



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC PETITION CASE NO. 9 OF 2018**

**JOHN MITUA KIEMA.....PETITIONER**

**VERSUS**

**1. KENYA NATIONAL LANDS COMMISSION**

**2. KENYA NATIONAL HIGHWAYS AUTHORITY**

**3. MINISTRY OF ROADS & TRANSPORT.....RESPONDENTS**

**JUDGEMENT**

The petitioner submitted that the petition is premised and relied exclusively on the provisions of the constitution as providing the principles that needed to be followed and disputed the principles and procedure applied by the respondents in assessing the compensation award for his portion of land. It was the petitioner's argument that under Article 40 (3) (b) (ii) of the Constitution, what is fair and just compensation can no longer be measured by solely using the standard yard stick of the general market value plus 15% statutory allowance without further investigations to ensure that, the property does not have special value to the owner, and that this special value is indeed recognized and guaranteed as an inalienable right under Article 40 (3) of the Constitution of Kenya. Therefore, that for purposes of compensation under a compulsory acquisition scheme, the use of the words "full just compensation to the person" under Article 40 (3) (b) (ii) of the constitution indicate not merely the value of land itself, but the whole of the economic injury caused in relation to the land taken as consequence of acquisition.

In this regard, it is the petitioners contention that the correct standard applicable to the assessment of compensation in the current case are that for purpose of Article 40 of the Constitution, the "market value plus a 15% statutory allowance" is presumed to be fair value of compensation, unless the aggrieved party can demonstrate 'special value' of land, being the financial value of any advantage, in addition to market value, to the person entitled to compensation which is incidental to the persons of the land.

Further, that if an owner, as in this case, demonstrates "special value" of the land i.e. the financial value of any economic injury done which is related to the land taken as consequence to cause, the onus is on the respondents, having regard to all relevant matters, to show why such a claim is not payable by law.

The petitioner urged that in the premises, it is within the court's jurisdiction to formulate a broad and guiding criteria on the factors which must be taken into consideration in determining the value of compensation under the Land Act, 2012 and in accordance with Article 40 (3) (b) (ii) of the Constitution. So as to safeguard the guaranteed property rights there under. It is the petitioners view that the factors which must be taken into consideration in determining the value include:-

- (a) the market value of the interest on the date of acquisition.
- (b) Any special value to the claimant on the date of acquisition.
- (c) Any loss attributable to severance.
- (d) Any loss attributable to disturbance.
- (e) Any depreciation in value of the interest of the owner, at the date of acquisition, in other land adjoining or severed from the acquired land by reason for the implementation of the purpose for which the land was acquired.
- (f) Any legal, valuation and other professional expenses necessarily incurred by the owner by reason of the acquisition of the interest.

The petitioner humbly prays as follows:-

- (a) A declaration that the petitioner's right to fair administrative action pursuant to Article 47 (1) and (2) have been contravened.
- (b) A declaration that the petitioner's right to information pursuant to Article 35 (1) (b) which would have assisted him to commence a dispute resolution mechanism was breached by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
- (c) A declaration that the compulsory acquisition of 67.45 of the petitioner's land by the 1<sup>st</sup> respondent without adhering to strict and mandatory provisions of the Land Acquisition Act violated the petitioner's constitutional right guaranteed under Article 40 (3) (a) & (b) not to be arbitrary deprived of its property by the state.
- (d) A declaration that the failure by the 1<sup>st</sup> respondent to comply with the mandatory provisions of the Land Acquisition Act violated the petitioner's Constitutional right to an administrative action that is lawful reasonable and procedurally fair guaranteed under Article 47 (1) of the Constitution.
- (e) A declaration that the 1<sup>st</sup> respondent was under a statutory duty to comply with the provision of the land acquisition Act in compulsorily acquiring 0.004 Ha. of the petitioner's property for the proposed rehabilitation of Kisumu-Kakamega-Webuye-Kitale road.
- (f) A declaration that the 1<sup>st</sup> respondent was under a statutory duty under section 3 and section 6 (2) to serve on the petitioner the notice of intended acquisition and the Notice of Acquisition.
- (g) A declaration that the 1<sup>st</sup> and 3<sup>rd</sup> respondent was under a statutory duty under sections 9 (1) (b) of the Land Acquisition Act to serve on the petitioner a Notice of inquiry to enable it prepare a written claim for compensation to be submitted at the inquiry.
- (h) A declaration that the 1<sup>st</sup> respondent was under a statutory duty to afford the petitioner a right to be heard at section 9 (6) of the Land Acquisition Act.
- (i) A declaration that the actions of the 1<sup>st</sup> respondent in failing to serve the notice of inquiry pursuant to section 9 (1) (b) and thereby denying him a chance to be present and/or be heard at the purported inquiry pursuant to section 9 (6) of the Land Acquisition Act violated the petitioner's constitutional right to an administrative action that is lawful reasonable and procedurally fair guaranteed under Article 47 (1) of the Constitution.
- (j) A declaration that the acquisition of the 0.004 ha of the petitioner's land by the 1<sup>st</sup> and 2<sup>nd</sup> respondents without complying with the mandatory provisions of the Land Acquisition Act was and is unlawful.
- (k) The delayed award of compensation of Ksh. 230,000 to the petition dated 4<sup>th</sup> May, 2018 which was arrived at without involving the petitioner at the inquiry be set aside and the petitioner to be awarded as per the Valuers report of 17<sup>th</sup> July, 2018.
- (l) The court to make issue and give such further, other and consequential orders, writs and directions as it may consider just, fit and/or appropriate for the purpose of enforcement of any of the provisions of Article 40 (1) & (3) and Article 47 (1) of the Constitution of Kenya 2010 in relation to the petitioner.
- (m) An order directing the 2<sup>nd</sup> respondent his agent, servants and or employees to extend the time for rehabilitation of the Kisumu-Kakamega-Webuye-Kitale road until the petitioner is paid.
- (n) The honourable court be pleased to issue any other order or reliefs it may deem fit and just to grant in the circumstances of the case.
- (o) Costs be provided for.

The 2<sup>nd</sup> respondent submitted that they are presently undertaking the construction and rehabilitation of the Kisumu-Kakamega-Webuye-Kitale Highway, and the parcel of land which is now the subject of the instant suit, namely South Maragoli/Buyonga/1434, is adjoining or otherwise share a common boundary with the said road under construction and rehabilitation, and is part of the adjacent parcels of land at that section of the road, required for compulsory acquisition for expansion of the road.

That it became apparent from the nature of the road design intended for the rehabilitation and construction of the Kisumu-Kakamega-Webuye-Kitale Highway, that it would require various portions of the parcels of land adjacent to the road reserve to undertake the exercise, including a portion of 0.0040 of the suit property known as South Maragoli/Buyonga/1434, amongst other different portions of land along the same road, the 1<sup>st</sup> respondent, in response to the 2<sup>nd</sup> respondent's request to consider the prospect of initiating the legal process of compulsory acquisition of the same, published the said land along with others, in the Gazette Notice No. 1699 dated 23<sup>rd</sup> February, 2018, for purposes of compulsory acquisition as required by law. (Exhibited hereto and produced as EM/ 1 is a copy of the said Kenya Gazette Notice No. 1699 of 23<sup>rd</sup> February, 2018, appearing at pages 477-478, thereof, in accordance with the provisions of sections 107 (5) and 112 of the Land Act, 2012).

That the 1<sup>st</sup> respondent had initially proposed to the petitioner an award of Ksh. 230,000/= but when the petitioner rejected the same, the 1<sup>st</sup>

respondent enhanced its offer for compensation to Ksh. 310,500/=, and pursuant to that offer, which the petitioner has neither rejected or otherwise communicated its response to, the 2<sup>nd</sup> respondent released the said sum from the funds set aside for compensation of such portions of land to be compulsorily acquired, to the 1<sup>st</sup> respondent for onward transmission to the petitioner amongst other similar land owners. (Exhibited hereto and produced as EM/2 is a bundle of copies the 1<sup>st</sup> respondent's letter dated 16<sup>th</sup> May, 2018 which notified the 2<sup>nd</sup> respondent of its enhanced award of Ksh. 310,500/= and on the basis of this request, the 2<sup>nd</sup> respondent had already released the funds to the 1<sup>st</sup> respondent for onward transmission to the petitioner, as per the 2<sup>nd</sup> respondent's letter dated 2<sup>nd</sup> August, 2018, which captures the petitioner's compensation as No. 32 thereof).

That that the petitioner's complaint for additional compensation is misconceived and lacks precision as to the nature of compensation and quantum thereof, which he seeks, and he appears to have based his entire claim on a misapprehension of the facts of the case, in respect whereof, he correctly admits that the portion of his land sought for compulsory acquisition is 0.0040 Ha, of the entire portion of the land comprised of 0.04 Ha, which is properly only 10% of his total acreage, yet in his claim as presented before this court seeks compensation for the whole parcel of land.

That it is instructive to note that the petitioner's claim for compensation at Ksh. 1,750,000/= as per the valuation report of Legend Valuers, is for the whole parcel of land, constitutes an unfair and unjustified claim for double compensation, and lacking in any logical basis because its valuation includes the structures and improvements undertaken by the other persons on the same parcel of land whom petitioner has identified as his tenants, both in the petition at page 2 under the sub-title "Brief Facts of the case" and in the valuation report at clause 12.0, yet those are the same persons who have already been compensated separately by the respondents, for their improvements on the land for those structures, without any complaint by the petitioner for their collecting that portion of the compensation alongside him, in accordance with the provisions of section 113 (1) of the Land Act, 2012, which requires such separate awards for compensation.

That the 2<sup>nd</sup> respondent, having already forwarded payments of the awards as assessed by the 1<sup>st</sup> respondent, following the inquiry hearings involving all the affected persons, as at the time this suit was filed in court, the 2<sup>nd</sup> respondent had already taken possession of the plaintiff's said portion of land and had completed the construction and rehabilitation of the relevant section of the Kisumu-Kakamega-Webuye-Kitale Highway, affected by the petitioner's claim.

That had the petitioner served the mandatory notice upon the 2<sup>nd</sup> respondent under section 67 of the Kenya Roads Act, the notice would have founded a legitimate basis for identification of the petitioner's dispute and its determination by the alternative dispute resolution mechanism contemplated under the provisions of Article 159 (2) (c) of the constitution of Kenya, which would have given the parties a legitimate opportunity for determination of the dispute before progressing to court, and would give an opportunity to the 2<sup>nd</sup> respondent to save on huge penalty costs in millions of shillings ordinarily imposed on the 2<sup>nd</sup> respondent by the contractors subcontracted to undertake the construction of the roads when there is such delays arising from such pending court proceedings.

That the petitioner having failed to present his claim, if any, at the inquiry hearing before the 1<sup>st</sup> respondent as advertised for 9<sup>th</sup> March, 2018, the 1<sup>st</sup> respondent was entitled in law under the provisions of section 113 (2) (a) (iii) of the Lands Act, 2012, to reach a determination on the award even if none of the parties interested in the land appear at the public hearing, and the award, if at all, is within the 1<sup>st</sup> respondent's discretion on the amount of the award after all the factors at section 4 of the Land Act, 2012, as read with Part VIII thereof, are considered.

That the petition as presented is misconceived, and constitutes an abuse of the due process of the law, on account of the petitioner's failure to issue and serve the requisite and mandatory Notice of Intention to sue contemplated under the provisions of section 67 of the Roads Act, 2007, and the 2<sup>nd</sup> respondent shall take up a preliminary objection on this point to have the petition struck out with costs.

This court has carefully considered the petition, submissions and authorities cited herein. The petitioner brought a constitutional petition before this honourable court for alleged contravention of fundamental rights and freedoms under articles 35, 40, and 47 of the Constitution of Kenya, 2010. The 1<sup>st</sup> and 3<sup>rd</sup> respondents failed to file any responses. The 2<sup>nd</sup> respondent are not disputing that indeed that they are presently undertaking the construction and rehabilitation of the Kisumu-Kakamega-Webuye-Kitale Highway, and the parcel of land which is now the subject of the instant suit, namely South Maragoli/Buyonga/1434, is adjoining or otherwise share a common boundary with the said road under construction and rehabilitation, and is part of the adjacent parcels of land at that section of the road, required for compulsory acquisition for expansion of the road. This to me seems to be a case of compulsory acquisition of land. The 2<sup>nd</sup> Respondent has averred that this Court has no jurisdiction to entertain this matter. The court will determine this preliminary issue of law before going into the merits and or demerits of this petition. It is trite law that jurisdiction is everything and if a court has no jurisdiction, it cannot entertain the said matter but can only down its tools. See the case of *Owners of the Motor Vessel 'Lillian S'...Vs...Caltex Oil (Kenya) Ltd 1989 KLR 1*, where the Court held that:-

*"...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".*

Indeed the suit herein involves compensation arising from compulsory acquisition of all those parcels of land contained the Gazette Notice No. 1699 dated 23<sup>rd</sup> February, 2018. The 1<sup>st</sup> Respondent did express its intention to acquire the stated parcels of land for the proposed rehabilitation of Kisumu-Kakamega-Webuye-Kitale road. It is not in doubt that the 1<sup>st</sup> Respondent is an independent Commission established under the Constitution and was operationalized by the *National Land Commission Act No.5 of 2012*. One of its mandate is to compulsory acquire land for both *National and County Governments* upon requests. Following the above stated request, the 1<sup>st</sup> Respondent expressed its intention to acquire the stated parcels of land vide the Gazette Notice No. 1699 dated 23<sup>rd</sup> February, 2018. It is apparent that once the 1<sup>st</sup> Respondent expressed their intention to acquire the said parcels of land, then the provisions of *Section 112(1) of the Land Act* sets in and inquiries stage was to commence. *Section 112(1) of the Land Act* provides:-

112. (1) At least thirty days after publishing the notice of intention to acquire land, the Commission shall appoint a date for an inquiry to hear issues of propriety and claims for compensation by persons interested in the land, and shall—

(a) cause notice of the inquiry to be published in the Gazette or county Gazette at least fifteen days before the inquiry; and;

(b) serve a copy of the notice on every person who appears to the Commission to be interested or who claims to be interested in the land.

Section 112(5) of the said Act provides that for the purpose of an inquiry the commission shall have all the powers of the court to summon and examine the witness, any Interested Parties on the land intended to be acquired and even compel production of any documents relevant. It is therefore very clear that since the 1<sup>st</sup> Respondent did express an intention to acquire the stated parcels of land, then any query or issues that the petitioner might have had best have been addressed during the inquiry stage. In the case of *Patrick Musimba...Vs...National Land Commission & 4 Others (2016) eKLR*, the Court held in para 91;-

*"Section 112 of the Land Act then involves the land owner directly for purpose of determining proprietary interest and compensation. The Section has an elaborate procedure with the National Land Commission enjoined to Gazette an intended inquiry and the service of the Notice of inquiry on every person attached. The inquiry hearing determine the persons interested and who are to be compensated. The National Land Commission exercise quasi-judicial powers at this stage".*

It is therefore clear that since the 1<sup>st</sup> Respondent expressed its intention to acquire the stated parcels of land, and if the petitioner was dissatisfied with the award then he ought to have appealed to the court as contemplated by Section 128 of the Land Act. *I find this court does have jurisdiction to entertain this matter as a constitutional petition.*

As was stated by Mutungi, J in the case of *Virendra Ramji Gudka & 3 Others vs Attorney General (2014)eKLR*,

*"Rights of compulsory acquisition are conferred by specific provisions of the law being Article 40 of the Constitution and Sections 107 to 133 of the Land Act, No. 6 of 2012 which replaced the provisions previously contained in the Land Acquisition Act".*

The Court of Appeal in the case of *Mwavumbo Group Ranch vs National Land Commission & 3 others (2019) eKLR* held that;

*"The issues raised needed adducing of evidence as to how much compensation was payable; which people had been paid and for what interest in the affected land etc. These were issues that were ill suited for ventilation through a constitutional petition. They are to say the least not constitutional issues. As stated earlier, where Parliament has expressly prescribed a method or process of dispute resolution, parties must defer to it and eschew running to the constitutional or other courts for recourse. Clothing an ordinary dispute with constitutional regalia does not necessarily transform it to a constitutional dispute."*

On the issue of jurisdiction the courts have consistently held that where the law specifies a particular mechanism for redress of grievances, that mechanism must be invoked and exhausted before a party can seek redress in the courts. This was held in the cases of **Narok County Council vs Trans Mara County Council & Another, CA No. 28 of 2000, Republic vs The National Environment Management Authority, CA No 84 of 2010** and **Mutanga Tea & Coffee Co Ltd vs Shikara Ltd & Another, CA No. 54 of 2014**. It was also held in the case of *Abdalla Mangi Mohamed –versus- Lazarus Benja & 5 Others Mombasa HC Constitutional petition No 59 of 2011* that;

*"Where there is a dispute as to the applicant's entitlement to property and where there exists a statutory mechanism for the resolution of the dispute, the statutory procedure should be utilized in the determination of the applicants claim to the property rather than clog the constitutional court with applications for enforcement that require prior determination. The improper practice of making private disputes as to ownership of property as application for enforcement of constitutional rights to property should be discouraged.*

The petitioner's recourse lay in the Land Act which is mandated to handle the kind of grievances the petitioner had against the respondents and not through a constitutional petition. For these reasons I find that the petition is unmerited and I dismiss it with costs to the 2<sup>nd</sup> respondent.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 28<sup>TH</sup> OCTOBER 2020.**

**N.A. MATHEKA**

**JUDGE**