



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CONST. PETITION NO. 17 OF 2015

JOSEPH MUNYAO MUTUA.....1ST PETITIONER

COSMAS MAKAU MUNYAO.....2ND PETITIONER

VERSUS

HON. ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

1. In the undated Further Amended Petition, the Petitioners averred that they are the grandson and son of the late Munyao Nzeki Ikuku (*deceased*) respectively; that the late Munyao Nzeki Ikuku was the registered proprietor of land known as Machakos/Matuu/6742 (*originally Machakos/Matuu/ 650*) (*the suit property*) and that in the year 1990, the then Commissioner of Police, one Philip Kilonzo, acting on behalf of the Kenya Police Force, arbitrarily took possession of part of the suit property.

2. According to the Petitioners, the said Philip Kilonzo caused to be erected on a portion of the suit property measuring 2.2 Ha Matuu Police Station which was gazetted as such and that the occupation of the said land by the Government has arbitrarily deprived the Estate of Munyao Nzeki the use and enjoyment of the suit land.

3. The Petitioners are seeking for a declaration that the acquisition of the portion of land known as Machakos/Matuu/6742 by the government was unlawful and tantamount to arbitral deprivation of land, which is a violation of the Estate of Munyao Nzeki constitutional right; a declaration that the occupation, retention and detention of the portion of suit property amounts to compulsory acquisition and an order for the payments of Kshs. 50,000,000 being the current value of the occupied land by the Government of a portion of land known as Machakos/Matuu/6742 (*originally Machakos/Matuu/650*), together with interest and *mesne* profits.

4. The Respondent filed Ground of Opposition in which he averred that the issues raised in the Petition cannot be canvassed by way of Affidavit evidence; that the issues raised in the Petition are matters that can only be addressed in a substantive suit on the issue of ownership and that the Petitioners are seeking for compensation for the alleged compulsory acquisition of land, which mandate is within the jurisdiction of the National Land Commission.

5. In the Supplementary Affidavit, the 1st Petitioner deponed that the Petition is properly before the court; that the National Land Commission has not ousted the jurisdiction of this court to grant relief and that the main issue is whether Matuu Police Station was built on private land belonging to the deceased, and if so, whether and what compensation or other remedies should be awarded for the deprivation of property. The Petition proceeded by way of written submissions.

6. The Petitioners' advocate submitted that the late Munyao Nzeki Ikuku (*deceased*) was the registered proprietor of parcel of land known as Machakos/Matuu/6742 which was arbitrarily taken by the Kenya Police; that the Matuu Police Post was erected on the suit property and that the said Police Post was gazetted in the Gazette Notice No. 5958 of 1992.

7. Counsel submitted that the possession of the Petitioners' land was done without prior communication contrary to the provisions of Section 3 of the Land Acquisition Act.

8. Counsel submitted that the Petitioners' title to the suit property has not been challenged; that the actions of the government to develop The Police Station on the suit property without compensation was in total contravention of the Petitioners' constitutional rights enshrined in Article 40(3) of the Constitution and that Article 40(2) of the Constitution provides that a person shall not be arbitrarily deprived of his property.

9. The Petitioners' counsel submitted that under the Land Acquisition Act (*repealed*), where land is acquired compulsorily, full compensation is to be paid promptly and that the procedures set out in the Land Acquisition Act were never followed by the Respondent while acquiring the suit property.

10. Counsel submitted that it is only fair that the Respondent compensates the Petitioners for the unlawful occupation of the suit property; that the market value of the suit property as at 15th April, 2015 was Kshs. 50,000,000 and that had the Respondent not deprived the Petitioners of their property, they would be leasing out the said land for Kshs. 50,000 per month. Counsel submitted that the Petitioners are entitled to *mesne* profits since 1990. The Petitioners' counsel relied on several authorities which I have considered.

11. The Respondent's advocate submitted that there are serious questions of fact which must be determined before reaching a conclusion as to whether the Petitioners' title is a good title and that the issue of the legality of the Petitioners' title cannot be dealt with by way of Affidavit evidence.

12. Counsel submitted that Part II of the Land Acquisition Act (*repealed*), under which the Petitioners are claiming the suit land was acquired, gave the Commissioner of Lands powers to acquire land on behalf of the Government and that under Part VIII of the Land Act, it is National Land Commission that is mandated to acquire land on behalf of the Government. It was submitted that the National Land Commission took over the functions of the Commissioner of Lands as far as acquisition of land for public purpose is concerned and that the National Land Commission should have been sued.

13. In the amended Petition, the Petitioners have averred that parcel of land known as Machakos/Matuu/6742 was owned by the late Munyao Nzeki, and that the said land was arbitrarily acquired by the Kenya Police in 1990. According to the Petitioners, the acquisition of the land by the Government without compensation infringed on their right to own property, and where the land is compulsorily acquired, they should be compensated promptly.

14. According to the Petitioners, the late Munyao owned parcel number Machakos/Matuu/650 which was later sub- divided to create various portions, including the suit property; that prior to the acquisition of the said property by the government, there was no preliminary notice indicating that the government intended to recover the land for the construction of a Police Station in accordance with the provisions of the Land Acquisition Act and that the Matuu Police Station has been constructed on his land. The Petitioners are seeking for the following orders:

a) A declaration that the acquisition of the occupied part of L.R. No. Machakos/Matuu 6742 (originally Machakos/Matuu/650) by the Government was unlawful, tantamount to an arbitral deprivation of land and was a violation of Munyao Nzeki Ikuku's constitutionally guaranteed right under Article 40(3) (a) and (b).

b) A declaration that the said occupation, retention and detention of the occupied part L.R. No. Machakos/Matuu 6742 (originally Machakos/Matuu/650) amounts to compulsory acquisition.

c) A declaration that any continued occupation of the said portion of the suit land without compensation amounts to unlawful acquisition contrary to Article 40(3) of the Constitution.

d) An order for the payment of Kshs. 50, 000,000 being the current value of the occupied part of L.R. No. Machakos/Matuu 6742 (originally Machakos/Matuu/650) with interest thereon at prevailing Central Bank rates from the date hereof till payment in full or in the alternative, the Estate of Munyao Nzeki Ikuku-deceased be restored possession of its land in the same condition as it was when it was unlawfully acquired by the Government.

e) An order that the Respondent to pay its mesne profits from the date of occupation until restoration or in the alternative, the Respondent to pay interests at Commercial Rates on the prevailing market value from 1990 to date of payment.

15. The Petitioners produced in evidence the Title Deed for land known as Machakos/Matuu/6742 measuring 11.47 Ha which was issued on 7th April, 2015 to the late Munyao Nzeki Ikuku. The Petitioners also exhibited a Valuation Report dated 15th April, 2015 which shows the value of the portion of the suit property where Matuu Police Station is situated measuring approximately 2.2 Ha. The value of the said land is stated to be Kshs 50,000,000.

16. The Petitioners have alleged that a portion of the suit property was compulsorily acquired in 1990. The law applicable for the Petitioners' claim is the repealed Constitution and the Land Acquisition Act (*repealed*) whose preamble provides as follows:

“An Act of Parliament to make provision for the compulsory acquisition of land for the public purpose.”

17. Section 8 of the Act provided that where land is acquired compulsorily, full compensation shall be paid promptly to all persons interested in the land. The process of acquiring land compulsorily was to be commenced by the Commissioner of Lands, which office was replaced by the National Land Commission under the Land Act, 2012.

18. Indeed, under Section 10 of the repealed Land Acquisition Act, it was the Commissioner of Lands who had the sole mandate of preparing an Award of Compensation, and every Award was to be filed in his office. The process of filing Appeals against the decision of the Commissioner of Lands was provided for under the Land Acquisition (*Appeals to the High Court*) Rules. Rule 4 provided as follows:

“(4) In the Memorandum the Commissioner of Lands shall in the first instance be named as a Respondent to the Appeal.”

19. The Commissioner of Lands was key in all matters pertaining to compulsory acquisition of land on behalf of the Government. That is why he had to be a Respondent in any dispute relating to an allegation that the land, although acquired by the government, had not been paid for or that the payment is inadequate. A suit could not have succeeded without suing the Commissioner of Lands.

20. When the Land Act came into force in the year 2012, the National Land Commission, which is an independent Commission, took over the functions of the Commissioner of Lands in matters relating to compulsory acquisition of private land for public purpose. Section 107(1) of the Land Act provides as follows:

“(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 public land to the Commission to acquire the land on its behalf.”

21. At Section 125 of the Land Act, it is the National Land Commission that is mandated to pay full and just compensation to all persons interested in the land. The National Land Commission is therefore the only body that can respond to the issues raised in the current Petition. Indeed, it is only the National Land Commission, having taken over from the Commissioner of Lands, that can pay any form of compensation in the event the court finds that the Petitioners are entitled to compensation for the land where Matuu Police Station has been constructed.

22. The Petitioners should have therefore sued the National Land Commission. Considering that the orders of this court are meant to bind the National Land Commission, then it will be absurd for the court to make orders against a party without hearing a party. Such an order will be unconstitutional and not binding at all.

23. To the extent that the Petitioners did not join the National Land Commission in this Petition, I find the Petition to be unmeritorious. For those reasons, the Petition is struck out with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 15TH DAY OF MAY, 2020.

O.A. ANGOTE

JUDGE