existence. That further that the plaintiffs conceded that they filed a suit for removal of the restriction after over 20 years.

Counsel also submitted that compulsory acquisition in respect of this matter was commenced and concluded under section 75 of the retired constitution and Land Acquisition Act Cap 295, (now repealed.) and that the Act was a self-executing instrument with very strict timelines within which certain decisions or steps were to be taken. It provided that if :-

(b) the decision failed to determine some material issue of law or usage having the force of law; or (c) a substantial error or defect in the procedure provided by or under this Act has produced error or defect in the decision of the case upon the merits.

(11) ***A party to an appeal under subsection (10) to the court who is dissatisfied with the decision of the court thereon may, upon giving notice of appeal to the other party or parties to that appeal within fifteen days after the date on which a notice of that decision has been served upon him, appeal to the Court of Appeal from the order made by the court; but an appeal to the Court of Appeal under this subsection may be made on a question of law only.***

On the last issue whether the 3rd Interested Party's counterclaim has merit, counsel relied on the case of **James Joram Nyaga & another -versus- Attorney General & another [2019] eKLR,** the Court of Appeal held that:

We are also of the persuasion that the doctrine of public trust envisaged under section 75 of the o/d Constitution so that land compulsorily acquired could only be used for public purposes for which it was acquired and the Government hold such land in trust for its citizens was applicable in the circumstances. Accordingly, the suit property having been acquired for public purposes, that is, construction of a road, it was held in trust for the public and could not have been allocated to the appellant who were private individuals for their own private use. As was stated in ***Maz Mohamed V Commissioner of Land & others HCC No. 423 of 1998*** *and reiterated in* ***Re Kisima Farm Ltd [19781 KLR 36,*** *land had to be used for the purpose for which it was acquired and use of land for any other purpose was illegal. If the land was not utilized, then the Local Authority should have held it in trust under the Local Government Act.*

Mr. Odongo submitted that the interest of the Government having been noted on the register of the suit property in respect of portion measuring 2.441 Ha in 1995 and 1997, such interest remained an overriding interest to the suit property by dint of section 30 of the Registered Land Act, (now repealed) now section 28 of the Land Registration Act. Consequently, the declarations sought in the 3rd interested

party's counter-claim ought to be granted as the 2.441 Ha of the suit property is public land.

Counsel therefore urged the court to dismiss the plaintiffs' suit against the interested parties be dismissed with costs and the counter-claim by the 3rd interested party be allowed as prayed.

ANALYSIS AND DETERMINATION

The issues that flow from the pleadings are as follows:

a) Whether the plaintiffs 'have locus standi to file this suit.

b) Whether the plaintiff are the bona fide owners of the suit land and if so are they entitled to the orders sought

c) Whether the government acquired a portion of the suit land by compulsory acquisition.

d) Who is entitled to the 30,000 tons of ballast that were retained on site after excavation.

e) Whether the Defendant breached the terms of the lease.

On the first issue whether the plaintiffs had *locus standi* to file this suit, the term locus standi means a right to appear in court or be heard in such proceedings as was held in the case of **Law Society of Kenya …Vs… Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000,** the Court held that; -

"Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law". Further in the case of Alfred Njau and Others Vs City Council of Nairobi (1982) KAR 229, the Court also held that*;* -

"the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings".

In the Supreme Court case in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** the court held that:

"The issue of locus standi raises a point of law that touches on the jurisdiction of the Court, and it should be resolved at the earliest opportunity. In Mary Wambui Munene v. Peter Gichuki Kingara and Six Others, Sup. Ct. Petition No. 7 of 2013; [2014] eKLR, this Court held (at paragraphs 68 and 69) that the question of jurisdiction is a "pure question of law," and should be resolved on a priority basis."

Parties are bound by their pleadings and an issue as a party's standing to bring a suit which touches on the jurisdiction of the court to hear and determine a matter must be resolved at the earliest opportunity to avoid the court long and protracted trial which the court could have dealt with at the first instance. There is no two ways about it, a party either has locus standi or not and not in between.

Counsel for the defendant and the interested parties submitted elaborately on the issue of locus standi that the plaintiff did not have authority to sue as they were not the legal representatives of the estate of the deceased as they neither had a limited grant for purposes of entering into the agreement and filing suit nor had a full grant for the estate of their father.

The plaintiff's admitted that the limited grant that they had was obtained in 2014 before they entered into the agreement that is subject to this case and further that it was for purposes of filing a suit in Kericho. Limited grants just its name, are for purposes of limited activities and once such is done then it is spent. A grant that confers representation of the estate of a deceased person is either grant of letters of administration or a confirmed grant.

It is trite law that the estate of a deceased person can only be represented in any legal proceedings by a person who is duly authorized to do so on behalf of the estate. The powers of the personal representative are set out under Section 82 of the Law of Succession Act, Cap 160 of the Laws of Kenya which provides as follows:

82. ***Personal representatives shall subject only to any limitation imposed by their grant, have the following powers: -***

a) to enforce, by suit or otherwise, all causes of action which by virtue of any law, survive the deceased or arising out of his death for his personal representative;

b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them as they think best:

i) Any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and

ii) No immovable property shall be sold before confirmation of the grant;

c) To assent, at any time after confirmation of the grant to the vesting of a specific legacy in the legatee thereof;

(d) ……..

The above provisions never complied with and any letter of administration granted after the fact cannot cure the irregularity and I note that in this case there was no such attempt to get letters of administration after filing the suit.

In the case of **Isaya Masira Momanyi v Daniel Omwoyo & another [2017] eKLR** the court held that:

> ***"In his filed submissions the plaintiff has unprocedurally annexed as "Ex.4" a copy of letters of administration to the estate of Marisa Onsase dated 20th July 2016 issued to Isaya Masira Momanyi in CMC Succ. Cause No. 219 of 2016. The letters of administration are to the plaintiff in the present suit meaning that as at 8th June 2016 when he filed the suit he never had any letters of administration to the deceased estate. He definitely did not have any capacity and/or locus standi to file the suit on behalf of the deceased estate. The suit is incompetent and filed in abuse of the process of the court. The suit was null and void abinitio and cannot be sustained.***
>
> ***11. I accordingly order the suit by the plaintiff initiated vide a plaint dated 8th June 2016 struck out in its entirety. I award the costs of the application dated 5th August 2016 and of the main suit to the 1st defendant."***

Further in the case of **Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased) [2016] eKLR** where the Court held that:

> ***"Further the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings."***

From the pleadings and the authorities cited I find that the plaintiff's lacked the requisite *locus standi* to institute and/or maintain this suit.

On the issue as to whether the court has jurisdiction to inquire on the issue of compulsory acquisition of land under the Land Acquisition Act Cap 295(now repealed), the said Act had comprehensive processes and timelines within which certain activities had to be done and the relevant bodies tasked with appeals in case of dissatisfaction.

It is on record that there was a restriction on the suit land by the government in respect of 2.441Ha in 1995 and 1997 which was compulsorily acquired. The plaintiffs confirmed that there was a restriction in favour of the government and they had not filed any case for removal until they filed this case which was 20 years after the fact.

In the case of **Kenya National Highway Authority v Shalien Masood Mughal & 5 others [2017] eKLR** (supra) and **Cycad Properties Limited & another v Attorney General & 4 others [2013] eKLR.** (supra) the court held the court could not inquire into whether or not the acquisition process undertaken in the 1970s was done in accordance with the law.

The court further held that the validity or otherwise of that process could only have been questioned and determined within the time frame specified in the Land Acquisition Act, and by the parties from whom the land was being acquired.

I am also in agreement that the plaintiffs cannot at this stage question the process of acquisition undertaken more than 20 years. Counsel for the plaintiff tried to question the process of compulsory acquisition of the plaintiffs' parcel of land as the process was not followed. The plaintiff did not file a reply to defence to counter the issue of compulsory acquisition. It came about as a response to the evidence that the government had acquired the land hence the restriction on the register.

Having found that the plaintiffs lacked capacity to file this suit against the defendants, it also follows that the reliefs that they sought for are also not tenable.

The plaintiffs dragged the defendants and the interested parties to court who also had an opportunity to bring their claims against the plaintiffs. The defendant stated that they did not have a claim to the portion of 1. 5 acres for excavation of ballast for construction of a road on behalf of the government. However, the defendant had a claim of 30, 000 tons of ballast they had excavated within the contract period but the court had stopped any dealings until this suit is heard and determined

It should be noted that the defendant made an application to be allowed to remove the 30,000 tons of ballast to enable them use in the construction but the court stated that this would be prejudicial to the plaintiff as it was one of the issues for determination. The defendant had explained to the court that the ballast belonged to them as they were excavated within the contract period which contract amount had been paid in full.

The plaintiff acknowledged that the consideration for the contract had been paid in full upon execution of the agreement hence the defendant is entitled to the 30,000 tons of ballast left on site. This was not part of the residue that was to remain after completion of the project.

On the last issue whether the government compulsorily acquired 2,441 Ha of the suit land, the evidence of the Land Registrar together with the gazette notices produced confirmed that there was a restriction in 1995 and 1997 which were never challenged or objected to by the

deceased plaintiff's father. The documents indicated that the requisite notices were issued to the deceased and that compensation was done. Further that the deceased was supposed to surrender the original title for subdivision of which he was issued with a notice but never complied with. Even if the deceased were to stay with the title indefinitely without surrendering, the portion of 2.441Ha would neither revert back to him nor belong to him. I therefore find that the government acquired 2.441 Ha out of 6.475Ha of the suit land.

Had the plaintiff had capacity to institute this suit, the court would have looked at the other limbs of their prayers, but from the pleadings and the evidence it is clear that the plaintiffs case started with a false start with many challenges in the pleadings leading to numerous applications and amendments which did also not cure many anomalies.

The upshot is that the plaintiff's suit is dismissed with costs and a declaration is hereby issued that 2.441Ha out of 6.475 Ha was acquired by the government hence the plaintiffs should surrender the original title for subdivision.

A declaration is hereby issued that the defendant is entitled to remove 30,000 tons of ballast from the suit land within 30 days.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 10TH DAY OF DECEMBER, 2021.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.