



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC PETITION NO. 713 OF 2016**

**IN THE MATTER OF ARTICLES 19, 20, 21, 22, 23 AND 24 OF THE CONSTITUTION OF KENYA 2010.**

**AND**

**IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS AS ENSHRINED UNDER ARTICLES 40 AND 47 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE REGISTERED LAND ACT CAP 300 (REPEALED)**

**AND**

**IN THE MATTER OF THE LAND ACT, 2012**

**AND**

**IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT, 2012**

**AND**

**IN THE MATTER OF COMPULSARY ACQUISITION OF LR NO. 1279/73 BLOCK 97/33 AND LR NO. 12790/74 BLOCK 97/32**

**BETWEEN**

**MOHAMED ABDI OSMAN.....PETITIONER**

**AND**

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

**JUDGEMENT**

1. This is the petition dated 23<sup>rd</sup> June 2016 brought by Mohamed Abdi Osman (**“hereinafter referred to as “the petitioner”**). The petitioner states that he is the registered owner of all those parcels of land known as LR No. 12797/73- Block 97/33 and LR No. 12797/74- Block 97/32 situated within Nairobi County (hereinafter referred to us **“the suit properties”**).

2. The petitioner is a Kenyan citizen who enjoys protection of all fundamental rights and freedoms as an individual as enshrined under chapter four of the Constitution of Kenya, 2010. The respondent is the constitutional body charged with overseeing compulsory acquisition of private land and facilitating adequate compensation as stipulated in Section 111 of the Land Act, 2012.

3. It is the petitioner’s case that the properties are jointly known as “Hamza Apartments” and are situated along Outer Ring road. The respondent vide a gazette notice dated 22<sup>nd</sup> January 2016 purported to revoke the petitioner’s title to the suit properties among several other titles, in order to surrender seven (7) meters to Kenya Urban Roads Authority for construction of a transport corridor. The government of Kenya is undertaking a major reconstruction of the Outer Ring road in a bid to expand its capacity and ease decongestion in Nairobi.

4. It is further the petitioner's case that the respondent has abdicated its statutory and constitutional responsibilities of compensating the petitioner and all other parties whose parcels of land have been acquired or are to be acquired for purposes of construction of the Outer Ring road as dictated by both the constitution and the law.

5. The reliefs sought are:-

**(a) A declaration that the petitioner's fundamental rights and freedoms as enshrined under Articles 40(1), 40(2) (a), 40(3) (b) (i), 47 (1) and 47(2) of the Constitution of Kenya 2010, have been contravened and infringed upon the 2<sup>nd</sup> and 3<sup>rd</sup> respondents herein.**

**(b) An order compelling the respondent to fast-track due and just compensation for the compulsory acquisition his property comprising of all land parcels known as LR No. 12797/72 – Block 97/33 and LR No. 12797/72 Block 97/33 Nairobi County.**

**(c) General, exemplary and aggravated damages under Article 23(3) (e) of the Constitution of Kenya 2010 for the unconstitutional conduct of the 2<sup>nd</sup> respondent.**

**(d) Any other orders and directions as this honourable court may consider appropriate in the circumstances.**

**(e) Costs of this petition.**

**(f) Interest on (d), (e) and (f) above.**

6. The petition is supported by the affidavit of Mohamed Abdi Osman, the petitioner herein sworn on the 23<sup>rd</sup> June 2016. He deposes that he is the registered proprietor of the suit properties situated along outer Ring road on a lease hold term for a term of 99 years with effect from 4<sup>th</sup> January 1980. That the two parcels are adjacent to each other. He has constructed three Blocks of five stoney residential and commercial buildings known as "Hamza Apartments" comprising of six shops, fourteen one bedroom apartments and forty two, two bedroom apartments, all jointly fetching a monthly income of Kshs.2,000,000 in rent. He further deposed that he had charged the suit properties to Gulf African Bank as security for a loan of Kshs.90,000,000/- registered on 26<sup>th</sup> October 2012 and varied on 14<sup>th</sup> January 2013.

7. Further that vide a gazete notice dated 22<sup>nd</sup> January 2016, the respondent purported to revoke his (petitioner's) titles in order to surrender 7 metres to Kenya Urban Roads Authority for construction of a transport corridor. He deposed that he is entitled to just and adequate compensation for the portion of his private land acquired by the government for its use.

8. The suit properties are private properties and are not on any road reserve and/or public utility. They are mainly residential and the excision of the 7 metres has affected their usage as the entire parking lot has been hived off causing tenants to move out *en masse* and as such the properties have been rendered idle and inhabitable.

9. He further deposed that vide a letter dated 4<sup>th</sup> February 2016, he wrote to the respondent pursuant to section 122 of the Land Act requesting that the respondent acquires the entire parcel of land as the partial compulsory acquisition had rendered the remaining land inadequate for its intended use and the acquisition had severely and disproportionately reduced the value of the remaining land. The respondent has remained unresponsive.

10. In response to the respondent's replying affidavit, the petitioner swore a further affidavit, on the 4<sup>th</sup> July 2019. He depones that the respondent is the constitutional body that is tasked with being the intermediary between him and the acquiring body and by dent of the gazette notice published on 22<sup>nd</sup> January 2016, purported to revoke his title. Further that the time the title to the properties was being revoked by the respondent he was the registered proprietor and as such compensation for acquisition of the property should go to him.

11. The petition is opposed. There is a replying affidavit sworn by Brian Ikol, the Deputy Director Legal Affairs and Enforcement of the respondent, sworn on the 14<sup>th</sup> February 2019.

12. He deposed that for compensation to be paid, the acquiring body has to forward the necessary funds as envisaged in Article 40 of the constitution, section 107(1) and III (1A) of the Land Act, 2012 to the commission for onward transmission to the affected individuals. Thus the respondent can only pay the compensation after the funds are made available to it and if not, its hands are tied.

13. Any claim for compensation following compulsory acquisition of property should also include the acquiring body since it is the one providing the compensation funds. In this case Kenya Urban Roads Authority should have been enjoined in this petition. Further that even if compensation was owed, the funds have yet to be forwarded by Kenya Urban Roads Authority and as such the respondent is unable to pay.

14. The petitioner does not have *locus standi* because he is not the registered owner. According to documents held by the Ministry of Lands, Nairobi Registry, the suit properties were put up for sale by public auction by the chargee Gulf African Bank Limited. The same were eventually sold by Garam Investments Auctioneers to Dorothy K. Jemator who was the highest bidder.

15. He further deposed that records indicate that a transfer by the chargee in exercise of power of sale transferred the leasehold interest from Mohamed Abdi Osman to one Samuel Mwangi Makome dated 22<sup>nd</sup> August 2016 and registered on 1<sup>st</sup> September 2016. The results of official search indicate that Samuel Mwangi Makome is the proprietor of the suit property. Samuel Mwangi Makome then charged the suit property to Gulf Africa Bank in a charge dated 25<sup>th</sup> August 2016 and registered on 1<sup>st</sup> September 2016. The petitioner therefore has no *locus standi* and the petition is an abuse of the court process and ought to be dismissed with costs.

16. On the 29<sup>th</sup> November 2018 the court with the consent of the parties directed that the petition be canvassed by way of written submissions.

### **The Petitioners submissions**

17. They are dated 24<sup>th</sup> January 2019 and filed on 25<sup>th</sup> January 2019. He also filed supplementary submissions dated 4<sup>th</sup> July 2019 and filed on 8<sup>th</sup> July 2019. The submissions raise four issues for determination:-

- (i) *Whether the respondent acquired the suit properties.*
- (ii) *Whether the constitutional and statutory provisions relating to compulsory acquisition were adhered to.*
- (iii) *Whether the acquisition amounts to arbitrary deprivation of private property.*
- (iv) *Whether the petitioner is entitled to compensation as sought in the petition.*

18. To the first question counsel referred to the gazette notice dated 22<sup>nd</sup> January 2016 and stated that it amounts to a clear communication of the decision reached by the respondent to acquire seven (7) metres each from the two properties. In respect of the second issue counsel cited Part VIII of the Land Act, more particularly Section 107, 111, 113 on the procedure of compulsory acquisition. He has put forward the case of **Patrick Kusumba vs NLC & 4 Others [2016] Eklr.**

19. On the third issue, counsel cited Article 40(2) of the Constitution and the Blacks Law Dictionary 9<sup>th</sup> Edition 2009, page 119 which defined the word "arbitrary" to mean something or a decision founded on prejudice or preference other than reason or fact. The respondent's actions have proven prejudicial as they lack reason and are capricious in nature. Reliance was placed on the case of **Mtana Lewa vs Kahindi Ngala Mwangandi [2015] Eklr.** That by issuing the gazette notice in accordance with section 107 and 110 of the Land Act, the respondent should have conducted due diligence by investigating the title and that sections 113-119 dictate that the National Land Commission shall make compensation for every person determined to be interested in the land which to date has not been done by the respondent.

20. Section 120 (1) forbids the government from taking possession without compensating the owner of the land unless it is of urgent necessity. Compulsory acquisition falls in the ambit of administrative action hence regulated by Article 47(1) and (2) of the Constitution. That the respondent has not given any reason written or otherwise to justify the arbitrary deprivation of the suit property without justification. He has put forward the case of **Republic vs National Police Service Commission exparte Daniel Chacha [2016] eKLR.** Counsel argued that the respondent has not projected proper procedure and their act is therefore unprocedural and unconstitutional. He has put forward the case of **Rutongot Farm Limited vs Attorney General & 3 Others [2014] Eklr.**

21. On the fourth issue counsel opined that it is not in doubt that the suit properties are private properties and not in a road reserve. It is also not in doubt that the said properties were acquired by the respondent to facilitate the construction of outer ring road. He has put forward the case of **Arnacherry Ltd vs Attorney General [2014] eKLR** and stated that compensation can be done two fold; it may be a monetary award or land in lieu of monetary award and where an award is accepted it should be promptly paid by the National Land Commission. Where it is not accepted the payments should be made into a special compensation account held by the National Land Commission in accordance with Section 114 (2) of the Land Act. Further that there exists an overreaching right to compensation that is not only guaranteed under Article 403(b) (i) of the constitution but also under section 111 of the Land Act. That no person under the constitution should be deprived of his property unjustly. He relied on the case of **Horn vs Sunderland Corporation [1941] I ALL ER 480** in relation to compensation in compulsory acquisition. The right to just compensation is an in alienable right and it is only just and fair that the respondent compensates the petitioner.

22. In his supplementary written submissions, the petitioner asserts that the respondent's replying affidavit signed by Brian Ikol on 14<sup>th</sup> February 2019 is defective as it was not commissioned by a commissioner for oaths which is contrary to the provisions of the oaths and statutory declaration Act, Cap 15. That at the time of the gazettement of the revocation of the petitioner's titles and compulsory acquisition of his property, he was the legal and registered proprietor. In the plaint dated 31<sup>st</sup> August 2016 in ELC 1053 of 2016 between himself and Gulf African Bank and Another, the petitioner has categorically stated that it is as a result of acquisition of his properties and the unlawful excision of 7 metres that he failed to service his loan and the bank exercised, its statutory power of sale.

23. The suit was eventually compromised and parties agreed that the suit properties revert back to the petitioner. Thereafter Samuel Mwangi Makome duly executed transfers of the properties to the petitioner's name. The petitioner has an absolute right to be compensated for the acquisition of his property.

24. The respondent as the intermediary body between the owner of the property and the acquiring body, Kenya Urban Road Authority has failed and/or neglected to exercise its statutory duty to compensate the aggrieved party. Section III (1A) of the Land Act, can only be relied on as part of the wholesome procedure under part VIII of the Land Act. Payment of compensation by the acquiring body cannot be done in isolation. The respondent has not shown any justifiable reason for not complying with the statutory provisions. It has not demonstrated that it made any efforts in requesting for funds from the acquiring body to compensate the affected parties.

### **The Respondent's submissions**

25. They are dated 3<sup>rd</sup> April 2019. They raise three issues for determination:-

- (i) ***Whether the petitioner has locus standi.***
- (ii) ***Whether the petitioner is entitled to compensation.***
- (iii) ***Whether the suit property was properly acquired.***

26. On the first issue the respondent's submitted that the petitioner is neither the legal nor the registered owner of the suit properties as shown by the documents in the land registry. The land was transferred to Samuel Makome on 22<sup>nd</sup> August 2016 in exercise of the statutory power of sale by the chargee. The petitioner has no proprietary interest and no locus standi. It was noted that the suit was filed on 23<sup>rd</sup> June 2016 and the sale by auction was on 20<sup>th</sup> July 2016. Though the petitioner had proprietary interest at the time of filing suit, he was relieved of the same shortly thereafter.

27. On the second issue, citing Article 40 of the constitution, the respondent's counsel contended that to seek protection, one has to prove that he is the legal owner of the affected property and or that they acquired the same lawfully. The respondent has provided documents showing that the petitioner is not the lawful owner of the suit properties and as such he does not meet the conditions set out under article 40. He is therefore not owed any protection under it.

28. On the third issue, it was asserted by the petitioner that the property was lawfully acquired in accordance with section 107(1) of the Land Act. The National Land Commission acquired the land on behalf of Kenya Urban Roads Authority which is an agent of the National Government. Since the National Land Commission acquired the land on behalf of an acquiring body it logically follows that the acquiring body will then forward the sums required to compensate the affected parties, to the commission so that it may pay them promptly as is provided under section 111(1)(A) of the Land Act, 2012.

29. The petitioner should have enjoined Kenya Urban Roads Authority, since that agency is crucial to this case given that the land was acquired on its behalf and it is the one that is meant to provide the requisite compensation.

30. I have considered the petition, the supporting affidavit and the annexures. I have considered the replying affidavit, the annexures and the written submissions filed on behalf of the parties together with the authorities cited. The issues for determination are:-

- (i) ***Whether the petitioner has locus standi.***
- (ii) ***Whether the suit properties were properly acquired.***
- (iii) ***Whether the petitioner is entitled to compensation.***

31. Before I delve into the issues, I first wish to observe that the replying affidavit sworn by Brian Ikol, the Deputy Director Legal Affairs and Enforcement of the Respondent is duly filed on 12<sup>th</sup> March 2019. However I note that the same is not commissioned as required by the Oaths and Statutory Declarations Act. The same is filed together with the submissions dated 14<sup>th</sup> March 2019 to which the petitioner has responded to, by filing supplementary submissions dated 4<sup>th</sup> July 2019. Under Article 159 (2) (d) of the Constitution, this court is obligated to administer justice without undue regard to technicalities. It is for this reason that this court finds that it is in the interest of justice to rely on the said replying affidavit rather than to expunge it from the court record. I therefore find that no prejudice will be occasioned to the petitioner if this affidavit is relied on as it is.

32. **Article 40 (3)** of the Constitution of Kenya 2010 provides that:-

***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.***

33. It is not in dispute that the respondent published vide gazette notice dated 22<sup>nd</sup> January 2016 a notice to the effect that the titles to the suit properties were revoked and 7 metres surrendered for a transport corridor. The respondent is the body that is vested with the mandate to compulsorily acquire land required for public purpose or public use on behalf of the national and county government upon request.

34. It is the respondent's contention that the petitioner lacks *locus standi* to institute this petition. The reason being that he is not the registered owner of the suit properties as claimed in the petition. It is not in doubt that the petitioner charged the suit properties to Gulf African Bank as security for a loan of Kshs. Ninety Million (Kshs.90,000,000). The charge was registered on 26<sup>th</sup> October 2012 and varied on 14<sup>th</sup> January 2013.

35. It is also not in doubt that the suit properties were sold by public auction on 20<sup>th</sup> July 2016 by M/S Garam Investments on instructions from the Bank. A certificate of official search annexed to the affidavit of Brian Ikol and marked annexure “B12” shows that the registered proprietor of the suit properties is Samuel Mwangi Makome with effect from 1<sup>st</sup> September 2016. The same were charged to Gulf African Bank Limited as security for a loan of Kshs.70,000,000 on 25<sup>th</sup> August 2016. The charge was registered on 1<sup>st</sup> September 2016. The petitioner has shown a further affidavit dated 4<sup>th</sup> July 2019 to which he has annexed a transfer dated 22<sup>nd</sup> May 2019. There is an alleged transfer to the petitioner for consideration of kshs.35,000,000 on 25<sup>th</sup> March 2019. The said transfers are not registered. It is clear that the petitioner has failed to demonstrate that he is the registered proprietor of the suit properties. He therefore does not have proprietary interests hence he has no locus standi to bring this petition.

36. The statutory framework for compulsory acquisition is founded under Part VIII of the Land Act No. 6 of 2012. **Section 107(1)** of the Land Act, provides that:-

***“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.”***

37. In the instant petition, the respondent was acquiring land on behalf of the Kenya Urban Roads Authority. Section 111 of the Land Act 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.***

***(A) The acquiring body shall deposit with the Commission the compensation funds in addition to survey fees, registration fees and any other fees before acquisition.”***

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

38. It is clear from Section 111 (1A) of the Land Act that the acquiring body shall deposit with the respondent the compensation funds in addition to survey fees, registration fees and any other fees before acquisition. In view of this, the petitioner ought to have enjoined Kenya Urban Roads Authority as a party to this petition since the land was acquired on its behalf and it is the one meant to provide the requisite compensation funds. The respondent on its application dated 5<sup>th</sup> August 2019 sought to enjoin Kenya Urban Roads Authority to this petition. This application was dismissed for in attendance upon the prayer by the petitioner’s counsel.

39. Be that as it may, I find that failure to include Kenya Urban Roads Authority as a party to this petition is fatal to the petitioner’s case. It was important for Kenya Urban Roads Authority to confirm that it had already deposited the funds with respondent and the respondent has refused and or neglected to pay. As things stand the petition cannot succeed against the respondent. In a nut shell the case against the respondent cannot succeed as it is. I find that the petitioner is not entitled to the compensation.

40. The upshot of the matter is that the petition is dismissed. I order each party to bear own costs.

It is so ordered.

**Dated, signed and delivered in Nairobi on this 30<sup>th</sup> day of September 2020.**

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Muchoki for Ms Asli for the Petitioner

No appearance for the Respondent

Kajuju - Court Assistant