



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

PETITION NO. 12 OF 2018

(FORMERLY KIAMBU HIGH COURT PETITION NO.16 OF 2018)

**IN THE MATTER OF APPLICATION UNDER ARTICLES 22(1)
AND 23 OF THE CONSTITUTION OF KENYA 2010, FOR THE ENFORCEMENT
OF THE FUNDAMENTAL RIGHTS AND FREEDOMS AND SECTION 75(2) OF THE
CONSTITUTION OF KENYA (REPEALED)**

AND

**IN THE MATTER OF THE DAGORETTI-WANGIGE- NDENDERU ROAD
AND THE CONSTRUCTION OF THE SOUTHERN BY PASS**

AND

**IN THE MATTER OF COMPULSORY ACQUISITION OF THE PROPERTIES KNOWN
AS LAND REFERENCE NUMBERS MUGUGA/GITARU/T.260 AND MUGUGA/GITARU/161**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER ARTICLE 20(2), 21(1), 27, 40(1), 40(3), 47,
50(1) OF THE CONSTITUTION OF KENYA, 2010 AND SECTION 75(1)
OF THE CONSTITUTION OF KENYA (REPEALED)**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOM RULES 2013)**

WANGAI GACHERU.....PETITIONER

VERSUS

THE KENYA NATIONAL HIGHWAYS AUTHORITY.....1ST RESPONDENT

THE NATIONAL LAND COMMISSION.....2ND RESPONDENT

JUDGMENT

By a Petition dated 7th March 2018, the Petitioner herein sought for the following orders against the Respondents herein.

- a. A declaration that the Petitioner's Rights under Articles 40(3) (a), (b), 47(1) and 50 (1) of the Constitution were violated.
- b. A declaration that the purported compulsory acquisition of the Petitioner's land Maguga/Gitaru/161, measuring 1.0 acres and Maguga/Gitaru/T.260, measuring 0.088 hectares was done without due or proper administrative process, full, fair and prompt compensation as was required of it under Article 40 of the 2010 Constitution.
- c. A Declaration that the Petitioner's Rights from deprivation of property under Article 40(2) and his right to acquire and own property in any part of Kenya under Article 40 (1) of the Constitution has been contravened by the 1st and 2nd Respondents.
- d. A declaration that the Petitioner's Right to protection from laws and practices that are discriminatory under Article 27 of the Constitution have been contravened by the Respondents.
- e. A declaration that the 2nd Respondent was under statutory duty to comply with the provisions of the Land Acquisition Act, Cap 295 (repealed) and the Land Act 2012.
- f. A declaration that the 1st Respondent was under a statutory duty under section 9(1) (b) of the Land Acquisition Act, Cap 295 (Repealed) to serve on the Petitioner the Notice of inquiry to enable him prepare a written claim for compensation to be submitted at the inquiry.
- g. A declaration that the actions of the 1st Respondent in failing to serve the Petitioner a notice of inquiry pursuant to sections 9(1) of the Land Acquisition Act, Cap 295 (repealed) denied him a chance to be present and or the right to be heard and therefore violated his right to fair administrative action that is lawful, reasonable and procedurally fair under Article 47 (1) of the Constitution of Kenya 2010.
- h. A declaration that the alleged compensation for Mugua/Gitaru/T.260, as communicated in the 1st Respondent's letter reference No. VAL.200 and dated 11th August 1972, is unjust, null and void as the procedure required by law were not strictly adhered to by the 1st Respondent.
- i. A declaration that the failure and/ or refusal by the 1st Respondent to furnish the Petitioner with a map of and valuation report regarding the specific portions to be excised from the two parcels of land, Muguga/Gitaru/161 measuring 1.0 acres and Muguga/Gitaru/T.260, measuring 0.088, hectares in the compulsory acquisition contravened the Petitioner's Constitutional right to fair Administrative action that is lawful, reasonable and procedurally fair under Article 47(1), of the Constitution of Kenya 2010.
- j. A declaration that the Petitioner's right to have any disputes resolved by application of the law in a fair and public hearing before a court under Article 50(1) has been contravened by the Respondents.
- k. The 1st and 2nd Respondents be ordered to compensate the Petitioner in the tune of Kshs. 45,000,000/= in value for unlawful deprivation of land parcels Numbers Muguga/ Gitaru/161 and Muguga/Gitaru/T.260 and interest thereof.
- l. Costs of this Petition
- m. Such other orders as this Honourable Court may deem fit.

The Petitioner has averred that, he is the registered owner of the two suit properties. That in the early 1970s, the government through the then Ministry of Works, proposed road realignment for the then existing **Dagoreti-Kikuyu, Wangige-Ndenderu Road**, which necessitated acquisition of parcels of lands through which the roads passed. He averred that various gazette notices were published of the intention to acquire the land together with notices of inquiry. He contended that his land, **Muguga/ Gitaru/T.260**, was acquired for the construction of the said road despite it being not among those gazetted for acquisition. Further, that at the time his land was acquired and the road constructed through it, he was serving a jail term and he has never received any payment as compensation for the acquired land. That his efforts to follow up the said compensation have been futile. Further that in the process of constructing the said road, the Respondents unlawfully encroached onto his land being **LR NO Muguga/Gitaru/161**, and the encroachment therefore rendered the land useless for any productive purposes and that he was also not compensated for the said encroachment.

It was his further contention that the said compulsory acquisition of his land and subsequent encroachment without his consent are unconstitutional and a violation of his rights. Further, that the actions of the Respondents amount to compulsory acquisition of property without following the procedures laid down in law and as a result he continuous to suffer loss and damage.

In his supporting affidavit, the Petitioner **Wangai Gacheru**, averred that upon his release from Prison, he found a portion of **Muguga/Gitaru/T.260**, utilisable by road construction and it had been excavated and left with steep sections and gulleys. He also averred

that he engaged an advocate, who wrote to the **Kenya National Highway Authority**, the 1st Respondent herein, vide a letter dated **3rd March 2015**, and the Authority wrote back inviting him and surveyors for a site visit. That when the land was surveyed, the surveyor a **Mr. Munene** placed beacons on the said plot but failed to share with him the report. Thereafter, he lodged a complaint with **The Ombudsman**, who wrote to **Kenya National Highway Authority**, vide a letter dated **18th January 2016**, and by a letter dated **15th June 2016**, the Authority responded to **the Ombudsman**, and attached various documentations. That upon perusal of the documents provided by the **Kenya National Highway Authority**, he established that whereas the Authority stated that **Muguga/Gitaru/T.260**, was not among the gazetted plots earmarked for acquisition and compensation, the people whose plots were acquired thereby were paid and moved to other places upon compensation yet he was not among them. That further the Authority paid a **Mrs Kanyi Gacheru** who was a stranger to him the alleged compensation for **Muguga/Gitaru/T.260**. That the said **Mrs Kanyi** was not on the list of those who were compensated as per the records provided by the **Kenya National Highway Authority**.

He further averred that when the office of **The Ombudsman** sought for clarification, the 1st Respondent wrote to the said office, alleging that a compensation was made and cheques collected by his mother one **Mrs Kanyi Gacheru**, on his alleged instructions. He disputed the various references to his compensation on the grounds that the thumbprint on the documents were not his and that he never consented to the alienation of his land while in Prison. It was his contention that the letters dated **20th September 1972**, and **24th December 1972**, were internal communications and that he was never involved. Further, that upon release from Prison, he obtained a document dated **24th May 1972**, alleging that he had agreed to cede **0.46 acre** of **Muguga/Gitaru/161**, for the construction of the now existing road.

It was his contention that upon release from Prison, he misplaced title deed for **L.R Muguga/Gitaru/ T.260**, and he was **re- issued** with a new one upon following due process. He urged the Court to order that he be compensated as per the valuation report prepared by **Amazon Valuers Limited**, being **Kshs.15,000,000 for L.R T.260, and Kshs. 30,000,000 for L.R 161**.

The Petition is contested and the 1st Respondent filed a **Replying Affidavit**, through **Thomas Gacoki**, Deputy Director, Survey Department, who averred that the Petitioner did not have any legal interest over the suit properties. Further that the only gazette Notice given on **28th January 1972**, was Gazette Notice **No. 231 of 197**, and that when the government decided to acquire land where the road would pass, several gazette Notices were published expressing intention to acquire the said properties which were published including **Gazette Notices No. 2738 and 2739 of 8th October 1971, No. 531 and 532 of 25th February 1972 and No. 231 of 28th February 1972**. Further, that there were instances where the land was acquired through agreements entered into between the owners of land and the Valuers who were acting on behalf of the government to which the suit properties fell under. It was alleged that the title issued to the Petitioner for **parcel No T. 260**, was a bad title as the land had been alienated as a **road reserve** since the early **1970s** and should never have been allocated to an individual. Further that the Petitioner had been compensated through a cheque issued to his nominee **Kanyi Gacheru**, as he was in Prison at that time. That the government then utilized for construction of the **Dagoretti-Kikuyu- Wangige Ndenderu road**. It was also contended that the title issued to the Petitioner on **24th December 2010**, was issued due to non-disclosure of material facts by the Petitioner.

It was further averred that parcel number **L.R 161**, no longer exists as the same was subdivided by the Petitioner into three portions namely **L.R No. Muguga/ Gitaru 1673, 1674 and 1675**, and sold to different proprietors. That only **0.46 acre of L.R 161**, was acquired by the government, vide an agreement dated **24th May 1972**, between **Milligan Company Limited** the Valuer and the **Petitioner**. Further, that the compensation to be paid to the Petitioner was **Kshs.2, 143/=** and the Petitioner agreed that the same was commensurate with the value of the land. That the compensation was paid pursuant to the Petitioner's own declaration through the Superintendent of Prisons at **Shimo la Tewa Prisons**, on **21st August 1972**. It was denied that the Petitioner was prejudiced or that its actions caused any harm or damage as 1st Respondent adhered to all legal and procedural requirements in exercising its mandate. Further that the Petitioner cannot rely on the **2010 Constitution**, for actions that arose on **1972**, when the applicable law was **Constitution of 1963**, and that the Petitioner was guilty of laches as the cause of action arose in **1972**.

The **3rd Respondent**, filed grounds of opposition on **6th November 2018**, and averred that the orders sought by the Petitioner are not tenable. Further that the Court lacks jurisdiction to hear the Petition herein as the dispute is over public land and the same should be referred to the **National Land Commission**. It was contended that the Petitioner's rights under **Article 40(3) (a) (b), 47 (1)** are not absolute but are limited by **Article 24** of the **Constitution**. Further that the Petitioner's rights should be balanced with public interests. It was further contended that the Petitioner has not demonstrated to this Court any breach of his constitutional rights and failed to demonstrate violation of right to fair hearing under **Article 50** of the **Constitution**.

The Petition was canvassed by way of written submissions, which the Court has carefully read and considered.

From the available evidence, there is no doubt in that **early 1970's** the **Government of Kenya** through the Ministry of Works proposed road realignment of **Dagoreti – Kikuyu-Wangige – Ndenderu Road (C63)**. Due to the proposed realignment of the above stated road, there was need for acquisition of land where the road would pass through. This is evident from the pleadings of both the Petitioner and the 1st Respondent.

Further it is evident that several **Gazette Notices** were published expressing the intention to acquire various parcels of land. These notices were **Gazette Notices No. 2738 and 2739 of 8th October 1971, Gazette Notice No.531 and 532 of 25th February 1972 and Gazette Notice No. 231 of 28th January 1972**.

The Petitioner herein has alleged that by then, he was the proprietor of **LR. No. MUGUGA/GITARU/161** and **MUGUGA/GITARU /T260**. From the above Gazette Notices, it is evident that the two parcels of land were not indicated as among the parcels of land that were to be **compulsory acquired** for the purposes of constructing of the stated road. Further, it is not in doubt that a company known as **Milligan & Co. Estate Agents, Valuers and Management Agents** was involved in payment of compensation for the acquired parcels of land. This is evident from the letter dated **15th May 1972**, wherein the said Company addressed the **Commissioner of Lands** on the agreement recorded with some land owners and the amount payable to them. From that said letter the two parcels of land are not listed as among the parcels of land that were compulsorily acquired.

However, there are several correspondences dated within the period of the said compulsory acquisition, showing that the two parcels of land were also considered for compensation. There is a document dated **24th May 1972** showing that **LR. No.161Gitaru** measuring **0.46 acres** was being sold to **Milligan Company**, under the employment of the **Commissioner of Lands** for road expansion. The owner of the land was **Wangai Gacheru**, who is the Petitioner herein and the amount to be paid out as compensation was **Kshs.2143/=**. There were further correspondences showing that **LR.No. MUGUGUA/GITARU/T260**, was also a subject of compensation and the compensation was to **Wangai Gacheru**. It is also not in doubt that during this period of negotiation of the land compensation, the Petitioner herein was incarcerated in Prison for an offence of **Robbery with Violence**. He averred that he was eventually released from Prison in the **year 1985**. The court has seen **WG13** which is a signal from **Naivasha Prisons** indicating that **Joseph Wangai Gacheru**, was released from Prison on **5th December 1985**.

The **1st** Respondent has alleged that when the Petitioner was imprisoned in **1971**, and he erected to have his compensation paid to his mother, **Mrs Kanyi Gacheru**. The Petitioner has alleged that the said **Mrs Kanyi Gacheru**, is a stranger to him and that he was never compensated. However, the court has seen a document dated **21st August 1972** though not very clear indicating that **Wangai Gacheru** had erected **Mrs Kanyi Gacheru** his mother as a recipient of his land compensation money. Several correspondences followed from the **Chief Engineer Roads** and **Commissioner of Lands** and the **District Officer, Kikuyu** on the said issue.

From the said correspondences what is clear is that for **MUGUGA /GITARU/T260**, the amount payable was **Kshs.62/=** and a cheque was to be drawn in favour of **Mrs Kanyi Gacheru** for that amount.

Further for **MUGUGA/GITARU/161**, the amount payable as compensation was **Kshs.2143/=** and the amount was payable to **Mrs Kanyi Gacheru**.

The **1st** Respondent has alleged that the said **Mrs Kanyi Gacheru**, was paid the amount on behalf for the Petitioner herein. The Petitioner has alleged that he did not receive any compensation for his two parcels of land and that he did not authorize anyone to receive any money on his behalf and that **Mrs Kanyi Gacheru**, is unknown to him and is a stranger to him. He thus filed this Petition.

The above are the undisputed facts. However the court finds the issue for determination are as follows:-

- i. Whether the Petition is time barred**
 - ii. Whether the Petitioner is the lawful owner of the suit property**
 - iii. Whether there was compulsory acquisition of the suit properties and if so whether the same was procedurally done.**
 - iv. Whether the Petitioner was duly compensated**
 - v. Whether the Petitioner's Rights were violated under the Constitution.**
 - vi. Whether the Petitioner is entitled to the orders sought.**
- i. Whether the Petition herein is time barred or barred by limitation.**

It is evident that the suit properties were allegedly **compulsorily** acquired in **1970s**. It is also evident that the compulsory acquisition herein was governed by the **Land Acquisition Act, Chapter 295** (now repealed) which came into operation on **23rd August 1968**. The said **Act** gave procedure for compulsory acquisition of land by the Government for various purposes. **Section 8** of the said **Act** provides that:

“Where land is acquired compulsorily under this part, full compensation shall be paid promptly to person interested in the Land.”

The **Act** also contained provisions for Appeals to the High Court in the subsidiary Legislation. **Section 4** of the **Subsidiary Rules** provides that:-

“A memorandum of Appeal shall be presented to the Registrar within thirty days from the date upon which notification in writing (If any) of the decision is question or served upon the applicant but the court may in any case in the interest of justice and for sufficient reason be recorded extend the time or presentation whether or not the time presented this rule has already expired.”

The **1st** Respondent has contended that the instant Petition is **time barred** by **limitation of time** as there was inordinate delay on the part of the Petitioner in bringing this Petition to court. The **1st** Respondent further averred that acquisition was done in **1972** and the Petitioner brought this Petition in **2018** about **46 years**, after the alleged cause of action arose. However the Petitioner contended that this is a **Constitution Petition**, which is never barred by time and that the Constitution of Kenya allows a party to bring a Constitution Petition anytime if the party feels that his/her rights have been violated.

The Petitioner further contended that the alleged **compulsory acquisition** of his parcels of land was done in **1972**, and that by that time he was serving a jail term for an offence of **Robbery with Violence**. However, it is evident that the Petitioner was released from Prison in the **year 1985**. There is no evidence of whether the Petitioner did anything to agitate for his right immediately after coming from Prison. The

Petitioner did produce a letter dated **2001** which showed that a report of boundary dispute was reported to **Kiambu Lands Office**. Even after the **Land Registrar** summoned the parties for the said boundary dispute, there is no evidence availed by the Petitioner to confirm whether the parties appeared before the said **Land Registrar** and what was the outcome of the said meeting. From **1985 to 2001** is a period of **16 years** and the Petitioner has not explained to this court why he did not lodge an appeal at the High Court as stipulated by the **Land Acquisition, Subsidiary Rule No. 4** to advance his case of non-payment of the alleged land compensation.

After **2001**, the Petitioner again did not act until in **2016** when a demand letter was written to the 1st Respondent and later an inquiry by the **office of the Ombudsman**.

From **1985 to 2016** was a period of over 30 years and the Petitioner has not explained what prevented him from filing a Petition then, or appealing under the **Land Acquisition Act, Subsidiary Legislation**. The Petitioner decided to come to court after a decision to construct the **Southern Bypass** had been made.

The Petitioner relied on the case of **Joan Akinyi Kabaselleh & 2 others vs Attorney General (2014)eKLR** where the court held:-

“Although there is no limitation period for filing proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant relief under section 84 of the Constitution, is entitled to consider whether there has been inordinate delay in lodging the claim/. The Court is obliged to consider whether justice will be served by permitting a respondent, whether an individual or the State in any of its manifestations, should be vexed by an otherwise stale claim.”

It is clear from the above decision, that the court needs to consider whether there has been **inordinate delay** in lodging the claim. The court finds that there was indeed **inordinate delay** on the part of the Petitioner herein. Justice is a two way traffic and it must apply to both the Petitioner and the Respondents. This matter was handled by individuals or persons who worked in the Ministry of Lands, Public works and Commissioner of Lands many years ago. It is possible that most of those individuals are no longer working in the said Ministries and some of the documents might be missing or destroyed due to the passage of time. Indeed bringing this Petition after a period of **46 years** from the alleged date the cause of action arose, will occasion injustice on the part of the Respondents herein and is a recipe for anarchy.

When the Petitioner was released from Prison in 1985, he had a chance to appeal the decision of the Commissioner of Lands to the High Court, but he chose not to do so. The court will concur with the findings in the decision quoted by the 1st Respondent. In the case of **Joseph Migere Onoo vs Attorney General, Petition No. 424 of 2013**, where the Court held that:-

“..... A Court must always consider whether the delay in filing a Petition alleging violation of Constitutional rights is unreasonable and prejudicial to a Respondent’s defence.”

Further in the case of **Ochieng Kenneth K’Ogutu vs Kenyatta University & 2 others, High Court Petition No. 306 of 2012**; the court held that:

“The respondent has argued that the Petitioner is guilty of inordinate delay and I am inclined to agree with it. The event complained of took place more than 12 years ago. There is nothing before the court to explain or justify the delay in coming to court to vindicate his rights.”

Equally, in this case, the Petitioner has not explained to the required standard the reasons for his delay in bringing this Petition. He was released from Prison in **1985**, and brought the Petition in **2018**, after a period of **33 years**. That is an **inordinate delay** which has not been explained.

In the above quoted case the court further observed.

“..... A delay of 10 years or more before one comes to court to allege violation of right is clearly not justifiable. As Nyamu J. observed in Abraham Kaisha Kanzika and Another vs Central Bank of Kenya(supra): “Even where there is no specified period of limitation, it is proper for the court to consider the period of delay since the accrual of claim and the reason for the delay. An applicant must satisfactorily explain the delay in this case, a delay of 17 years is inordinate and it has not been explained.”

This Court finds that a delay of **33 years** after the Petitioner came from Prison is inordinate and with no proper explanation.

The Petitioner ignored the enforcement of his right under the **Land Acquisition Act** (now repealed) and he decided to convert his grievances into a Constitutional issue. The Court finds the Petitioner’s action is an after thought and the Respondents stand to suffer. Consequently, the court finds that the Petitioner’s Petition herein which was brought after a period of **46 years**, from time the cause of action arose, or **33 years** after the Petitioner was freed from Prison and was available to come to court is time barred and that delay is inexcusable. The Petition herein is thus found to be time barred.

ii. Whether the Petitioner is the lawful owner of the suit property?

The Petitioner has contended in his Petition that the Government compulsorily acquired his property **MUGUGA/GITARU/T260** in **1972**, but did not compensate him. However, the 1st Respondent has alleged that the said suit property **MUGUGA/GITARU/T260**, was in fact a **Road Reserve**, but when the Government realised that the Petitioner erroneously held a title deed for the said property, he was compensated with **KShs.62/=**, which amount of money was paid to his nominee **Mrs Kanyi Gacheru**.

The Court has seen various correspondences to that effect. It is also evident that when the Petitioner applied for a re-issue of a title deed for the suit property in **2010**, after swearing an affidavit to the effect that the initial title deed got lost when he was in Prison. The Respondents have alleged that the Petitioner misled the **Land Registrar, Kiambu** and that the said land had been compulsorily acquired by the Government of Kenya for construction of the **Dagoreti-Kikuyu-Wangige –Ndenderu Road**.

It is indeed not in doubt that land parcel No. **MUGUGU/GITARU/T260**, was a subject of various correspondences in regard to compulsorily acquisition and compensation. It is evident that the said land parcel could not have been a subject of discussion in the various letters attached to the pleadings herein if it had not been compulsorily acquired. The Petitioner came from Prison in 1985, and in 2001, he complained of a boundary dispute. He did not allege in 2001 that his title deed was lost. He did so in **2010**, after a period of about **25 years**, since he came from Prison.

The Court finds that the Petitioner did plead that his land was compulsorily acquired and that he was not compensated for it. The fact that he acquired the title deed after about **38 years** from the date of the alleged compulsorily acquisition raises doubt to his allegations in the **Kenya Gazette Notice No. 12641 of 22nd October 2010**, wherein he had alleged that his title deed got lost. The Court has all reasons to believe that **LR. No. MUGUGA/GITARU/T260**, was compulsorily acquired by the Government in the year **1972** and that the Petitioner might have fraudulently acquired the title deed for the suit property in **2010**, after misleading the **Land Registrar, Kiambu** that the said title deed was lost. Therefore, the court finds and holds that the Petitioner is not the lawful proprietor of the **MUGUGA/GITARU/T260**.

In respect **MUGUGA/GITARU/161**, the said title is no longer in existence. It was pleaded by the Petitioner that the remainder of the suit property was subdivided into three portions and the resultant subdivisions are title No. **1672, 1673 and 1674** and the same have been transferred to third parties. Since the property No. **MUGUGA/GITARU /161** is not existing anymore, this court cannot hold that the Petitioner is the current proprietor of **MUGUGA/GITARU/161** which is non-existence.

iii. Whether there was compulsory acquisition of the suit properties and if so whether the same was procedurally done.

The Petitioner in his pleadings averred that the Government of Kenya compulsorily acquired **MUGUGA/GITARU/T260**, and portion of **MUGUGA/GITARU/161** but did not compensate him.

The **Land Acquisition Act Cap 295** (now repealed) clearly stipulated the procedure of compulsory land acquisition. There were various **Gazette Notices** annexed to the pleadings and the two parcels of land were not indicated in the said Gazette Notices as some of the parcels to be compulsorily acquired by the Government. However, there is an agreement dated **24/5/1972**, which indicated that the Petitioner had consented to sell **0.46 acres** to **Milligan Company**, and which was a company acting on behalf of the Commissioner of Lands on the issue of the compensation of the compulsorily acquired parcels of land. Further there were several letters which evidenced communication over the issue of compensation for the two parcels of land.

The Petitioner has also confirmed that portion of **MUGUGA/ GITARU/161**, was acquired by the Government. However, the 1st Respondents contended that Land Parcel No. **MUGUGA/GITARU/T260** was a Road Reserve and that was the reason why it was not indicated in the list of parcels of land to be compulsorily acquired by the Government. From the available evidence, there is no doubt that the two parcels of land were compulsorily acquired by the government for realignment of **Dagoreti-Kikuyu- Wangige -Ndenderu Road**.

iv. If they were compulsorily acquired, was the same procedurally done?

The Land Acquisition Act Cap 295 (now repealed) provided for the procedure that was to be followed when land was to be compulsorily acquired. The said land that was to be compulsorily acquired was to be indicated in the Gazette Notices and dates for inquiry were also to be set in the another Gazette Notice. There is evidence that the two parcels of land were not indicated in the Gazette Notices produced in court. However, the 1st Respondent alleged that there were also other agreements entered between the owners of the land and the Company paying out compensation on behalf of the Commissioner of Lands and that the Petitioner's land parcel No. **MUGUGA/GITARU/161**, fell under the said category. Further that land parcel No. **MUGUGA/GITARU/T260**, was a road reserve and the government needed not to compulsorily acquire it. The court has seen the letter that triggered the compulsory acquisition and the alleged compensation of **MUGUGA /GITARU/161**. Though that letter was not any of the procedure of compulsory acquisition provided by Cap 295 (now repealed), the Petitioner did not appeal the said process in 1985 when he came from Prison. However, after the agreement of **25/5/1972**, several correspondences followed in regard to payment of **kshs. 2143/=** for land parcel no. **MUGUGA/GITARU/161**. The court has no reason to doubt that there was a private agreement between the Petitioner and **Milligan Company** for the sale of **0.46 acres** from land parcel no. **MUGUGA /GITARU/161**. Consequently, the court finds that a portion of land parcel no. **MUGUGA/GITARU/161**, was properly acquired by the Government.

On land parcel No. **MUGUGA/GITARU/T260**, the court finds that the 1st Respondent alleged that it was a **Road Reserve** and therefore the Government could not compulsorily acquire it. That the Petitioner had been wrongly issued with a title deed and that is the reason why he was eligible for some compensation of **Kshs.62**. the Petitioner brought his Petition many years after the alleged compensation and the Court would therefore have no reason to doubt the averments made by the 1st Respondent that a number of crucial witnesses and documents could not be traced to ascertain the above allegations due to passage of time and other reasons.

Therefore, this court finds that the two parcels of land were procedurally acquired.

(v) Whether the Petitioner was duly compensated?

It is the Petitioner's allegations that he has never been compensated for the compulsory acquisition of his two parcels of land. It is trite that he who alleges must prove. See **Section 107 & 109** of the Evidence Act.

“107.(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

109. 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. 110. Proof of admissibility.”

Though the Petitioner alleges that he was never compensated, the Respondents, have alleged that he was duly compensated and the money was paid to **Mrs Kanyi Gacheru** his mother as per his choice. There are various correspondences in that regard. The Petitioner alleged that **Mrs Kanyi Gacheru** was not known to him and was stranger to him. However, he did not avail any evidence to confirm that **Mrs Kanyi Gacheru** was not his mother. He is the one who alleged and he had a duty to call evidence to prove his allegations. The Petitioner failed to call that evidence. The Correspondences available show that indeed **Kshs.62/=** and **2143/=** were paid to **Mrs Kanyi Gacheru**, who had been nominated by the Petitioner to collect the money on his behalf. This court has no reason to doubt that the Petitioner herein was duly compensated for the two parcels of land that were compulsorily acquired by the government.

vi. Whether the Petitioner’s rights were violated under the Constitution?

The court found and held that the Petitioner’s claim herein is time barred and thus an abuse of the court process. The Petitioner had a recourse under Cap 295 (now repealed) in **1985**, when he came from Prison. He should have appealed to the High Court under **Rule 4** of the **Subsidiary Legislation**, of **Cap 295** and should have sought for enlargement of time. He failed to do so, but brought this Petition once the construction of **Southern By-pass** was underway. The Court therefore finds this Petition to be an afterthought and an abuse of the court process.

Consequently, the Court finds that the Petitioner’s right were never violated under the Constitution.

vii. Whether the Petitioner is entitled to the orders sought?

Having found that the Petition herein is time barred, is an abuse of the Court process and that the Petitioner’s rights were never violated under the Constitution, the court finds that the Petitioner is not entitled to the orders sought herein.

Consequently, having carefully considered the pleadings herein, the annexures thereto, the rival submissions, the cited authorities and the relevant provisions of the law, the court finds that the Petition herein is not **merited** and the same is dismissed entirely with costs to the Respondents.

It is so ordered.

Dated, Signed and Delivered at Thika this 8th day of April 2020

L. GACHERU

JUDGE

Lucy-Court Assistant

ORDER

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

By consent of :

Mboy Wangong’u & Company Advocates for the Petitioner

Sagana Biriq & Company Advocates for the 1st Respondent

Anne Mwhaki Litigation Counsel for the 3rd Respondent

L. GACHERU

JUDGE