



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**CONSTITUTIONAL PETITION NO. 9 OF 2020**

**SOFIA KASSIM SALIMU.....PETITIONER**

**AND**

**THE CHIEF LAND REGISTRAR, MOMBASA ..... 1<sup>ST</sup> RESPONDENT**

**THE NATIONAL LAND COMMISSION.....2<sup>ND</sup> RESPONDENT**

**THE KENYA NATIONAL HIGHWAY AUTHORITY ..... 3<sup>RD</sup> RESPONDENT**

**CHINA ROAD AND BRIDGE COMPANY LIMITED .....4<sup>TH</sup> RESPONDENT**

**RULING**

(Application seeking inter alia mandatory orders of payment of compensation for land compulsorily acquired and injunction to stop construction of a road designed to pass through the suit land which is the same land that was compulsorily acquired and mandatory orders to compel the Land Registry to issue a replacement title; the authorities insisting that compensation can only be paid to petitioner upon submitting the original title and proof of ownership of the land; applicant claiming that the title is lost and she has prepared documents for a replacement title to be issued but the Land Registry has failed to reissue title; assessment of the evidence demonstrates that there are serious questions to be addressed on whether or not the land is actually owned by the petitioner; court cannot make an order for compensation or reconstruction of the land parcel file based on the material presented in the application; mandatory orders can only be made where the case is very clear; on whether or not to grant an injunction, applicant can be compensated by way of damages as the money for compensation is already available and is earning interest; public interest outweighing the private interest of the applicant; application dismissed)

1. The application before this court is that dated 18 March 2020 filed by the petitioner alongside the petition. The application seeks the following orders :-

- i. Spent (a certification of urgency)
- ii. Spent (interim orders pending hearing of the application)
- iii. There be a temporary injunction restraining the respondents by themselves, their servants and whomsoever from utilizing, excavating, fencing off, constructing, taking possession, transferring to themselves, demolishing the petitioner's storey house standing on Plot No. MN/VI/2398 and/or in any other matter (sic) dealing with part of that parcel of land more specifically known as Plot No. MN/VI/2398 pending the hearing and determination of this petition.
- iv. An order of mandamus and/or mandatory injunction do issue against the Chief Land Registrar Mombasa compelling him to register the deed of indemnity dated 14<sup>th</sup> August, 2019, reopen a parcel file and issue the Petitioner with an official search in respect of Parcel No. MN/VI/2398.
- v. An order of mandamus and/or mandatory injunction do issue against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents compelling them to pay the Petitioner the due compensation of KShs. 83,260,000.00 as per the award dated 4<sup>th</sup> June 2018, the non issuance of an official search by the 1<sup>st</sup> Respondent notwithstanding.
- vi. Costs be awarded to the Petitioner.

2. The application is opposed by the 3<sup>rd</sup> respondent.

3. In the petition, the petitioner has described herself as “an awardee” in respect of the compulsory acquisition of part of Plot No. MN/VI/2398 (hereinafter referred to as the suit land or the suit property). She has pleaded in the petition that the suit property is registered in the names of her great grandfathers Juma Bin Salim Bin Juma and Abdulla Bin Salim Bin Juma, as the Trustees of the Wakf of Salim Bin Juma Muhunzi and belongs to the estate of Kassim Salim Juma (deceased) and administered by his widow Hadija Kassim Salimu as one of the legal administratrix. It is pleaded that a grant of letters of administration was issued in Mombasa High Court Succession Cause No. 165 of 2014 on the 22<sup>nd</sup> day of October 2015 to Hadija Kassim Salimu and Zuhura Kassim Salim and was confirmed on the 5<sup>th</sup> November 2015 wherein the petitioner was named as one of the beneficiaries of the estate of Kassim Salimu Juma. It is pleaded that vide Kenya Gazette Notices No. 1388 and 1389, of 17 February 2017 and 176 of 12 January 2018, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents (National Land Commission and Kenya National Highways Authority, respectively) compulsorily acquired part of the suit land for purposes of constructing the Mariakani-Mombasa Road Project in Mombasa County, which construction works are being undertaken by the 4<sup>th</sup> respondent (China City Construction Group Company Limited). It is pleaded that public hearings to identify those to be compensated were held. It is averred that one of the administrators of the estate of Kassim Salim Juma, Zuhura Kassim Salim, was deceased at the time the grant was confirmed, and the surviving administratrix, Hadija Kassim Salimu, is of advanced age, and given that position, the latter donated to the petitioner a power of attorney who then stepped into the shoes of her grandmother. It is averred that premised on that backdrop, the petitioner was identified as the awardee of the developments and land in respect of part of the suit property that was compulsorily acquired and she was duly issued with two awards dated 4 June 2018 for KShs. 3,726,000.00 and KShs. 83,260,000.00 for the development/structure and the land respectively. It is averred that the award for the development/structure has since been settled and the only outstanding award is for the land, which the 2<sup>nd</sup> and 3<sup>rd</sup> respondents maintain that they cannot pay without proof of ownership of the land by way of an official search. It is pleaded that through her advocates, the petitioner submitted an application for an official search on 14 August 2019, but the same was unsuccessful, as the 1<sup>st</sup> respondent (the Land Registrar, Mombasa) advised that the parcel file for the suit land could not be traced at the land registry in Mombasa. It is pleaded that the petitioner presented and duly paid for a deed of indemnity to enable reconstitution of the parcel file but the Land Registrar declined to register the deed of indemnity. It is pleaded that the suit property was initially administered by the Wakf Commissioners, prior to the settlement of the Wakf of Salim Juma Muhunzi, and the original certificate of title cannot be traced. It is said that the same has been reported as lost and an abstract for the said loss issued. It is claimed that despite exhibiting the copy of the said abstract in the affidavit in support of the deed of indemnity, the 1<sup>st</sup> respondent insists that the petitioner ought to avail the original certificate of title. It is said that the last time a search was conducted was on 24 April 2013, when a certificate of official search was issued to the petitioner. It is pleaded that the 1<sup>st</sup> respondent is duty bound to issue the petitioner with a certificate of official search and if the parcel file cannot be traced then proceed to reconstitute it. It is pleaded that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have already issued the petitioner with a notice of eviction and the 4<sup>th</sup> respondent is at an advanced stage of the road construction works and that once they take possession of the property, the petitioner and members of her family will be rendered homeless, and without any source of income as there are tenants on the land.

4. In the petition, the petitioner has asked for the following orders :-

- a. A declaration due (sic) issue that the compulsory acquisition of the petitioner’s land without just compensation is a violation of her constitution rights under Articles 40,47,43,27, 28 f the Constitution of Kenya, 2010.
- b. A declaratory order to issue to the effect that the petitioner is entitled to be compensated for the compulsory acquisition of Plot No. MN/VI/2398.
- c. An order of mandamus and/or mandatory injunction do issue to compel the 1<sup>st</sup> respondent to register the deed of indemnity dated 14<sup>th</sup> August 2019, reconstitute the parcel file for Plot NO MN/VI/2398 and issue the petitioner with a certificate of official search for the suit property.
- d. An order of mandamus and/or mandatory injunction to compel the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to pay the sum of KShs. 83,260,000.00 to the petitioner being the compensation justly and fairly due to her for the compulsory acquisition of part of parcel No. MN/VI.2398 as per the award dated 4<sup>th</sup> June 2018.
- e. In the interim, an injunction order do issue restraining the respondents, by themselves, their servants and whomsoever from utilizing, excavating, fencing off, constructing, taking possession, transferring, demolishing the petitioner’s storey house standing on Plot No. MN/VI/2398 and or other manner dealing with part of that parcel of land more specifically Plot No. MN/VI/2398 until this suit is heard and determined.
- f. The costs of this petition be provided for.

5. The supporting affidavit to the application is sworn by the petitioner. She has more or less reiterated what is in the petition. She has annexed a copy of the confirmation of grant of the estate of Kassim Salim Juma dated 19 September 2019, a copy of a Power of Attorney donated to her by Hadija Kassim Salimu as administratrix of the estate of Kassim Salim Juma Muhunzi; a settlement deed dated 22 March 2009 of the Wakf of Salim Juma Muhunzi; the grant of letters of administration to the estate of Kassim Salim Juma issued to Zuhura Kassim Salim and Hadija Kassim Salimu dated 22 October 2015; the Gazette notices for compulsory acquisition; copies of the awards for compulsory acquisition; a letter from the Chief of Mikindani location; an acknowledgement form and account details for payment of the compensation funds which she averred she gave the 2<sup>nd</sup> and 3<sup>rd</sup> respondents; demand letters demanding payment; copies of application for search of 4 July 2019; copies of the deed of indemnity and payment receipts for the same; abstract of loss of the title; the official search of 24 April 2013 which is said to have been the last time the search was done over in respect of the suit property; a copy of eviction notice issued by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

6. She has deposed that she stands to lose prime property without due compensation contrary to Article 40 of the Constitution and she stands to suffer irreparable loss.

7. So far, only the 3<sup>rd</sup> respondent has filed documents in respect of the 3<sup>rd</sup> petition and in respect of this application. The replying affidavit is

sworn by Daniel Mbuteti, a Senior Surveyor working with the 3<sup>rd</sup> respondent (KENHA). He has deposed that the 3<sup>rd</sup> respondent is tasked with the responsibility of developing, rehabilitating, managing and maintaining all national trunk roads comprising classes S,A and B. He has deposed that the Government of Kenya through the 3<sup>rd</sup> respondent is in the process of constructing and dualling the Mombasa- Mariakani road. He is aware of the process of compulsory acquisition and has averred that this was done procedurally and within the ambits of the law. He has averred that the suit land was among those to be acquired and he has deposed that it is the National Land Commission (NLC) which is responsible for acquiring land on behalf of the Government. He is aware of the Gazette Notices for the acquisition of the suit land. He has deposed that the 2<sup>nd</sup> respondent carried out due diligence to establish the ownership of the suit land and having completed its inquiry awarded the sum of KShs. 83,260,000/= to the petitioner. He has deposed that prior to the commencement of the road construction, there was a change in road design at the section where the road touches the suit land. The effect was to reduce the acreage to be acquired from 0.3775 to 0.3664 Ha. He has said that the petitioner was informed through a Corrigendum Gazette Notice No. 5266 published on 22 May 2018 and now the amount of compensation fell to KShs. 75,090,601.25/=. He is aware that KENHA transferred this money to the NLC for onward transmission to the petitioner. He has annexed a copy of a letter forwarding the money and a bank deposit slip for it. He has deposed that the award was forwarded to the NLC since the ownership of the suit land had not been ascertained and the petitioner had not submitted all the necessary documents to complete the compensation process. He has deposed that the 2<sup>nd</sup> respondent has been able (probably meant not able) to ascertain the ownership of the parcel of land making it difficult for it to pay out the compensation. He is aware that the 2<sup>nd</sup> respondent issued a notice to take possession and vesting on 17 January 2020 requiring the petitioner to vacate the suit property within 30 days and granted access to the 3<sup>rd</sup> respondent to the site to commence construction works. He has averred that the petitioner is required to deliver the original title to prove ownership which she has failed to do to enable processing of payment. He has stated that the money in issue is now held in a special compensation account awaiting proof of ownership.

8. I need to say that when the matter came before me in the first instance, I questioned the capacity of the petitioner to file this suit. I noted that she is not the administrator of the estate of the deceased owner of the suit land and neither does she hold a power of attorney from the beneficiaries. To address this, a supplementary affidavit was filed sworn by one Mzee Salim Kassim. He has deposed that he is sibling to the petitioner who is their eldest sister. He has deposed that his siblings have always respected the decision of their grandmother, Hadija Kassim Salimu's decision to grant the petitioner a power of attorney in respect of the suit land. He has deposed that indeed, the petitioner has been representing their grandmother and themselves in all cases in respect of the deceased estate and he has mentioned the succession matter and the cases Mombasa ELC No. 289 of 2016 and Constitutional Petition No. 5 of 2017. He has averred that his siblings have similarly consented to and authorised the petitioner to institute this petition on their behalf. He has annexed a letter of authority. He has deposed that KENHA has increased the acreage for compulsory acquisition yet no payment has been made save for the sum of KShs. 3,726,000.00. He has deposed that the only remaining storey house is in the name of the petitioner and that it will soon be demolished in which event they will be rendered homeless and destitute hence the need to expedite payment of the award of KShs. 83,260,000.00.

9. I invited counsel to file written submissions which they did. The submissions of Ms. Shariff, learned counsel for the petitioner, however appear to be submissions filed in respect of the petition itself rather than this application. They have not been of much use in helping me make a decision on this application. Ms. Sinana, learned counsel for the 3<sup>rd</sup> respondent, on her part submitted that the project is funded and any delays will impose a tax burden on the public. She submitted that public interest overrides private interests. She submitted that the failure by the petitioner to prove ownership of the suit land should not inconvenience the public. She submitted that because of failure to prove ownership, the money was properly placed in a special account, pursuant to Section 115 of the Land Act. She submitted that the application before court is for a mandatory injunction and relief should only be granted on a clear case. She referred to the cases of *Kenya Breweries Ltd & Another vs Washington O. Okeyo (2002) eKLR*; *Locabail International Finance Ltd vs Agroexport and others (1986) 1 All ER 901*; and *Kenya Power & Lighting Co. Ltd vs Samwel Mandere Ogeto (2017)eKLR* on the principles applicable for the grant of a mandatory injunction. She further submitted that the petitioner has not demonstrated loss that cannot be compensated by way of damages as Section 117 of the Land Act provides for payment of interest on money placed in a special compensation account.

10. I have considered the matter.

11. The prayers sought in the application, specifically prayers (iv) and (v) seek orders in the nature of a mandatory injunction. I am in agreement with the authorities that counsel for the 3<sup>rd</sup> respondent provided which lay out the principles applicable in an application for a mandatory injunction. In the case of *Locabail International Finance Ltd vs Agroexport and Others (1986) 1 All ER 901*, it was inter alia held as follows :-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly be granted, that being a different and higher standard than was required for a prohibitory injunction.”

12. Do I have a very clear case before me ? I do not think so.

13. For starters, I have serious question marks on the true ownership of the land. I have tried to piece together the ownership from the limited amount of documents that I have. In the petition, the petitioner averred as follows at paragraph 7 :-

7. That the plot No.MN/VI/2398 is registered in the names of Petitioner's great grandfathers Juma Bin Salim Juma and Abdulla Bin Juma Muhunzi as the Trustees of the Wakf of Salim Bin Juma Muhunzi and belongs to the estate of Kassim Salim Juma (deceased) and administered by his widow Hadija Kassim Salimu as one of the legal administratrix.

14. If I am to believe the above, it means that Juma Bin Salim Juma and Abdulla Bin Juma Muhunzi were mere trustees of a Wakf. What is contained in that Wakf is not known to me as the Wakf has not been presented before this court. I therefore do not know who the beneficiaries of the Wakf may be. In the same breadth, I wonder how the land is now said to belong to the estate of Kassim Salim Juma

(deceased). How did this land become the land of the late Kassim Salim Juma if it was held under a Wakf? The search that the petitioner has annexed to her petition is dated 24 April 2013. That search shows Juma Bin Salim Juma and Abdulla Bin Salim Bin Juma as the two registered owners of the suit land. I am still at a loss as to why it is said that the suit property is owned by Kassim Salim Juma as I have not seen his name in any ownership document in respect of the suit land. The petitioner will need to demonstrate to this court at the hearing, why she believes that the suit property is one that falls within the estate of Kassim Salim Juma as I do not have any evidence to that effect. The land ownership document that I have shown that the suit land is not one falling within the estate of Kassim Salim Juma. I have tried to reconcile this search and the document referred to as a "Deed of Settlement" made on 2 March 2009. That document states that the Salim Juma Muhunzi created a Wakf for the benefit of his children and were appointed trustees. It goes further to state that the trustees died and that a dispute over the beneficiaries of the said Wakf was referred to the High Court in Case No. 578 of 1974 where the Court appointed the Wakf Commissioners of Kenya as Trustee of the Wakf. The document further goes to state that the beneficiaries are "settling" the Wakf properties of Salim Juma Muhunzi. The persons who are signatories to this document are said to be Kassim Salim Juma Muhunzi, Salim Abdulla Salim Juma Muhunzi and Badi Juma Bin Salim Muhunzi. That document is not signed by the Wakf Commissioners, despite the same document acknowledging that they are the trustee. The same document does provide that an application will be made before the High Court for their appointment so as to take over from the Wakf Commissioners. I have not been shown any application made to the High Court in that respect. I have also not been shown any document where the Wakf Commissioners relinquished their position as trustee of the Wakf under which the property fell.

15. Even if I am to assume that the document is authentic and legally sound, the instrument only states that "*Kassim Salim Juma Muhunzi and all his beneficiaries shall take over the income from Plot No. 2398 Section VI Mainland North.*" The instrument does not vest ownership upon Kassim Salim Juma Muhunzi, only the right to income. Nowhere do I have any record of the suit land being transferred to Kassim Salim Juma Muhunzi or any record where Kassim Salim Juma Muhunzi became proprietor of the suit land. I am aware that the petitioner has displayed a grant distributing this land but I am afraid that in the circumstances before me, a grant by itself, may not be good enough. What is critical for purposes of reconstituting a land parcel file would be documents in support of previous transactions and there is none or pretty little in this instance. This court needs to be sure of the rightful owners of the suit land before issuing an order for restitution of the land parcel file in the manner sought by the petitioner or order payment in the way that the petitioner has proposed. At the moment, I am yet to be fully convinced of that position and I regret that I cannot therefore grant the orders of mandatory injunction sought by the petitioner.

16. Assuming that I was persuaded that the land is rightfully owned by Kassim Salim Juma Muhunzi, I have my own reservations on the capacity of the petitioner to be paid the money due for compensation and even her capacity to file this suit. If I am to follow the distribution of the suit land, it was distributed as follows :-

- To Hadija Kassim Salim – ½ share
- The other ½ share equally distributed to Sofia Kassim Salimu (the petitioner herein I presume), Mwanasiti Kassim, Mzee Salim Kassim, Farida Salim Kassim, Abdillahi Farid Kassim, Aziz Kassim Salim, and Aswan Kassim Salim.

I have seen that the petitioner has a power of attorney donated by Hadija Kassim Salim. It follows that the petitioner can only file suit on behalf of Hadija and in respect of herself and nobody else for I have not seen any power of attorney donated to the petitioner by the rest of the said beneficiaries. Neither are they parties to this petition. This court in those circumstances cannot therefore order payment of all of the money directly to the petitioner as it has been sought in this application, for there are other beneficiaries. The supplementary affidavit sworn by Mzee Salim Kassim is not the equivalent of a donation of a power of attorney and neither does it make him or the other said beneficiaries parties to this suit.

17. I am unable, at this juncture, to fault the position of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to place the money in a special account pending proof of ownership of the land. I am also unable to fault, at this juncture, the decision of the Land Registrar Mombasa, not to reconstitute a parcel file based on the documents tabled by the petitioner. I am afraid that the petitioner will need to demonstrate through a full hearing that she is entitled to the prayers in the petition, for clearly I am not persuaded to grant the said orders on the basis of the application before me.

18. On whether or not to grant an injunction to stop the development of the road through the suit land, this would be an application in the nature of an interlocutory injunction. The principles applicable are those set out in the case of *Giella vs Cassman Brown (1973) EA 358*. One needs to demonstrate a prima facie case with a probability of success; show that he/she stands to suffer irreparable loss if the injunction is not granted; and where the court is in doubt, it will decide the application on a balance of convenience. In the circumstances at hand, I do not see what irreparable loss the petitioner stands to suffer that cannot be compensated by an award of damages. What has stalled payment of the money is lack of sufficient proof of ownership of the suit land. The money has already been set aside. That money will attract interest and this court also has discretion to award interest. There is therefore no irreparable loss that the petitioner stands to suffer for she or the person that she holds a power of attorney for, stand to be compensated. To stall the creation of the road will also bring damage to the public, not only financially, but the public will be denied the construction and use of a road. Public interest here, must override any private rights, such that even if I was to consider the balance of convenience, it tilts towards allowing the construction of the road to proceed as the issue of who is the rightful person entitled to compensation for the suit land is being sorted out. In the circumstances at hand, I am therefore unable to grant the order for an interlocutory injunction.

19. I believe that I have said enough to demonstrate that this application must fail. The petitioner will need to prove her case without the benefit of any interlocutory orders. This application is hereby dismissed with costs to the 3<sup>rd</sup> respondent.

20. Apart from the above, and having gone through the documentation, especially the documentation that show that the suit land, was under the Wakf Commissioners, I am of the view that it is necessary that the Wakf Commissioners of Kenya be enjoined as an interested party to this suit. They may have information on the ownership of the suit land which will be beneficial to this court. I therefore make the order that the Wakf Commissioners be enjoined to this suit as interested party as they were trustees of the Wakf of Salim Bin Juma Muhunzi. Either party to serve the Wakf Commissioner with this order of joinder and to also serve them with the pleadings so far filed within 7 days. The Wakf Commissioners upon service have 14 days to file any affidavit that may assist this court in arriving at a decision over the issues in this matter and especially enlighten the Court on the Wakf of Salim Bin Juma Muhunzi and the possible whereabouts of the original title.

21. Orders accordingly.

**DATED AND DELIVERED THIS 17TH DAY OF SEPTEMBER, 2020**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**