



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION. NO. 241 OF 2016**

**MARGARET WANJIRU MBURU**

**ELIZABETH WAMBUI MBURU**

**SALOME NJOKI MBURU**

**ANTHONY SABATO GACHIGI**

**ZAINABU WANJIRU GACHIGI**

**JOSEPH ZAMBETAKIS**

**EDITH KURIA GATHONI.....PETITIONERS**

**VERSUS**

**THE NATIONAL LAND COMMISSION.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This undefended Petition was commenced by beneficiaries of the late Rahab Wanjiru Evans (“the deceased”) who at the time of her demise was registered as the proprietor of all that property known as Land Reference Number 209/11540 (“the subject property”).
2. The Petition concerns the alleged compulsory acquisition by the Respondent of the subject property on behalf of the office of the Deputy President with the Petitioners faulting the process.
3. The Petitioners seek orders to compel the Respondent to produce the letter of request made by the office of the Deputy President for the acquisition. The Petitioners also seek orders to compel the Respondent to make a full and just compensation for the compulsory acquisition of the subject property. The Petitioners ask that the payment be made into court.

**Background facts**

4. The deceased was allocated the subject property on 1 November 1991 by the Respondent’s predecessor. In 2000, following the deceased’s demise in the same year the deceased’s beneficiaries got engaged in litigation involving the administration, and ultimate distribution of the deceased’s estate. The

Petitioners were involved. The subject property was listed as part of the estate. The court battle ended in the Court of Appeal and the subject property was ordered to be sold and the net purchase price to be shared equally amongst the beneficiaries. Pursuant to the order for sale, the court directed the valuation of the subject property to be undertaken and a valuation was eventually returned. The value given on 18 February 2015 was Kshs. 760,000,000/=.

5. On 11 June 2015, the Respondent gave a notice of intention to acquire the subject property. The notice was published in the Kenya Gazette of 15 June 2015. The Respondent then quickly proceeded to fence off the subject property but made no payments to the Petitioners or the beneficiaries of the estate of the deceased by way of compensation.

### **Petitioners' case**

6. The Petitioners contend that the Respondent has violated their right to property as enshrined under Article 40 of the Constitution. The Petitioners also contend that the Respondent has infringed on their right to information in so far as the Respondent has failed to disclose or avail to the Petitioners the relevant communication in the form of written correspondence by the office of the Deputy President to the Respondent. The Petitioners are finally wary of the fact that the subject property and not justly or fully compensate the Petitioners.

### **Petitioners' submissions**

7. The Petitioners' case was urged by Mr. Githui through the written submissions filed on 16 November 2016.

8. The Petitioners' counsel argued that the process of compulsory acquiring the subject property was rife with irregularities and not in accordance with the legal provisions. Counsel contended that under the law, the Respondent could not publish a notice of compulsory acquisition and proceed so shortly thereafter to take possession. Counsel referred the court to the case of **Patrick Musimba –v- National Land Commission & 4 others [2016] eKLR** which laid out the procedure for compulsory acquisition. It was the Petitioners contention that the Petitioners were not only entitled to a full disclosure of the information relating to acquisition of the subject property but also to a prompt payment of the full and just compensation as per the already undertaken valuation.

9. The Petitioners urged for the court's intervention in the circumstances to protect their rights to information and to property.

### **Discussion and Determination**

10. Two issues emerge for discussion and determination.

Firstly has the Respondent violated the Petitioners right to property and right to information. Are the Petitioners entitled to the reliefs sought in any event.

11. The Petitioners argued that the Respondent has acted arbitrarily in denying them information showing or confirming that the office of the Deputy President sought for the acquisition of the subject property. Secondly, the Petitioners also contended that the Respondent acted arbitrarily in acquiring the subject property. The Petitioners affidavit evidence is that the Petitioners' requested information from the Respondent but was denied. The Petitioners through the 1<sup>st</sup> Petitioner also deposed that the Respondent has taken possession of the subject property by fencing it off prior to compensating the Petitioners.

12. I must first point out that the Petitioners' claim was not pleaded with all the requisite particularity as was laid out in the case of **Anarita Karimi Njeru v Republic [1980] KLR 154**. The Petitioners, apart from Article 40 made no reference to any other Article of the Constitution. It was however relatively clear that the Petitioners were urging the court to also enforce rights under Article 35 of the Constitution and I will deal with the rights enshrined under this Article first.

13. Article 35 of the Constitution provides for and guarantees the right of a citizen to information. The Article provides that every citizen has the right of access to information held by the state or by another person required for the exercise or protection of any right or fundamental freedom. It is a right recognized by international conventions as well: see Article 19 of the Universal Declaratory of Human Rights. The right of access to information seeks to embed a culture of accountability, responsiveness and openness in governance and shed off secrecy and unresponsiveness by the state: see **Nelson Havi & 8 others v Inspector General of Police & 5 Others [2016] e KLR**. Consequently, disclosure of information or free access to information should always be the rule and not the exception: see **Nelson Havi & 8 Others v Inspector General of Police & 5 Others** and also **M & G Media Ltd & 2 Others v 2010 Fifa World Cup Organizing Committee S.A Ltd & Another [2011] 2ACC 210**.

14. In **Nairobi Law Monthly Ltd v Kenya Electricity Generating Company & 2 Others [2003] eKLR**, in laying out the guide for enforcement of the right of access to information, Mumbi J stated that to be entitled to an order that right of access to information has been infringed a citizen must show that the information sought was with or in the possession of the person stated to have denied access to the information; secondly, that it had been requested for and denied and; thirdly, that the information is required for purposes of protecting or exercising a right or fundamental freedom.

15. The Respondent is an independent commission established pursuant to the provisions of Chapter five of the Constitution. It is enjoined by the Constitution as well as the National Land Commission Act, No. 5 of 2012 to manage public land on behalf of the national and county governments. It is also enjoined under the Land Act No. 6 of 2012 to take charge of and conduct any compulsory acquisition of private land by the county or national governments: see s. 107 of the Land At. In the course of performing the latter function statute stipulates that the acquisition process will be ignited by way of a request made by the cabinet secretary or County Executive Committee Member. The Respondent may then reject the request upon reasons or accept the request and publish a gazette notice to that effect in both the County and National Gazettes.

16. Privately owned land may only be acquired by the state after following due process and as provided for under Article 40(3) of the Constitution. Private land may thus only be acquired if the acquisition is “in accordance with the Constitution and any Act of Parliament”. Under the Constitution the state may only deprive a person of property if the deprivation is for a public purpose or in the public interest and a public purpose or in the public interest and the state makes prompt payment in full, of just compensation to the person deprived. Under the relevant statute, being the Land Act, the Respondent is the state agency mandated to undertake the acquisition once prompted by the department of government (through the cabinet secretary) seeking the acquisition.

17. The Respondent is involved in a pre-inquiry stage of receiving the request for acquisition, ascertaining the proprietor of the property, verifying the survey delineations of the property and inspecting the property to ascertain its suitability for the purpose for which it is acquired once satisfied that the acquisition is viable the Respondent is to publish in the gazette a notice of intention to acquire the property.

18. Neither the Constitution nor the land Act contemplates the involvement of any other party at this preliminary stage (up till the gazette Notice). The gazette notice is however, in my view an invite to the public including the registered proprietor to get involved in the process of acquisition.

19. It is a common cause that in the instant case the Respondent gazetted the intention to compulsorily acquire the subject property on 15 June 2015. The acquisition it was stated was on behalf of the office of the Deputy President. The Petitioners state that the reasons for the acquisition do not meet the constitutional threshold that is to say that the acquisition is not for a public purpose or in the public interest and for this the Petitioner seeks further information from the Respondent through the court.

20. While I am satisfied that for the purposes of a more transparent and accountable governance approach by the Respondent information in the nature of a request by a cabinet secretary for acquisition of private property ought to be disseminated to the public and especially the registered proprietor, such information

ought to be availed only upon request by a party and also once the Respondent has communicated its reliance upon such request. The communication as to reliance is evident when the Respondent issues a gazette notice of the intention to acquire as happened in this case. The Respondent opens itself to scrutiny when it publishes the gazette notice indicative of the intention to acquire as effectively the Respondent in depicting reliance upon a request.

21. In the instant case, I am satisfied that the document sought is with the Respondent. I am also satisfied that the Respondent has no reason not to avail it. However, there is no evidence before me that the Petitioners have ever requested the Respondent to supply them with the document in question. In my view, the Petitioners have prematurely sought the courts assistance and support. The Respondent is a public body and I see no reason why the Petitioners made no formal and recorded attempt to obtain from the Respondent the request by the office of the Deputy President for the Respondent to put in motion the process of compulsorily acquiring the subject property.

22. It brings me to the second issue as to whether the Petitioners are in any event entitled to the reliefs sought.

23. By reason of the fact that I have found that the Petitioners never requested for the information they now want availed to court, I see no reason why the court ought to be made the first stop for information availability. An attempt to obtain or access the information from the body in possession must be shown before the court intervenes and in this case there is no evidence of any such attempt.

24. The Petitioners also sought an order for the Respondent to make payment in full and justly in compensation and based on the valuation by the government valuer.

25. I however, did not hear the Petitioners to suggest that the Respondent has failed or refused or neglected to compensate the Petitioners. If they had, it would have been a different take. I hasten to point out that on the issue of compensation, the Constitution speaks volumes. No private property is to be compulsorily acquired without a prompt, just and fair compensation. The instant case would be no exception. The Respondent must promptly compensate the estate of the deceased and or its beneficiaries once the process of compulsory acquisition is completed. I see no reason to however make an order to like effect given that the process is still ongoing. Instead, I would state that I expect that the Respondent shall strictly adhere to all the relevant provisions of both the Constitution and the Land Act in the process of compulsorily acquiring the subject property.

### **Conclusion and Disposal**

26. I am satisfied that the Respondent is in the process of acquiring the subject property. I am however not satisfied that the Respondent has acted contrary to the provision of the Constitution as well as the relevant statute law. I am also satisfied that the Petitioners are entitled to access the information in the form of the request from the office of the Deputy President for the compulsory acquisition of the subject property. I am however not satisfied that the Petitioners have established that their respective rights to access the information have been violated. There was no evidence of request by the Petitioners of the stated information or documents and a subsequent refusal or neglect by the Respondent.

27. In the result, the Petition ought to fail and I dismiss it but with no order as to costs.

**Dated, signed and delivered at Nairobi this 9th day of June, 2017.**

***J.L.ONGUTO***

**JUDGE**