



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

PETITION NO.46 OF 2019

IN THE MATTER OF: CENTRAL ORGANIZATION OF TRADE UNION COTU-KENYA

AND

IN THE MATTER OF: THE LABOUR RELATIONS ACT, NO.14 OF 2007(REVISED 2012)

AND

**IN THE MATTER OF: AN APPLICATION UNDER ARTICLES 22(1) AND 23 ON ENFORCEMENT OF
THE FUNDAMENTAL RIGHTS AND FREEDOMS UNDER THE CONSTITUTION OF
KENYA, 2010**

AND

**IN THE MATTER OF: CONTAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS
UNDER ARTICLES 40, 41, 43, 47, 48, 50 AND 64 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF: COMPULSORY ACQUISITION OF ALL THAT
PROPERTY KNOWN AS LAND REFERNCE NUMBER 10425(I.R.17839)**

AND

IN THE MATTER OF: COMPANIES ACT, NO.17 OF 2015, LAWS OF KENYA

AND

IN THE MATTER OF: EAST AFRICA PORTLAND CEMENT COMPANY LIMITED

AND

IN THE MATTER OF: THE CAPITAL MARKETS ACT, CHAPTER 485 A, LAWS OF KENYA

AND

**IN THE MATTER OF: SECTIONS 9(2) (C) (1), 107, 108, 109, 110, 111, 112, 113, 114, 115, 116,
117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, AND 128 OF THE LAND ACT NO.6 OF 2012**

AND

IN THE MATTER OF: SECTIONS 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 OF THE LAND REGULATIONS, 2017

AND

IN THE MATTER OF: SECTION 49(2) OF THE NATIONAL SOCIAL SECURITY FUND (NSSF) ACT, 2013

AND

IN THE MATTER OF: SECTIONS 2, 42, AND 37 OF THE RETIREMENT BENEFIT (RBA) ACT, 1997

BETWEEN

CENTRAL ORGANIZATION OF TRADE UNION (COTU-
KENYA).....PETITIONER

AND

THE PRINCIPAL SECRETARY MINISTRY OF LANDS & PHYSICAL PLANNING.....1ST RESPONDENT

THE PRINCIPAL SECRETARY, STATE DEPARTMENT OF

HOUSING, MINISTRY OF TRANSPORT, INFRASTRUCTURE,

HOUSING, URBAN DEVELOPMENT & PUBLIC WORKS.....2ND RESPONDENT

THE PRINCIPAL SECRETARY, STATE DEPARTMENT OF INDUSTRIALIZATION,

MINISTRY OF INDUSTRY, TRADE & COOPERATIVES.....3RD RESPONDENT

THE PRINCIPAL SECRETARY, NATIONAL TREASURY,

MINISTRY OF NATIONAL TREASURY & PLANNING.....4TH RESPONDENT

THE ATTORNEY GENERAL.....5TH RESPONDENT

AND

NATIONAL SOCIAL SECURITY FUND.....1ST INTERESTED PARTY

EAST AFRICA PORTLAND CEMENT PLC.....2ND INTERESTED PARTY

JUDGEMENT

1. This is the petition dated 5th September 2019. The petitioner states that the 2nd Interested Party is the registered owner of the land parcel known as **L.R.No.10425 (I.R.17839)** measuring 4,272 acres situated in Athi River and which is referred to as (**“the suit property”**) herein.

2. It also states that the Respondents expressed interest and intention of the government of Kenya to compulsorily acquire the suit property prompting it to seek the court’s intervention to stop the threatened compulsory acquisition of the suit property.

3. The petitioner seeks the following reliefs:-

a) That a declaratory order do issue that the threatened compulsory acquisition of all that parcel of land known as L.R No.10425 (I.R.17839) measuring 4,272 acres situate in Athi River is unlawful, null and void.

b) That, a declaratory order do issue that the threatened compulsory acquisition of all that parcel of land known as L.R No.10425 (I.R.17839) infringes on the 2nd Interested Party’s constitutional right to own land.

c) That a declaratory order do issue that the threatened compulsory acquisition of all that parcel of land known as L.R No.10425 (I.R.17839) infringes on the constitutional right to investments and economic rights of the 1st Interested Party and Kenyan workers in the country represented by the Petitioner.

d) That a declaratory order do issue for protection of the 2nd interested Party parcel of land known as L.R No.10425 (I.R.17839) measuring 4272 acres situate in Athi River.

e) That a declaratory order do issue that the letters dated 11/07/2019 and 13/08/2019 are unconstitutional and hence invalid.

f) That a declaratory order do issue against the actions of Respondents for the threatened and compulsory acquisition and the letters dated 11/07/2019 and 13/08/2019 be quashed;

g) That an order of a permanent injunction do issue against the Respondents jointly and or severally restraining them from compulsorily acquiring 2nd Interested Party's land.

h) That a conservatory order do issue maintaining the status quo and directing the Respondents jointly and or severally, their servants or other government or statutory bodies from interfering with the 2nd interested Party quiet possession and ownership of property L.R No.10425 (I.R.17839).

i) That a declaratory order do issue that any action of the Respondents jointly and/or severally that is inconsistent with the constitution be voided to that extent.

j) That any or further orders of the court do issue to give effect to the principles of The Constitution.

k) That costs of the petition be awarded to the petitioner.

4. The petition was supported by the affidavit of Dr. Francis Atwoli, the Secretary General of the Petitioner (COTU) and a trustee of the 1st Interested Party sworn on 05/09/2019 and as secretary general of the Petitioner, his mandate requires that he safeguards both economic and labour rights of Kenyan workers. He annexed a copy of certificate of registration of COTU.

5. He deponed that the 2nd interested party is the registered proprietor of the suit land. He further deponed that vide a letter dated 11th July 2019 addressed to the 2nd Interested Party Chairman, Board of directors, the 1st Respondent expressed interest and intention of the government of Kenya to compulsorily acquire the suit property and reminded the 2nd Interested Party's acting Manager director through the letter dated 13th August 2019 of the urgent need to surrender the suit property. The letter also stated that the 1st Respondent's ministry would initiate and fast track transfer of the title to the government due to limited time. He annexed a copy of title to the suit property and the letters dated 11th July 2019 and 13th August 2019.

6. He further deponed that in the implementation of the government's Big Four Agenda, the Respondents are guided by a laid down framework specifically; "Development framework guidelines on Kenya affordable housing programme" He annexed a copy of the October 2018 issue of the Development framework guidelines and deponed that the Respondents have jointly and/or severally high handedly subverted the guidelines and principles on compulsory acquisition of land.

7. He also deponed that the Respondents are also bound by the affordable housing delivery framework and according to the said framework, the Respondents are jointly and /or severally mandated to seek relevant statutory authority's approvals from all stakeholders in the acquisition of both private and public land. He annexed affordable housing delivery framework of June 2019.

8. He deponed that the 1st Interested Party manages funds for both formal and informal workers and that it has invested hugely in the 2nd Interested Party and as 30.06.18, its shares at the 2nd Interested Party had an approximate market value of more than Ksh. 100 Million as per its audited accounts. He annexed a copy of report of the auditor general on the financial statements of National Social Security Fund (NSSF) for the year ended 30 June 2018.

9. He also deponed that the 2nd Interested Party is a public listed company regulated by Capital Markets Authority in its share trade at the Nairobi Stocks Exchange (NSE) and the Company Laws of Kenya in its management and operation under its Articles of Association to make decisions such as board approvals including to acquire, desire, if any dispose of property, and /or sale. He deponed further that the 2nd Interested Party's financials have been on a dwindling trajectory from the year 2014 to date and the suit property is its only asset. He annexed the 2nd Interested Party's update for the year ended 2018 and 2019.

10. He further deponed that the deteriorating performance of the 2nd Interested Party does not signify in any way that it is not in business and /or that it is not using the suit land for the intended use. He further deponed that the 2nd Interested Party has put forward a potential equity injunction of kshs.45 Billion over the next 5 years which the company and its shareholders believe will be fundamental in elevation of the company's facilities such as its aging plant and machinery which has caused significant periods of downtime thus return the 2nd Interested Party to a position of competitiveness in the market thus disposal of the suit property which is its only asset would be too premature and detrimental to the 2nd Interested Party and its investors which include the 1st Interested Party and the petitioner's union members.

11. He deponed that as the Petitioner's Secretary General in consultation with the 2nd Interested Party and the 1st Interested Party they have not held discussions and /or given approvals of intention to dispose of the only asset of the 2nd Interested Party whether by willful sale and/or compulsory acquisition and the action of the Respondents jointly /or severally to compulsorily acquire the suit property is a fundamental violation of property, economic and labour relations rights under the constitution thus the court should grant conservatory orders sought.

The Respondent's Response

12. The petition is opposed by the Respondents vide the Replying Affidavit sworn on 13/02/2020 by Dr. Nicholas Muraguri; the principal Secretary Ministry of Lands and Physical planning. He deponed that the suit land is public land that was a direct allocation to East Africa Portland Cement PLC, (which is a state corporation under the state corporations Act) in 1960 for a term of 495 years from 01/04/1960 at an annual rent of kshs.854.40 with a special condition on the lease that the land should be used for agricultural purposes.

13. He further deponed that the 2nd Interested Party is in breach of the foretasted special condition since the suit land is being used for mining purposes .He deponed that it is in that context that the Ministry of Lands wrote to East Africa Portland Cement asking it to surrender the suit parcel of land to the government taking into account the fact that the land is not currently in use for its intended purpose and the 2nd Interested Party has already exhausted limestone mining which is the economic use into which the land has been put.

14. He also deponed that in the year 2008, as part of the planning for vision 2030,the government declared the corridor along Mombasa Road from Athi River to Mombasa as a special economic zone and since the government is implementing the 3rd term plan(MTP3) and the Big Four Agenda policy as a means of realizing vision 2030 and realization of the policy required land, the suit land has been identified as one of the options available for the proposed affordable housing project as well as industrial development and future government development plans along Mombasa road.

15. He further deponed that following the 2nd Interested Party's breach of the special condition, the government has met statutory requirements for commencing proceedings for re-entry into the suit land by the National Land Commission on behalf of the government but before invoking the said provisions for forfeiture and re-entry, it sought to engage the 2nd Interested Party in negotiations with a view to having the suit land voluntarily surrendered back for use for the purpose of affordable housing as well as industrial development and the 2nd Interested Party's board did not object thus it was not necessary to invoke section 31 of the Land Act 2012 .He added that the decision of the board has since been endorsed at a special general meeting of the shareholders.

16. He also deponed that the claims by the petitioner are unfounded as the Petitioner has no stake in the land or the company which is a limited liability state corporation and the Petitioner cannot speak for the 1st Interested Party as it is represented on the 2nd Interested Party's board and is equally bound by the decisions of the shareholders of the 2nd Interested Party. He deponed further that once the process of surrender is completed, the land titles will be held by the Permanent Secretary Treasury but the suit land will vest in The National Land Commission who will take over and manage the suit land until modalities are put in place for it to be put to the intended public use under the affordable/low cost housing policy. He deponed that ultimately it is the workers who will benefit as a result of affordable housing and the contemplated industrial development hence the Petitioner's claim is unfounded.

17. He also deponed that even though there has been no compulsory acquisition, the state is vested with the power of eminent domain, exercisable under Article 40(3) and one cannot stop the government from compulsorily acquiring property once the constitutional threshold of due process is met. He urged the court to dismiss the petition.

The 1st Interested Party's Response

18. The 1st Interested Party supported the petition. It filed the replying affidavit sworn on 27/11/2019 by Austin Ouko, the acting General Manager, Corporate Affairs and corporation Secretary with the 1st Interested Party. He deponed that the 1st Interested Party is a fund established under the provisions of Section 3 of the National Security Fund Act, No.45 of 2013 and its principal activity is provision of social security to members. He deponed further that provisions of Section 10(1) of the Act gives the board of the 1st Interested Party the responsibility to acquiring, controlling and supervising the funds and assets of the 1st Interested party in such a manner that best promotes the objects for which the fund is established and it is in that regard that the 1st Interested Party had invested in immovable property situated in different parts across the Republic of Kenya and also invested through shares.

19. He submitted further that the 1st Interested Party had invested substantially in the in the 2nd Interested Party which is a public listed Company and while it is not opposed to the Governments affordable housing initiative under the big 4 agenda, it has a fiduciary duty and a statutory duty under the Constitution, the NSSF Act No.45 of 2013,the Retirement benefits Act No.3 of 1997 and the public Finance Management Act 2012 to secure member's investments thus the 2nd Interested Party should be compensated for acquisition of the suit property or any part of the said property guided by market value or a fair consideration to secure the interests of shareholders who include the 1st interested party.

20. He deponed that the provisions of Section 51(2) of the NSSF Act requires the board of trustees to account and prepare and transmit to the Auditor General amongst others a balance sheet showing details the assets and liabilities of the fund and a statement of income and expenditure of the fund. He annexed a statement for the year ended 30/06/18 published in the local dailies of 22/10/2019.

The 2nd Interested Party's Response

21. The 2nd Interested Party opposed the petition vide the replying affidavit sworn on 21st February 2020 by Sheila Kahuki; the 2nd Interested Party's Company Secretary and Head of Legal Services .She deponed that the 2nd Interested Party is both a state corporation under the State Corporations Act as the government of Kenya is the largest shareholder and that it is also a listed Company incorporated under the Companies Act and its shareholders are as follows:

a) Lafarge Holcim (through its subsidiaries as follows

-Associated International cement - 14.6%

-Bamburi Cement Limited	-	12.5%
-Cementia Holdings Limited	-	14.6%
Total	-	41.7%
b) National Social Security Fund	-	27%
c) The National Treasury	-	25.3%
d) Other Shareholders	-	5.9%

22. She further deponed that the suit property was granted to the 2nd Interested Party on 01/04/1960 for a term of 99 years (previously 945 years) vide a Grant NO.IR 17839. She deponed it is the registered lessee from the Government of Kenya of the suit land. She annexed a copy of the title document and deponed that it was a special term of the grant that the property would be used for agricultural purposes only but it utilized the suit land for mining.

23. She deponed that the 2nd Interested Party received the letter dated 12/07/2019 from the principal Secretary, Ministry of Lands and physical planning indicating that the government had identified the suit land for affordable housing scheme, manufacturing and other urban uses as envisioned in the economic and Macro Pillar of Vision 2030 and that the grant was issued for agricultural use and the 2nd interested party had exhausted its economic use of mining and should therefore surrender it to government. She annexed the said letter.

24. She further deponed that on 30th July 2019, the 2nd Interested Party held a special board of directors' meeting to discuss the government's request to surrender the property and after deliberations, the board of directors resolved to recommend to the shareholders to surrender the land parcel in a special general meeting of all shareholders. She also deponed that vide a letter dated 24th July 2019, the 2nd Interested Party wrote to the Chief Executive Officer of the Capital Markets Authority notifying the regulatory authority of its intention to hold an extraordinary general meeting where one of the agendas was on the surrender of the suit property to the government. She annexed a copy of the said letter. She also deponed that vide the letter dated 16th August 2019, the Chief Executive Officer of the Capital Markets Authority advised the 2nd Interested Party to prepare a detailed shareholder circular explaining to the shareholders the proposed surrender and the 2nd Interested Party then prepared the shareholder circular dated 29th August 2019 notifying all the shareholders of an extraordinary general meeting that was held on 27th September 2019 at the Safari Park Hotel where the surrender was approved by over 99% of the shareholding. She annexed the letter dated 16th August 2019, the shareholder circular dated 29th August 2019 and a letter from PWC who conducted polling at the extraordinary general meeting. She added that the resolution was submitted to the regulator, the Capital Markets Authority as required under the law and executed transfer documents in favor of the Ministry of Treasury and National Planning on 7th October 2019. She attached the transfer document and asked the court to dismiss the petition.

The Petitioner's Submissions

25. They are dated 8th July 2021. They raise two issues for determination:-

(i) Whether the compulsory acquisition process of land is inconsistent with and or in contravention of laws and principles under the Constitution.

(ii) Whether the Petition discloses a legal interest capable of protection under the law.

26. The 1st Interested Party is the biggest shareholder in the 2nd Interested Party and stands to lose all the worker's investments once the 2nd Interested Party's only investment is compulsorily acquired. The 1st Interested party is not aware and has never been informed that the 2nd Interested Party stopped using the land for its intended purpose as alleged by the Respondents, neither is the Petitioner aware of the allegations.

27. Even if the subject property has been identified for the proposed affordable housing project, that fact alone cannot quash the Petitioner's right to protection of the property. It has put forward the case of **National Land Commission vs Afrison Export Import Limited & 10 Others [2019] eKLR**.

28. There is a clear statutory provision which dictates how a certain legal or statutory procedure should be undertaken, that procedure cannot be overlooked by invoking public interest. The Petitioner has a substantial legal interest in the subject property and has a right to be protected. It has put forward the cases of **James Shikwati Shikuku vs County Government of Kakamega & 3 Others; Isaac Shavachi Mutoka & 2 Others (Interested Parties) [2019] eKLR; Republic vs Chief Immigration Officer [1976] 3 AER 843; Republic vs Council of Legal Education Exparte Nyabira Oguta [2016] eKLR; Horn vs Sunderland Corporation [1941] 2 KB 26, 40; President of the Republic of South Africa & Others vs South African Rugby Football Union & Others 2000(1) SA 1 CC, 1123 C-D**.

29. The court has to look at the rather inalienable right to just compensation when the state has to deprive a person of his property and ensure that right is not infringed.

30. The Petitioner being the largest umbrella body of Kenyan workers incorporated under the Trade Unions Act (Cap 233 Laws of Kenya) has the mandate to safeguard and protect workers' fundamental rights and freedoms. It prays that the reliefs sought be granted.

The Respondents Submissions

31. The Respondents filed the submissions dated 12th November 2020. They identified the following issues for determination:-

- a) *Whether the Petitioner has locus standi to institute this petition.*
- b) *Whether the intended acquisition is within the law.*
- c) *Whether the petition discloses a legal interest protectable within the law.*
- d) *Whether the court should grant the reliefs sought.*

32. They submitted that the suit property has always been public land and if compulsorily acquired, there will be no payment of compensation. They also submitted that the Petitioner being a shareholder in the 1st Interested Party with no direct interest in the suit property has no locus to institute the petition since a company is a separate and distinct entity from its shareholders. They relied on **Omondi v National Bank of Kenya Ltd & others [2001] IEA**. They also submitted that the 2nd Interested Party would take action if the intended acquisition was likely to infringe on any right guaranteed under the constitution and that the Petitioner cannot hide under the provisions of Article 22 and 258 of the Constitution which lowered the bar on locus standi as they are shareholders of the 2nd Interested Party and they are represented on the board of directors and the annual general meeting as may be held from time to time.

33. They also submitted the state is vested with the right of eminent domain exercisable under Article 40(3) of the Constitution and the intended acquisition is justified under Article 40(3) since the property has been identified for use of public purpose as one of the suitable properties for housing development which is part of the implementation of the 3rd term plan and Big Four Agenda. They submitted further that they are yet to commence the process of acquisition under part VIII of the Land Act and have not issued a notice of intention to acquire the suit property under Section 107 of the said Act.

34. On whether the petition discloses a legal interest protectable within the law, they submitted that the benefit in the acquisition of the suit property be it compulsorily or otherwise outweighs the interest of the Petitioner. They relied on **Veronica Waithira Trustee of Inter-Christian Churches & 3 Others vs Kenya National Highways Authority [2014] eKLR** and **Kenya Airports Authority V. Mitu-Bell Welfare Society & 2 Others [2016] eKLR** and urged the court to dismiss the petition.

The 1st Interested Party Submissions

35. The 1st Interested Party filed the submissions dated 6th March 2021. Counsel for the 1st Interested Party submitted that the primary issue for determination is the validity or otherwise of the acquisition and/or surrender of the suit property. He submitted further that the 1st Interested Party had no objection to the surrender and/or acquisition and the intended purpose but there ought to be compensation based on market value since it holds 27% shares in the said property, having invested members funds therein and it has an obligation and mandate under Article 201 of the Constitution, the NSSF Act ,no.45 of 2013, the Retirement Benefits Act no.3, of 1997 and the Public Finance Managing Act 2012, to safeguard those investments on behalf of the contributors.

The 2nd Interested Party's Submissions

36. The 2nd interested Party filed the submissions dated 5th March 2021. They identified the following issues for determination.

- a) *Whether the voluntary surrender of the suit property by the 2nd Interested Party to the Respondents is a kin to compulsory acquisition.*
- b) *Whether the surrender of the suit property was lawful.*
- c) *Whether the court should grant the reliefs sought.*

37. Counsel for the 2nd Interested Party submitted that the Petitioner's claim that the Respondents intend to compulsorily acquire the suit property without compensation is misconceived since the suit property has been surrendered to the government, the lessor of the property and not compulsorily acquired. He submitted further that according to Section 9(2) (c) of the Land Act, private land may be converted to public land by compulsory acquisition, transfer and surrender. The mode used herein was surrender which is distinct from compulsory acquisition which is a very elaborate process anchored under Article 40(3) of the Constitution and Chapter 3 of the Land Act. He added that the request to surrender was commenced vide the letter dated 11th July 2019 and the decision to surrender was approved in the extra-ordinary General meeting held on 27/09/2019. On the issue of whether surrender of the suit property was lawful, he submitted that the process leading to the acquisition of the property was voluntary and that the 2nd Interested Party had obtained all approvals including the shareholders' resolution approving the surrender. He also submitted that the question of how a company deals with its assets is purely an internal matter involving the management of the company and that it is not for the court to step in and interfere.

38. He also submitted that under Section 107 (1) of the Land Act, only the National Land Commission is empowered to acquire land on behalf of the government thus the respondents would be acting ultra vires if they purported to compulsorily acquire the suit property which is not the case.

39. On whether the Petitioner was deserving of the orders sought, it was his submission that it did not make a case for grant of a permanent injunction since it failed to meet conditions for grant of permanent injunctions reiterated by the court of Appeal in **Nguruman Limited V. Jan Bonde Niesen & 2 Others C.A NO.77 of 2012 [2014] eKLR**. He submitted further that the Petitioner being the largest shareholder in the 1st Interested Party which is a shareholder in the 2nd Interested Party did not establish any legal interest in the suit land as shareholders have no proprietary interest in the company's property as held in **Racheal Nataani Kinuthia vs Kings Pride Contractors Limited & 5 others [2021] eKLR** thus failing to establish a prima facie case. He added that the Petitioner also failed to meet the principles for grant of conservatory orders which are detailed in **Board of Management of Uhuru Secondary School vs City County Director of Education & 2 Others [2015] eKLR**.

40. I have considered the petition and the affidavit in support. I have considered the responses thereto, the written submissions filed on behalf of the respective parties and the authorities cited. The issues for determination are:-

(i) Whether the Petitioner has locus standi to institute this petition.

(ii) Whether the compulsory acquisition of the land is inconsistent with or in contravention of the law and the principles under the constitution.

(iii) Whether the Petitioner discloses a legal interest capable of protection under the law.

(iv) Is the Petitioner entitled to the reliefs sought?

(v) Who should bear costs of the petition?

41. Article 22 of the Constitution provides that:-

“22 Enforcement of Bill of Rights

1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

- a) a person acting on behalf of another person who cannot act in their own name;***
- b) a person acting as a member of, or in the interest of, a group or class of persons;***
- c) a person acting in the public interest; or***
- d) an association acting in the interest of one or more of its members.”***

Further, Article 258 of the Constitution provides as follows:

1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

- a) a person acting on behalf of another person who cannot act in their own name;***
- b) a person acting as a member of, or in the interest of, a group or class of persons;***
- c) a person acting in the public interest; or***
- d) an association acting in the interest of one or more of its members.***

In the case of **Ms. Priscilla Nyokabi Kanyua vs. Attorney General & Interim Independent Electoral Commission Nairobi HCCP No. 1 of 2010** it was appreciated that:

“Over time, the English Courts started to deviate and depart from their contextual application of the law and adopted a more liberal and purposeful approach. They held that it would be a grave lacuna in the system of public law if a pressure group or even a single spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. The strict rule of locus standi applicable to private litigation is relaxed and a broad rule is evolved which gives locus standi to any member of public acting bona fide and having sufficient interest in instituting an action for redressal of public wrong or public injury by a person who is not a mere busybody or a meddlesome interloper; since the dominant object of Public Interest Litigation is to ensure observation of the provision of the constitution or the law which can be best achieved to advance the cause of the Community or public interest by

permitting any person, having no personal gain or private motivation or any other oblique consideration, but acting, bona fide and having sufficient interest in maintaining an action for judicial redress for public injury to put the judicial machinery in motion like action popularis of Roman Law whereby any citizen could bring such an action in respect of public delict. Standing will be granted on the basis of public interest litigation where the petition is bona fide and evidently for the public good and where the Court can provide an effective remedy...In Kenya the Court has emphatically stated that what gives locus standi is a minimal personal interest and such interest gives a person standing even though it is quite clear that he would not be more affected than any other member of the population. The court equally has recognised that organisations have rights similar to that of individual private member of the public. A new dawn was the ushered in and the dominion of Private Law and its restrictive approach was dealt a final blow. A new window of opportunity emerged in the area of Public Law and shackles of inhibition in the name of locus standi were broken and the law was liberalised and a purposeful approach took the driving seat in the area of Public Law. In human rights cases, public interest litigation, including lawsuits challenging the constitutionality of an Act of Parliament, the procedural trappings and restrictions, the preconditions of being an aggrieved person and other similar technical objections, cannot bar the jurisdiction of the court, or let justice bleed at the altar of technicality. The court has vast powers under section 60 of the Constitution of Kenya, to do justice without technical restrictions and restraints; and procedures and reliefs have to be molded according to the facts and circumstances of each case and each situation. It is the fitness of things and in the interest of justice and the public good that litigation on constitutionality, entrenched fundamental rights, and broad public interest protection, has to be viewed. Narrow pure legalism for the sake of legalism will not do. We cannot uphold technicality only to allow a clandestine activity through the net of judicial vigilance in the garb of legality. Our legal system is intended to give effective remedies and reliefs whenever the Constitution of Kenya is threatened with violation. If an authority which is expected to move to protect the Constitution drags its feet, any person acting in good faith may approach the court to seek judicial intervention to ensure that the sanctity of the Constitution of Kenya is protected and not violated. As part of reasonable, fair and just procedure to uphold the Constitutional guarantees, the right to access to justice entails a liberal approach to the question of locus standi. Accordingly in constitutional questions, human right cases, public interest litigation and class actions, the ordinary rules of Anglo-Saxon jurisprudence, that an action can be brought only by a person to whom legal injury is caused, must be departed from. In these types of cases, any person or social action groups, acting in good faith, can approach the court seeking judicial redress for a legal injury caused or threatened to be caused or to a defined class of persons represented, or for a contravention of the Constitution, or injury to the nation. In such cases the court will not assist such a public-spirited individual or social action group espousing their cause, to show his or their standing to sue in the original Anglo-Saxon conception...”

The Court continued:

“In the interest of the realisation of effective and meaningful human rights, the common law position in regard to locus standi has to change in public interest litigation. Many people whose fundamental rights are violated may not actually be in a position to approach the Court for relief, for instance, because they are unsophisticated and indigent, which in effect means that they are incapable of enforcing their fundamental rights, which remain merely on paper. Bearing this in mind, where large numbers of persons are affected in this way, there is merit in one person or organisation being able to approach the court on behalf of all those persons whose rights are allegedly infringed. This means that human rights become accessible to the metaphorical man or woman in the street. Accessibility to justice is fundamental to rendering the Constitution legitimate. In this sense, a broad approach to locus standi is required to fulfil the Constitutional court’s mandate to uphold the Constitution as this would ensure that Constitutional rights enjoy the full measure of protection to which they are entitled.”

Also, in the case of **International Community of Women Living With HIV Registered Trustees v Co-ordination Board & 2 others; Teresia Otieno (Interested Party) [2021] eKLR**, the court held:-

“25. From the aforesaid Articles the Constitution (Article 258) is clear that every person has a right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened and further may do so claiming the constitution has been contravened or is threatened with contravention.

26. The Constitution gives guidance on who is the “person” referred to under Article 22 and 258 of the Constitution in its interpretation as defined in the Constitution under Article 260 of the Constitution where it is clearly stated, in this constitution, unless the context requiring otherwise; -“person” is defined as follows:-

“person” includes a company, association, or other body of persons whether incorporated or unincorporated.”

42. It is the Petitioner’s case that the suit property is the only asset held by the 2nd Interested Party “EAPCC” and if compulsorily acquired it would be detrimental to EAPCC, its investors and shareholders and the Petitioner’s members.

43. I find that the Petitioner instituted this petition on behalf of the Kenyan workers who remit and save their retirement benefits with the 1st Interested Party, a shareholder of the 2nd Interested Party (“EAPCC”). The 2nd Interested Party is the lessee of the suit property hence the Petitioner has *locus standi* to institute this petition.

44. The 2nd Interested Party is the legal and beneficial owner of the suit property hence the Respondents in intending to compulsorily acquire it ought to follow the law and procedure.

45. National Social Security Fund the 1st Interested Party was established pursuant to the National Social Security Fund Act, 2013. Section 70 of the Act provides that:-

“This Act applies to the Government-

(a) as an employer, and consequent thereupon, for purpose of coordination and accommodation of public servants joining the Fund as members thereof and for dealing with any matter arising therefrom; and

(b) as a guarantor of public interest in the Fund, reason whereof should the Fund suffer difficulties to the extent of liquidation thereof, the government shall take necessary steps to avert that eventuality and or protect the interest of members as may be appropriate”

46. The procedure for compulsory acquisition of land was set out in the Land Acquisition Act (now repealed) and now replicated in Part VIII of the Land Act.

Article 40 of the Constitution provides that:-

(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property

a) of any description; and

b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

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

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

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

47. Section 107 of the Land Act, No 12 of 2012 provides that:-

1) Whenever the national or county government is satisfied that it may be necessary to acquire some particular land under section 110, the respective Cabinet Secretary or the County Executive Committee Member shall submit a request for acquisition of land to the Commission to acquire the land on its behalf.

2) The Commission shall prescribe a criteria and guidelines to be adhered to by the acquiring authorities in the acquisition of land.

3) The Commission may reject a request of an acquiring authority, to undertake an acquisition if it establishes that the request does not meet the requirements prescribed under subsection (2) and Article 40(3) of the Constitution. (3A) Where the Commission rejects a request of an acquiring authority in accordance with subsection (3), the Commission shall inform the relevant acquiring authority within fourteen days of the decision to reject the request.

4) If the Commission establishes that the request under subsection (1) meets the requirements prescribed under subsection (2) and Article 40(3) of the Constitution, the Commission shall— (a) cause the affected land to be mapped out and valued by the Commission using the valuation criteria set out under this Act; and (b) establish that the acquiring authority has identified the number and maintains a register of persons in actual occupation of the land, confirming for each such occupation how much time they have been in uninterrupted occupation or ownership of interest in the land prior to the date of the request for acquisition of the land, and the improvements thereon.

5) Upon approval of a request under subsection (1), the Commission shall publish a notice to that effect in the Gazette and the county Gazette, and shall deliver a copy of the notice to the Registrar and every person who appears to the Commission to be interested in the land.

5A) The notice issued under subsection (5) shall contain the following particulars— (a) the purpose for which the land is to be compulsorily acquired; and (b) the location, general description and approximate area of the land.

5B) Upon receipt of the notice under subsection (5), the Registrar shall make an order, pursuant to section 76 (1) of the Land Registration Act, 2012, prohibiting or restricting dealings with the affected portion of land thereof until it vests in the acquiring authority.

6) Upon service of the notice, the registrar shall make an entry in the register of the intended acquisition.

7) For the purposes of sections 107 to 133, interested persons shall include any person whose interests appear in the land registry and the spouse or spouses of any such person, as well as any person actually occupying the land and the spouse or spouses of such person.

8) All land to be compulsorily acquired shall be geo- referenced and authenticated by the office or authority responsible for survey at both the national and county government”

48. Section 110 of the Act provides that:-

110. Notice of acquisition and effect of acquisition on plant and machinery

1) Land may be acquired compulsorily under this Part if the Commission certifies, in writing, that the land is required for public purposes or in the public interest as related to and necessary for fulfilment of the stated public purpose.

2) If, after land has been compulsorily acquired the public purpose or interest justifying the compulsory acquisition fails or ceases, the Commission may offer the original owners or their successors in title pre-emptive rights to re-acquire the land, upon restitution to the acquiring authority the full amount paid as compensation.

3) If any plant or machinery is attached or permanently fastened to the land, the person interested in that plant or machinery may serve on the Commission a notice in writing that such person desires to sever and remove the plant or machinery, after receiving the notice of intention to acquire the land under section 107(5), and not later than fifteen days before the inquiry appointed under section 112(1).

49. Section 111 provides that:-

1) If land is acquired compulsorily under this Act, just compensation shall be paid promptly in full to all persons whose interests in the land have been determined.

(1A) The acquiring authority shall deposit with the Commission the compensation funds in addition to survey fees, registration fees, and any other costs before the acquisition is undertaken.

(1B) Compensation for compulsorily acquired land may take any one or more of the following forms—

a) allocation of alternative parcel of land of equivalent value and comparable geographical location and land use to the land compulsorily acquired;

b) monetary payment either in lump sum or in instalments spread over a period of not more than one year;

c) issuance of government bond;

d) grant or transfer of development rights as may be prescribed;

e) equity shares in a government owned entity; or

f) any other lawful compensation

Provided that regardless of the form of compensation under this section, where an acquisition process is not completed within twenty-four months from the date of publication of the notice of intention to acquire the land, the acquisition shall lapse.

(1C) Subject to subsection (1B), an owner of land compulsorily acquired shall elect the form of compensation.

(1D) Compensation relating to compulsory acquisition shall not be paid to a public body unless there is a demonstrable inference that the land was purchased and developed by that public body.

2) *The Commission shall make rules to regulate the assessment of just compensation.*

50. Section 112 provides that:-

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

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

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

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

2) At the hearing, the Commission shall—

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

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

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

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

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

Section 113 of the Land Act provides that:-

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

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

a) shall be final and conclusive evidence of—

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

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

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

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

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

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

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

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

In the case of *National Land Commission vs Afrison Export Import Ltd & 10 Others* [2019] eKLR the court held thus:-

“4. Part VIII of the Land Act prescribes the process of compulsory acquisition of land required for public purposes. The Applicant is prompted either by the national or the county government when there is need to acquire land for a public purpose or in the public interest pursuant to Article 40(3) of the Constitution, which sets out the threshold to be met for compulsory acquisition. The Applicant is required to conduct due diligence before acquiring the land after which it publishes a notice of intention to acquire the land in the Kenya Gazette. The notice is to be delivered to the Land Registrar and to every person who appears to have an interest in the land.

5. The Applicant is required to hold an inquiry to determine persons interested in the land in order to determine those that are entitled to compensation. Upon the conclusion of the inquiry, the Applicant is to prepare a written award of compensation for every person found to have a legitimate interest in the land. Thereafter, the applicant is required to make prompt payment of the compensation to the interested parties and if payment is not accepted, then it is to be made into a special compensation account held by the Applicant. Once payment is made, the Applicant takes possession of the land acquired and the land is from that point deemed to vest in the national or the county government as the case may be.”

The Respondents admitted that the suit property has been identified as one of the suitable properties for proposed affordable housing project and industrial development which is part of the implementation of the Third Term Plan and The Big Four Agenda Policy as a means of realization of vision 2030.

51. In paragraph 18 of the Replying Affidavit by Austin Ouko, the General Manager Corporate Affairs and Corporation Secretary of the 1st Interested Party states:-

“The 1st Interested Party, as a shareholder of the 2nd Interested Party, purchased for value 24,300,000 shares in the 2nd Interested Party on behalf of members of the Fund and I do verily believe that the workers of the Republic of Kenya who make their contributions to National Social Security Fund a return for the investment made in the 2nd Interested Party in line with the Funds statutory obligation. It is important that any compulsory, acquisition of the 2nd Interested Party’s suit property be with prompt compensation.”

In the case of National Land Commission vs **Afrison Export Import Ltd & 10 Others (Supra)** the court held thus:-

“Section 75 of the repealed Constitution protected the right to property and set out clear guidelines upon which the state’s power of compulsory acquisition was to be exercised. Article 40 of the current Constitution outlaw arbitrary deprivation of private property and sets out a clear threshold that must be satisfied before the state can exercise the power of compulsory acquisition. Chapter VII of the Land Act sets out an elaborate framework on how the power of compulsory acquisition is to be exercised, which is tailored to ensure that there is no undue deprivation of private property.

Article 60 of the Constitution set out the principles upon which land is to be used and managed. It requires that land be managed in a manner that is equitable, efficient, productive and sustainable. Article 62 defines public land to include land lawfully held, used or occupied by any State organ except land held under a lease; sand land transferred to the state by way of sale, reversion or surrender. Article 66 empowers the State to regulate the use of any land, in the interest of defence, public morality, public order, public safety, public health and land use planning”

52. Similarly in the case of **Joseph Thugo Mwaura & Others vs The Attorney General & Others Petition No 498 of 2009 (unreported)** the court observed that:-

“Section 75 of the Constitution contemplates the person whose property is the subject of compulsory acquisition has a proprietary interest as defined by law. The constitution and more specifically Section 75 does not create proprietary interest nor does it allow the court to create such rights by constitutional fiat It protects proprietary interests acquired through the existing legal framework”.

I find that the Respondents ought to follow the proper procedure if it intends to compulsorily acquire the suit property. Anything else violates the principles under the constitution.

53. I find that the letter dated 13th August 2019 by the 1st Respondent to the 2nd Interested Party reminding the Acting Managing Director of the urgent need to surrender to the Government of Kenya the suit property is against the procedure set out under Part VIII of the Land Act and in violation of the Constitution.

54. I find that the Petitioner has established a substantial legal interest in the suit property and has a right to be protected.

55. From the foregoing, I find that the Petitioner is entitled to the reliefs sought in the petition except for prayer (g). I decline to grant a permanent injunction restraining the Respondents from compulsorily acquiring the suit property. This is because the state enjoys the power of eminent domain which is exercisable under Article 40(3) of the Constitution. The Respondent only needs to follow the law and procedure in respect of compulsory acquisition.

56. As this is a public interest litigation. I direct each party to bear own costs.

57. Accordingly, I find merit in the Petition and I grant the following reliefs.

(a) That a declaratory order is hereby issued that the threatened compulsory acquisition of all that parcel of land known as L.R.No.10425 (I.R.17839) measuring 4,272 acres situate in Athi River is unlawful, null and void.

(b) That a declaratory order is hereby issued that the threatened compulsory acquisition of all that parcel of land known as L.R.No.10425 (I.R.17839) infringes on the 2nd Interested Party’s constitutional right to own land.

(c) That a declaratory order is hereby issued that the threatened compulsory acquisition of all that parcel of land known as

L.R No.10425 (I.R.17839) infringes on the constitutional right to investments and economic rights of the 1st Interested Party and Kenyan workers in the country represented by the Petitioner.

(d) That a declaratory order do issue for protection of the 2nd interested Party parcel of land known as L.R No.10425 (I.R.17839) measuring 4272 acres situate in Athi River.

(e) That a declaratory order is hereby issued that the letters dated 11/07/2019 and 13/08/2019 are unconstitutional and hence invalid.

(f) That a declaratory order is hereby issued against the actions of Respondents for the threatened and compulsory acquisition and the letters dated 11/07/2019 and 13/08/2019 be quashed.

(g) That a conservatory order is hereby issued maintaining the status quo and directing the Respondents jointly and or severally, their servants or other government or statutory bodies from interfering with the 2nd interested Party quiet possession and ownership of property L.R No.10425 (I.R.17839).

(h) That a declaratory order is hereby issued that any action of the Respondents jointly and/or severally that is inconsistent with the constitution be voided to that extent.

(i) Each party shall bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 2ND DAY OF DECEMBER 2021.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. D. Kipkorir advocate for the Petitioner

Mr. Eredi advocate for the Respondents

No appearance for the 1st Interested Party

No appearance for the 2nd Interested Party

Steve Court - Assistant