



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 90 OF 2019**

VIJAY LAXMI SHAH.....1<sup>ST</sup> PLAINTIFF

VIMAL BHANUSHANKAR VYAS.....2<sup>ND</sup> PLAINTIFF

KRISHNA VIMAL VYAS.....3<sup>RD</sup> PLAINTIFF

SUDHIR CHANDRA GAJENDRA PATHAK.....4<sup>TH</sup> PLAINTIFF

DHARMESH CHANDULAL SHAH.....5<sup>TH</sup> PLAINTIFF

VERSUS

NATIONAL LAND COMMISSION.....1<sup>ST</sup> DEFENDANT

KENYA NATIONAL HIGHWAYS AUTHORITY.....2<sup>ND</sup> DEFENDANT

KENYA POWER AND LIGHTING COMPANY.....3<sup>RD</sup> DEFENDANT

HON. ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT

**RULING**

1. In the Notice of Motion dated 30<sup>th</sup> July, 2019, the Plaintiff has prayed for the following orders:

***a. That pending the hearing and determination of this suit a temporary order of injunction be issued restraining the Defendants whether by themselves, their servants, contractors, employees and/or agents from encroaching on or gaining access to Land Reference No. 10426/245 and further from interfering in any manner whatsoever with the Plaintiff's quiet and peaceful possession and enjoyment of the said property including carrying out of any road works of whatever nature and any works for the erection of power lines within the property.***

***b. Costs be provided for.***

2. The Application is supported by the Affidavit of the 5<sup>th</sup> Plaintiff who has deponed that the Plaintiffs are the registered proprietor of Land Reference No. 10426/245 measuring approximately 2.176 hectares and situate in Mavoko and that the 2<sup>nd</sup> Defendant has without the consent of the Plaintiffs appointed private contractors who have placed beacons on the suit property earmarking a substantial section of it for the expansion of the Athi River-Mombasa Highway.

3. According to the 5<sup>th</sup> Plaintiff, the section of the suit property earmarked for the said expansion is 0.1123 Ha; that the 3<sup>rd</sup> Defendant has earmarked sections of the same land for the erection of power line infrastructure without the consent of the Plaintiffs and that the purported actions of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are unlawful and amounts to encroachment and trespass.

4. In response, the 1<sup>st</sup> Defendant's Acting Director, Land Valuation and Taxation, deponed that the 1<sup>st</sup> Defendant, pursuant to its mandate under Part VIII of the Land Act, was in the process of acquiring various parcels of land on behalf of the 2<sup>nd</sup> Defendant for the construction of the second carriageway of Athi River -Machakos Turnoff Road Project.

5. According to the 1<sup>st</sup> Respondent's Director, Land Reference No. 10426/245 was among the parcels of land that were to be compulsorily acquired via Gazette Notice No. 9536 of 29<sup>th</sup> September, 2017 and that the 2<sup>nd</sup> Defendant has since written to the 1<sup>st</sup> Defendant stating that it

has revised the road design with minimal land acquisition.

6. According to the 1<sup>st</sup> Defendant's Valuer, the 2<sup>nd</sup> Defendant has also reviewed its land acquisition requirements and forwarded to the 1<sup>st</sup> Defendant a revised schedule and acquisition plan for the project; that L.R. No. 10426/245 is among the parcels of land that the 2<sup>nd</sup> Defendant has amended in its schedule and that the 2<sup>nd</sup> Defendant has instructed the 1<sup>st</sup> Defendant to publish a corrigenda that will reflect the amendment.

7. The Plaintiffs' advocate submitted that if the suit property is compulsorily acquired, then the Plaintiffs are entitled to compensation; that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants trespassed on the suit property and that the actions of the Respondents are unconstitutional. The Respondents' advocate did not file submissions.

8. It is not in dispute that the Plaintiffs are the registered owners of the suit property. According to the Plaintiffs, the Defendants have earmarked a portion of the suit property for the expansion of the road network, and that no acquisition notice has been served on them.

9. The 1<sup>st</sup> Defendant has acknowledged that initially, it had instructions from the 2<sup>nd</sup> Defendant to compulsorily acquire the suit land. However, due to the change of the road design, the acquisition of the Plaintiffs' land has been shelved.

10. The Plaintiffs have exhibited the survey Report showing the extent of the suit property that was to be acquired by the Defendants. If that is so, the Plaintiffs' only recourse is to sue for compensation.

11. I say so because under Article 40 of the Constitution, the Defendants, while exercising the power of Eminent Domain, can acquire private land for public use. The Constitution requires that upon such acquisition, the Plaintiffs will be entitled to prompt compensation.

12. Considering that the acquisition for private land by the Defendants is allowed by the law, the said process cannot be stopped by this court. The Plaintiffs' claim is only limited to compensation, which they should pursue in the main suit.

13. For those reasons, I disallow the Application dated 30<sup>th</sup> July, 2019 but with no order as to costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 15<sup>TH</sup> DAY OF MAY, 2020.**

**O.A. ANGOTE**

**JUDGE**