



No.24/2014

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**ELC PETITION NO.126 OF 2014**

**PATRICK MUSIMBA ..... PETITIONER**

**VERSUS**

**THE NATIONAL LAND COMMISSION ..... 1ST RESPONDENT**

**THE KENYA RAILWAYS CORPORATION ..... 2ND RESPONDENT**

**THE NATIONAL ENVIRONMENT**

**MANAGEMENT AUTHORITY ..... 3RD RESPONDENT**

**THE ATTORNEY GENERAL ..... 4TH RESPONDENT**

**AND**

**CHINA ROAD BRIDGE AND**

**CONSTRUCTION COMPANY ..... INTERESTED PARTY**

**RULING**

1. The matter herein was initiated by a Petition dated 15.10.2014 and filed on the 1.10.2014 brought under a galaxy of provisions after Constitution of Kenya, Land Act, National Land Commission Act, Environment Management and Coordination Act, Kenya Railways Corporation Act and Environment and Land Control Act. It was contemporaneously filed together with a motion dated 15.10.2014 and filed the same day.
2. One 15.10.2014 the matter was placed before the court under certificate of urgency and the following directions were made:
  - a. Application is certified urgent.
  - b. The application, petition and all the documents be served upon the Respondents for direction on the 21.10.2014.
3. On 21.10.2014 all the Respondents were represented save for the 1st Respondent and the interested parties. The Respondents represented sought an adjournment to put their replies. This

prompted the Petitioner/Applicant to seek prayer No.5 of the motion on temporary basis pending interpartes hearing of the application. The Respondents No.2, 3 and 4 opposed the same but after the arguments by the parties' advocates present, the court made the following orders:

- **The Respondents No.2, 3 and 4 are given 14 days to file and serve Replying affidavits.**
- **The 1st Respondent and the interested parties be served with the hearing notice, for the next hearing date.**
- **Temporary orders issued for 14 days upto 6.11.04 to maintain status quo, which will be re-assessed on 6.11.2014.**

4. On 6.11.2014, all parties were represented and the replies filed as follows:

- The first Respondent had filed and served a notice of preliminary objection.
- The second Respondent had filed and served a replying affidavit.
- The 3rd Respondent also filed and served a Replying Affidavit.
- The 4th Respondent filed and served Grounds of Opposition.
- The Interested parties filed a reply affidavit.
- After consultation, the advocates for the parties agreed to address the court on 2 issues, namely;

a. The prayer No.9 of the Applicants Motion dated 15.10.2014 on referral of the matter to the Chief Justice to appoint a 3 judge bench to hear the matter.

b. The status quo orders issued on 21.10.2014 and particularly whether same ought to remain in force.

5. The Petitioner's advocate addressed the court on the issue of empaneling of a 3 judge bench and relied on 2 authorities. It is the Applicant's submission that the petition herein raises a substantial question of law and thus seeks the matter to be referred to the Chief Justice to assign uneven number of judges being not less than 3 to hear the matter. Relying on authorities of:-

**(a) PET NO.7 AND 8 OF 2014: MARTIN NYAGA & OTHERS -VS- SPEAKER COUNTY ASSEMBLY OF EMBU AND 8 OTHERS.**

**(b) PETITION NO.16 OF 2013: AMOS KIUMO & OTHERS -VS- CABINET SECRETARY MINISTRY OF INTERIOR & CORDINATION OF NATIONAL GOVERNMENT.**

6. The Petitioner's advocate submitted on the elements of principles employed as tools to test whether the matter meets the thresh hold of certification that a substantial question of law is raised in the matter. The Respondent submitted that matter merits certificate to be issued as prayed. This is because the petition raises the core issues of Environment which is captured by the preamble of the Constitution of Kenya. The other core issue is the compulsory acquisition of land by the Government for the purposes of development. This engenders involuntary emigration of the people affected. This begs the question, whether they are entitled to public participation in the process, access of information on the project from its formulation, planning and implementation. Should the affected persons be given a degree of control over the decision making process?

7. The Applicant submits that in line with Article 10, 22, 35, 47, section 58, 59 EMCA, and regulation 7, 9, 11 and 21 of Environment impact assessment audit regulations, 2003 as well as section 112 of Land Act, he was entitled to public participation in the process. The Applicant submits that the Rules to regulate just compensation, have not been put in place by the 1st Respondent, therefore, what is just compensation? The Applicant submit that just compensation mode of determination is a substantial question of law. The Applicant raises an issue as to whether the 1st Respondent can rely on repealed land law to measure what is just compensation.

8. Another substantial question of law is whether 2nd Respondent can rely on provisions of Section 15(1) of Railways Corporation Act to make entry to claimants land without notice which is contrary to sections 107 and 129 of Lands Act. The Applicant also submitted that the issue of resettlement as promised by 3rd Respondent has been ignored and thus a substantial question of

law arises. This is because the 3rd Respondent via notice in a published notice, stated that it is one of the mitigating measures 2nd Respondent would undertake.

9. The Applicant concluded by submitting that the burden of prove as to the merit of application for empaneling of 3 judge bench is on the application which he submitted to have demonstrated to the required standards. The petitioner sought the interim orders to be extended to avoid the scenario where the Application and the petition would be rendered nugatory or academic and especially as appertains to environmental concern in that the harm which might arise may not be reparable and/or compensated. Further the involuntary removal without resettlement may render the Applicant's constituents destitute and may not be reparable.
10. Essentially the 3 Respondents and interested parties were not opposed to the certification of the matters as raising substantial question of law to warrant empaneling of 3 judges bench for hearing of the matters but they were very opposed to any kind of interim orders which may impede the progression of the project (SGR) continuous processing.
11. The 1st Respondent urged the court to remember that it is not hearing the application for conservatory orders but only certification as to whether the matter raises a substantial question of law to warrant certification for the empaneling of 3 judge bench to hear the matter. He supports the certification but opposes extension of orders of status quo.
12. The 2nd Respondent advocate raised concern over delay of determination of the matter if it were to be certified for hearing by 3 judge bench. He was apprehensive that certification may take all the 3 judges in Machakos and thus occasion injustice to the litigants. He submitted that the order will not be efficacious. He submitted that should the court wish to refer the matter to a 3 judge bench, then the orders of status quo should not be extended. He submitted at length on materials before court which goes to the merit of application and petition. I caution myself that the matter is yet to be heard on the application for conservatory orders and thus avoid touching on the matter which may prejudice application's outcome. However, I will make an observation later on the orders of status quo.
13. The 3rd Respondent advocate did not oppose the empaneling of the 3 judge bench to hear the matter. However, questioned the court's jurisdiction on certifying the matter for 3 judge bench as the relevant provisions of Article 165 talks of THE HIGH COURT NOT ELC COURT. He submitted that may be the ELC court can be moved under section 13 (7) of ELC Act but not Article 165. He opposed the extension of the orders of status quo and addressed the court on materials before the court which goes to the merit of the conservatory orders application. I restrain myself from analyzing the same submissions.
14. The 4th Respondent advocate supports the referral of the matter to the 3 judge bench, however he vehemently opposes the extension of status quo orders. He also touched on the materials on merit which ought to be raised during the interparte hearing of the conservatory orders application.
15. The interested parties advocate though not opposed to the empaneling did raise reservations to the courts jurisdiction in granting the orders sought for referral and urged the court to satisfy itself that it is the right way to proceed with the matter. The advocate submitted at length on the reason as to why the status quo orders should not be extended. He referred to the contents and relied on contents of the material placed before the court. The submission goes to the merit of the application and the petition.
16. After listening to the parties advocates submissions and going through the materials placed before the court, I find that there are 3 issues which emerges for determination. **(a)** On whether the court has jurisdiction to certify the matter herein as raising substantial question of law to warrant the Chief Justice to assign 3 judges to hear the matter?

1. If No.1 is yes,

**(b)** Whether the matter herein meet the thresh hold for the certification as raising substantial question of law to warrant empaneling of 3 judge bench to hear the same?

3. What is the direction as to the interim orders in the matter herein pending the hearing of the application herein?

17. On jurisdiction of the court in certification of matter as raising substantial question of law, we

have to look at the provisions of law. Article 165 empowers the High Court to certify the matter raising a substantial question of law under clause No.165 (3) (b) or (d) to be heard by an uneven number of judges more than 3 assigned by the Chief Justice. Article 162 creates superior court for determination in our case environment and the use, occupation and title to land AND confers Parliament with power to determine jurisdiction of the court. Section 13 (7) of the EMC Act empowers the court to make any order and grant any relief as court deems fit and just. Further sub section (3) of section 13, empowers the court to hear and determine applications for redress of a denial, violations or infringement of a threat to, rights or fundamental freedom relating to environment and land under Article 42, 69 and 70 of the Constitution.

18. Under section 21 (1) of EMC Act, the court may certify any matter as raising a substantial question of law. The matter shall be heard by an uneven number of judges being not less than 3, assigned by the principle judge. This court thus holds that it has jurisdiction and mandate to certify matter as raising a substantial question of law for the hearing by uneven number of judges of not less than 3 panel.

19. On whether the matter raises a substantial question of law under Article 165 (4) of the Constitution of Kenya, we have to look briefly on the principles of law on same subject and the materials before the court. Under Article 165 (3) (b) and (d) and 165 (4) Constitution of Kenya: when the matter is for determination of the question whether a right or fundamental freedom in the bill of rights has been denied, violated, infringed or threatened;

or deals with any question respecting the interpretation of the Constitution and it emerges that a substantial question of law arises, the same may be certified for hearing by an uneven number of judges being not less than 3, assigned by the Chief Justice.

20. In a persuasive authority of PETITION NO.7 & 8/2014 MARTIN NYAGA & OTHERS -VS- THE SPEAKER COUNTY ASSEMBLY OF EMBU & OTHERS, ODUNGA J. restated the factors to be considered to determine whether a substantial question of law is raised, Thus;

*“It is therefore my view that a matter would be considered to raise a substantial question of law if inter alia any or all of the following factors are present;*

*Whether the matter is moot in the sense that a matter raises a novel point, whether the matter is complex, whether the matter by its nature requires a substantial amount of time to be disposed off. The effects of the prayers sought in the petition and the level of interest generated by the petition”.*

21. In MERU PETITION NO.16/13: AMOS KIUMO & OTHERS -VS- CABINET SECRETARY INTERNAL AND CORDINATION OF NATIONAL GOVERNMENT & OTHERS, *Lesit Judge* citing MERU -VS- EACC PET. NO.177/014 held that:

*“The substantial question of law is a question to be determined in the circumstances of the case. Substantial issue of law is not necessary a weighty one or that raises a novel issue of law or fact or one that is complex. Many provisions of our Constitution are untested and bring forth novel issues yet is not every day that we shall call upon the Chief Justice to empanel a bench of not less than 3 judges. Public interest may be considered but is not necessarily a decisive factor. It is in the nature of Petitions filed to enforce the provisions of our Constitution to be matters of public interest generally.*

*The court ought to take into account other provisions of the Constitution, the need to dispense justice without delay having regard to the subject matter and the opportunity .... the empaneling should be the exception rather than a rule. A higher burden is cast on the party who applies to court to certify the matter for reference to the Chief Justice”.*

22. In the Petition dated 15.10.2014, the petitioner parades a galaxy of complaints which his advocate lumped together into 2 core issues of just compensation and environmental protection. Some of the issues raised in the petition spans from paragraph 48 to 63. They seek to know the extent of

- the project, impact on environment on them and whether their input would be factored before the project is embarked on. They want to know the basis of valuation of land, date when land will be required, paid in full, criteria for valuation of these properties including crops, trees, buildings inter alia. How design of railway takes into account and caters for social amenities e.g schools, market places, water, sand in rivers, bridges, schools, churches, valuation of graveyards. Dates of compensation and relocation. They want to know why they, Kibwezi people's lands are being trespassed into measurements taken, marks placed without their consent or without notice to them. They want to know how environmental degradation like murram and sand exploitation is going to be measured and compensated. They complain of the process of compulsory acquisition is being carried out under the repealed law. It is averred that they are being prejudiced as the repealed laws and rules are inconsistent with the latter, principles and spirit of the Constitution.
23. In terms of **MARTIN NYAGA & OTHERS** case (*supra*), the factors set by **Odunga J.** for testing, one would easily fit the contents of petition herein within the thresh hold. The novel issues raised range from how to legal measure and treat the environmental degradation element which goes beyond just compensation contemplated by the law? How does the law treat the issues of social impact by the project which may never be monetarily compensated? How do we measure just compensation aspect of the awards? By any measure, the matter is complicated having regard to the issues of environment, compensation of various aspects of social economic cultural aspect of people of Kibwezi livelihood. Can they be factored in, in assessment of just compensation?
24. The totality of the allegations, complaints raised in the petition and the reliefs sought raises substantial questions of law envisaged by the provisions of Article 165 (3) (b) (d) and 165 (4). Thus, warranting court in the instant case to certify the matter for referral to the Chief Justice for the assigning of an uneven numbers being not less than 3 for hearing the matter herein.
25. The final question is whether the status quo orders should be extended. When the matter came up on 15.10.2014, the court did not issue ex parte orders of any nature. On 21.10.2014 the court made the orders as the Petitioner was urging court that there was imminent danger of dispossession of claimants who are not parties herein. The Respondent 2, 3 and 4 were not supporting the orders of status quo but they had not put materials before the court for even a casual look as to the prevailing circumstances of the project.
26. The court is very conscious that it is not handling the application for conservatory orders. There are now on record the replying affidavits and a notice of preliminary objection. The court observes that non of the persons whose lands are to be acquired is a party. The Petitioner is a member of Parliament representing Kibwezi Constituency and has no land of his which is being acquired compulsorily. There are 154 claimants who have already signed acceptance of the awards as just compensation. The 2nd Respondent alleges that the numbers represents 98% of the owners of the lands which are being acquired.
27. Taking into account the interests and conveniences of the parties herein and the court restraining itself from prejudicing the bench which handle the motion herein, I do not find any justification forestalling the processes which were on going as at the 21.10.2014 when the orders were issued. It is only fair that the bench handling the matter to determine freely whether to make any interim orders or not pending hearing and determination of the application herein. The court thus makes the following orders:

**1. The matter is certified as raising a substantial question of law under clause (3) (b) and (d) of the Constitution and thus referred to the Chief Justice to empanel an uneven number of judges being not less than 3 to hear the matter.**

**2. Costs in the cause.**

**Dated and Delivered at Machakos this 12<sup>th</sup> day of November, 2014.**

**CHARLES KARIUKI**

**JUDGE**

