



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 186 OF 2013

BETWEEN

SHALEIN MASOOD MUGHAL.....PETITIONER

AND

ATTORNEY GENERAL1ST RESPONDENT

MINISTER FOR ROADS2ND RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY3RD RESPONDENT

CHINA ROAD AND BRIDGE CORPORATION 4TH RESPONDENT

THE CHIEF ENGINEER MINISTRY OF ROADS5TH RESPONDENT

THE COMMISSIONER OF LANDS6TH RESPONDENT

JUDGMENT

Introduction

1. This is another case concerning land situated along the Mombasa Nairobi Highway. The issue for consideration is whether the petitioner's constitutional guarantee to the protection of his property was violated by the State when it constructed a road over his property without invoking the process of compulsory acquisition.

Background facts

2. The basic facts giving rise to this case are set out in the various depositions filed by the parties. The petitioner has filed an affidavit in support of the petition sworn on 18th March 2013 and a further affidavit sworn on 25th July 2013. The 3rd respondent relies on the affidavit of Thomas Gicira Gacoki, the Manager-Survey sworn on 13th May 2013 and a further affidavit of Eliud Munene, a Surveyor, sworn on 16th December 2013. The 6th respondent has filed a replying affidavit sworn on 15th July 2013 by Edwin Munoko Wafula, a Land Registrar.

3. The petitioner is the registered proprietor of a parcel of land known as of LR No 209/12258 (Grant No. IR 90629) measuring 0.1176 of a hectare (“the suit property”). The property is an undeveloped plot which abuts the Nairobi-Mombasa Highway and runs parallel to the road for a distance of 45.9 meters. It is located next to the proposed Nairobi Southern Bypass interchange with Mombasa Road at the junction of Mombasa Road-Likoni Road which is the take-off point for the proposed southern bypass.
4. The petitioner purchased the property in the year 2005 from Peter Njuguna and Beatrice Wairimu who had been issued with the original Grant I.R Number 90629 from the President. On 5th May 2005 a valid transfer was registered against the title in the name of the petitioner. Since he purchased it, the petitioner has been in possession of the said L.R No.209/12258 and has been paying land rent and rates.
5. According to special condition No. 5 of the grant, the user of the suit property is for shops, offices and/or flats. The petitioner avers that in 2010, he obtained approval to build offices and penthouse apartments on the suit property from the City Council of Nairobi
6. The 4th respondent is a construction company contracted to construct the Nairobi-Mombasa Highway. It was awarded the contract on 15th November 2010 and ordered to commence works on 29th June 2012 for a period of 36 months. The contractor is currently preparing to start construction of the interchange on the Mombasa Road with the Nairobi Bypass. As a result the contractor has been constructing a deviation on Mombasa Road for diversion of traffic which passes through the suit property.
7. In February 2013, the 4th respondent entered the suit property without notice and began construction of a slip road connecting the main Mombasa Highway. In the course of construction, it started excavating soil from a part of the land, bringing stones and crushing them on the land leading to the petitioner to file this petition.
8. On 31st July 2013, during the hearing of the matter, the parties agreed to conduct a joint survey of the suit property to ascertain the exact location of the suit property, the location of the road reserve, the nature and extent of the encroachment of the road reserve, if any, the extent of encroachment by the 3rd respondent and relevant facts necessary to the determination of this suit. Consequently the joint survey was carried out by Daniel Mukiri of the Director of Survey and Evans Maghas of Toplands Engineering Survey appointed by the petitioner. In their report dated 27th November 2013, the surveyors made the following finding; *“Parcel No. 209/12258 abuts the Mombasa Highway and the plot is undeveloped. The tarmac road runs alongside the parcel of Land LR No. 209/12258 for a distance of 46. The area of the parcel taken up by the road is 470.12m² (0.047 Ha. Approx). This leaves a balance of 0.0696 Ha. on the parcel. However, the said balance still falls on the road reserve as pointed out in the background information. It is therefore our conclusions that a portion of LR No. 209/12258 measuring 0.047 ha. falls on the carriage-way while the remaining portion measuring 0.0696 Ha. falls on a road reserve.”*

Petitioner’s Case

9. The petitioner’s case is founded on the grant of the suit property issued to him by the State. He submits that the grant constitutes a contract between him and the State, represented by the Commissioner of Lands (“the Commissioner”), and is bound by the conditions set out therein. He avers that his ownership of the suit property entitles him to quiet and exclusive possession and use consistent with its terms. The petitioner contends that the use of a portion of the suit property as a slip road, bridge or road expansion is not permitted by the grant and as a result the action of the respondents is a breach of the terms upon which the grant was issued. The petitioner cites the case of ***Fletcher v Peck 10 U.S. 87 (1810)*** where the United States Supreme Court, in invalidating a statute repealing a statute pursuant to which land grants were issued, held that the grant was a contract between two parties and imposed obligations on both parties.

10. The petitioner also submits that he is the indefeasible owner of the suit property by virtue of the provisions of **section 23** of the **Registration of Titles Act (Repealed)**. Under the said provision, the Certificate of Title issued by the Registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof and the title of that proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which he is proved to be a party. The petitioner avers that he is a purchaser of the suit property for value without any notice of any defect in title and as the government approved the transfer and issued him with a title without any encumbrances, caveats and/or restrictions, it cannot take away his rights to the property without due process. He maintains that he is entitled to protection of the Constitution since he purchased the property and has been paying land rent and city rates.

11. Counsel for the petitioner, Mr Dar, cited the case **Fletcher v Peck (Supra)** and **Kuria Greens v Registrar of Titles and Another Nairobi No. 107 of 2010[2011]eKLR** to support that proposition that even if the title to the suit property is defective, it could only be dispossessed by due process. Counsel submitted that the State could only extinguish the petitioner's rights by paying full and prompt compensation through the process of compulsory acquisition of the suit property or by filing a suit in the High Court challenging the petitioner's title and await its determination one way or another. The petitioner submits that short of these processes, the respondents' action of forcefully taking over the suit property is a violation of his property rights guaranteed by **Article 40** of the Constitution. The petitioner further submits that the suit property has not been acquired by the State under any law permitting acquisition of land. Counsel cites the case of **Commissioner of Lands v Coastal Aquaculture Limited KLR (L&E) 264** where the court held that land could only be acquired by the State through procedures provided by the **Land Acquisition Act (Repealed)**.

12. The petitioner further contends that the respondents violated **Article 47(1)** of the Constitution which entitles every person to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The petitioner also draws support for his case from **Article 50(1)** of the Constitution which guarantees every person the right, " ... to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body." The petitioner submits that he ought to have been called upon to explain how he acquired the suit land before the land was forcefully taken. The petitioner also avers that as a title holder, his legitimate expectation was violated by the respondents' actions. Counsel cited **R v Devon County Council ex parte Baker [1995] 1 ALL ER**.

13. In the petition dated 18th March 2013 seeks the following reliefs;

- a. *It be declared that the respondents have contravened the petitioner's right to property under Article 40(1) and (3) of the Constitution.*
- b. *It be declared that the respondents have committed trespass to land.*
- c. *A permanent injunction restraining the respondents from permitting the said slip road from Mombasa Road to Likoni Road to pass across the said L.R No.209/12258.*
- d. *A permanent Injunction restraining the respondents from interfering with the petitioner's quiet enjoyment of L.R No.209/12258.*
- e. *A permanent injunction restraining the 2nd to 5th respondents whether by themselves, their servants or agents from entering into, being on, excavating and taking away soil from or bringing stones and rushing them on the said L.R No.209/12258.*
- f. *General and exemplary damages.*

IN THE ALTERNATIVE:

- g. *The petitioner be paid full and just compensation of market rates for the acquisition of the property known as L.R No.209/12258 by the Government of the Republic of Kenya.*

h. *Costs of the petition.*

1st, 2nd, 5th and 6th Respondent's Case

14. The 1st, 2nd, 5th and 6th respondents (“the respondents”) deny violation of the petitioner’s right to the protection of his property. The respondents’ case is that the suit property is on a road reserve. They aver that the Government acquired the 88m road reserve for Mombasa Road in the early 1970’s of which part of the suit property occupies a buffer zone.
15. The respondents rely on a letter reference No. VAL/ 241/11 dated 5th December 1972 from the Commissioner to John Burrow and Partners, the Consulting Engineers, confirming that LR No. 11308 previously known as Villa Franca Dairy Farm had been acquired by the Government and that road construction could proceed. The respondents fortify their position that the suit property is a road reserve and buffer zone by the findings of the joint survey. The respondents submit that in light of the acquisition, the suit property cannot be compulsorily acquired a second time.
16. The respondents’ counter the petitioner’s contention that the fact of payment of land rent and rates confers or supports his case that he is the registered proprietor of the land. Counsel cited the case of ***David Murungi Muboroki v Chief Conservator of Forests and Others HC Misc. Appl. No. 27 of 2006 (Unreported)*** to support this argument.
17. The respondents contend that the petitioner is not a bona fide purchaser without notice of the irregularities in the title to the suit property. They aver that it is probable that he knew and has always known that suit property is public road as it has remained undeveloped since he purchased it. Further, that as the suit property was on a public road reserve, which is an overriding interest, it was not necessary to note such interest on the register. Counsel for the respondents, Mr Motari, submitted that such an interest would normally operate to qualify the indefeasibility of a registered proprietor’s title.
18. In the written submissions, the respondents allude to a report of the Nairobi Town Planning Liaison Committee Report of the Sub-Committee on Mombasa Road Buffer Zone prepared in 1995 which recommended that development of plots on the buffer zone and critical areas of the interchange be disallowed. In relation to the suit property, the Committee found that the suit property wholly located within the interchange reserve and that there was no evidence of any part development plan on which the allocation was made, the Committee urged the Commissioner to make further investigations on the issue.
19. The respondents also refer to Ndungu Commission Report 2004 to impugn the petitioner’s case. They aver that the petitioner purchased the suit property when the Report publicly exposed numerous instances of illegal land allocations to individuals and corporations of government land of which it recommended repossession and restoration of the lands for purposes for which they were intended. They submit that since the report is a public document and accessible to all, it is evident that the petitioner did not exercise due diligence and he cannot therefore claim that he was a bona fide purchaser for value without notice to defects in the title.

3rd Respondent's Case

20. The 3rd respondent is a statutory body mandated under the ***Kenya Roads Act, 2007*** to perform amongst other functions construct, upgrade, rehabilitate and maintain national roads under its control. The 4th respondent works under its control and direction.
21. The 3rd respondent makes the same arguments as the other respondents that the suit property is part of a road reserve and a buffer zone and was therefore not available for allocation. As a practical matter, Mr Gacoki depones that the suit property forms part of the embankment during the construction of the interchange and will provide challenges of access, making developments in

this plot inaccessible.

22. Counsel for the 3rd respondent, Mr Wang, cited the case of *Cycad Properties Limited & Another v Attorney General & 4 Others Nairobi Petition No. 69 & 70 of 2010 [2013]eKLR* and submitted that it is not the duty of the court to inquire into whether or not the acquisition process undertaken in the 1970's was done in accordance with the law. The validity or otherwise of that process could only have been questioned and determined within the time frame specified in the *Land Acquisition Act (Repealed)* and by the parties from whom the land was being acquired. The 3rd respondent therefore submits that to the extent that the petitioner's title has encroached on the road reserve and a buffer zone, it is defeasible and the petitioner is not entitled to protection under **Article 40** of the Constitution.
23. Mr Wang also relied on the case of *Niaz Mohammed v Commissioner of Lands and Others Mombasa HCCC No. 423 of 1996 [1996] KLR* where the court held that land acquired for public purposes could not be alienated, transferred or used in any other way other than for the purpose for which it was acquired. He further cited *Veronica Njeri Waweru and Others v City Council of Nairobi Nairobi Petition No. 58 of 2011[2012]eKLR* where the Court held that public interest demands that land meant for use as a public road reserve should be used for the purpose intended and should not be appropriated for private use.

Determination

24. I have set out the essential facts necessary for resolution of this matter. The issue for consideration is whether the petitioners' right to property protected under **Article 40** have been violated by the respondents.
25. The petitioner's proprietary right is located in the title to the suit property issued under **section 23** of the *Registration of Titles Act (Repealed)* which gives the petitioner special protection by conferring indefeasibility. This provision has been replicated in the **section 26(1)** of the *Land Registration Act, Act No. 3 of 2012*. The petitioner's position finds support in several cases of our courts; *Wreck Motors Enterprises v The Commissioner of Lands and Others Nairobi Civil Appeal No. 71 of 1997 (Unreported)*, *Nairobi Permanent Markets Society and Others v Salima Enterprises and Others Nairobi Civil Appeal No. 185 of 1997 (Unreported)* and *Joseph N K arap Ng'ok v Justice Moijo ole Keiwa and Others Nairobi Civil Application No. NAI 60 of 1997(Unreported)*. In short, the petitioner's case is that he is entitled to protection of **Article 40** and his land cannot be taken arbitrarily without compensation. He contends that the act of entering and constructing the road over his property amounts violation of his constitutionally protected right.
26. The respondents' case is that the petitioner's title is illegal as the land is a part of a road reserve and buffer zone acquired in the 1970 for the purposes of construction of Mombasa Road. As such the property was not available for allocation and the petitioner is not entitled the protection afforded by **Article 40** of the Constitution. The respondents further contend that the petitioner had notice of irregularities and is not a bona fide purchaser of the land entitled to benefit from the court's protection.
27. The issue for consideration in this respect is whether the suit property was the subject of land acquisition in the 1970s. The petitioner's title is impugned on the basis that the land was acquired in the 1970's as part of a road reserve. The evidence of such acquisition is the letter reference No. VAL 241/11 dated 5th December 1972 which confirmed that certain land for the Mombasa Road had been acquired. The Commissioner in that letter noted, "I am now in the process of compulsorily acquiring the whole of Villa Franca Dairy Farm (LR 11308) for future urban development and I will let you know as soon as this is completed." The respondents rely on this letter as evidence of that the suit property was compulsory acquired.
28. Mutungi J., in *Eunice Grace Njambi Kambi Kamau and Another v Attorney General and*

Others Nairobi ELC No. 976 of 2012 (Unreported) dealt with the issue of proof of compulsory acquisition. He observed that, “*In my view and having regard to the provisions of the Land Acquisition Act (now repealed) the Government has an obligation to execute the process of land acquisition to finality to effectuate title acquisition. The Commissioner of Land and the Land Registrars have duties and obligations which they are required to execute to ensure land is properly documented and protected. I believed that the intention of the elaborate process and procedure set under the Land Acquisition Act*”

29. I agree with the position taken by the learned judge as the provisions in ***Land Acquisition Act (Repealed)*** set out an elaborate process for acquisition of land. **Sections 17, 18, 19 and 20** of the **Act** provide for survey of the compulsorily acquired land and vesting in the Government. The procedures require that appropriate notice be given to the Registrar of Lands and the fact of acquisition noted on the land register to serve as a notice to all persons dealing with the land. This procedure, the Court of Appeal held in ***Commissioner of Land v Coastal Aquaculture Ltd (Supra)***, must be adhered to strictly (See also ***Onyango and Others v Town Council of Awendo (Supra)***).
30. In this case only evidence of the acquisition is a letter by the Commissioner expressing an intention to acquire the property. The Commissioner, as the custodian of land documents, has not provided any gazette notice or any notice showing that the Government took possession of the land and that the property has vested in it in accordance with the ***Land Acquisition Act (Repealed)***. As the Commissioner is the custodian of these documents nothing would have been easier than to furnish them to the Court.
31. Since there is no evidence that the acquisition was completed, the argument that there was an overriding interest is not helpful to the respondents. In this respect, the decision of Mumbi Ngugi J., in ***Cycad Properties Ltd v Attorney General and Others (Supra)*** where she held that compulsory acquisition where established is an overriding interest and that the Court cannot inquire into the legality of the acquisition is distinguished on that basis. I am once again in agreement with Mutungi J., in ***Virenda Ramji Gudka and 3 Other v Attorney General [2014]eKLR*** where he stated, “*Rights of compulsory acquisition are conferred by specific provisions of the law being Article 40 of the Constitution and sections 107 and 133 of the Land Act, Act No. 6 of 2013 which replaced the provisions previously contained in the Land Acquisition Act ... These provisions have to be complied with for the rights of acquisition to crystallise.*”
32. In this case the respondents have not proved that the acquisition was completed. In such circumstances, would the petitioner, a purchaser have knowledge that the property had been vested in the government after compulsory acquisition? The petitioner was the second owner of the property and the transfer in his favour was duly registered by the same government that wishes to assert the position that the title is illegal.
33. As the petitioner is the title holder he is entitled to the protections of **section 25(1)** of the ***Land Registration Act, Act No. 3 of 2012*** and he the absolute and indefeasible owner and under **section 26** of the Act his title can only be challenged on the ground of fraud or misrepresentation to which he has to be proved to be a party or if it is shown he acquired the title illegally, unprocedurally or through a corrupt scheme.
34. The provisions of **section 26(1)** of the ***Land Registration Act*** fall within the rubric of **Article 40(6)** which provides that, “***The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.***” [Emphasis mine] I also hold that a finding of “*unlawful acquisition*” referred to in **Article 40(6)** of the Constitution must be through a legally established process. Repossession of the property cannot be by any other process other than that established by the law and which meet the basic requirements of due process. (See ***Isaac Gathungu Wanjohi and Another v Attorney General and Others Nairobi Petition No. 154 of 2011[2012]eKLR***)

35. The respondents have referred to the finding of the Nairobi Liaison Committee and the Ndung'u Report. Unfortunately, these reports were only introduced in the submissions and have no value in the proceedings. Nevertheless, the Constitution requires that a finding of 'unlawful acquisition' be done through a process established by law for that purpose and not by Committee or the Commission of Inquiry. These bodies do not have the power or authority to make a determination regarding the legality of the petitioner's title.

36. It has been established that the petitioner's property is on a road reserve and a buffer zone. But this fact cannot be laid at the feet of the petitioner and even if there was a tinge of illegality, the respondents were required to follow due process consistent with the provisions of **Articles 40(6), 47(1) and 50** of the Constitution. The action of the respondents proceeding onto the land, excavating it and constructing a road on it, without a modicum of due process, is I find and hold is a violation of the petitioner's fundamental rights and freedoms.

Reliefs

37. Having found in favour of the plaintiff, what then is the relief that is available to the petitioner? **Article 23** gives this court broad power to fashion a remedy depending on the facts of the case.

38. The road has already been constructed as such the grant of injunction would not assist the petitioner. But for the violation I have found, the property would have been acquired in accordance with the provision of the **Land Acquisition Act (Repealed)**. As regards damages, the petitioner has neither pleaded nor proved any special damages to enable the court assess the nature and extent of the loss. The petitioner has contended that he applied and was granted building approval but this, of itself, does not assist his case for damages. The petitioner has not demonstrated that he had mobilized resources or taken any concrete steps to realize his plans. Neither has he pleaded and proved the amount spent on developing the building plans.

39. I conclude that the proper course to award the petitioner the value of the land which has been taken without following the procedure for compulsory acquisition. I direct that the valuation of the land shall be carried out in the matter contemplated by the **Land Act** and the procedures applicable shall apply. The process shall be commenced within 21 days from the date hereof.

Disposition

40. The final order are therefore as follows:

- a. It is hereby declared that the respondents violated the rights of the petitioners under **Articles 40, 47(1) and 50(1)** of the Constitution by taking possession of LR No. 209/12258 and constructing thereon the slip road from Mombasa Road to Likoni Road.
- b. The petitioner shall be compensated for the acquisition of **LR No. 209/12258** in accordance with the **Land Act** and the procedures set out there in shall be commenced within 21 days from the date hereof.
- c. The 2nd respondent shall bear the costs of the petition.

DATED and DELIVERED at NAIROBI this 17th day of March 2014

D.S. MAJANJA

JUDGE

Mr Dar instructed by Tariq Khan and Associates Advocates.

Mr Motari, Litigation Counsel, instructed by the State Law Office for the 1st, 2nd, 5th and 6th respondents.

Mr Wanga instructed by Waweru Gatonye and Company Advocates for the 3rd respondent.