



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NUMBER 95 OF 2012

MAISHA NISHIKE LIMITED.....PETITIONER

AND

THE PERMANENT SECRETARY,

MINISTRY OF LANDS.....1ST RESPONDENT

THE PERMANENT SECRETARY,

MINISTRY OF ROADS AND PUBLIC WORKS.....2ND RESPONDENT

MINISTER FOR LANDS.....3RD RESPONDENT

COMMISSIONER OF LANDS.....4TH RESPONDENT

CHINA ROAD AND BRIDGE

CORPORATION KENYA.....5TH RESPONDENT

ATTORNEY GENERAL.....6TH RESPONDENT

JUDGMENT

1.This Petition herein is dated the 23rd of March, 2012 and is supported by an Affidavit sworn on the 23rd of March, 2012 by Ngugi Kiuna, a Director in the Petitioner company. The Petitioner also filed written submissions dated the 29th of November, 2012 in support of its case.

2. The 5th Respondents filed a Replying Affidavit sworn on the 22nd day of November, 2012 by one Shu Yili, at Nairobi, in his capacity as the Project Manager of the 5th Respondent.

3.The 6th Respondent filed Grounds of Opposition in response to the Petition, dated the 15th June, 2012 and the 1st, 2nd, 3rd, 4th and 6th Respondents jointly filed written submissions and a List of Authorities dated 8th October, 2012. The 4th Respondent filed a Replying Affidavit dated the 15th June, 2012 sworn by one Charles Moemi in his capacity as a Registered Valuer with the 4th Respondent's office i.e. the Commissioner of Lands.

Case for the Petitioner

4.The Petitioner has urged the point that it is the registered owner of a property known as LR Number 5989/3 Nairobi (hereinafter referred to as the "suit land") which forms the subject matter of this Petition. It is its case that the Government of Kenya pursuant to **Section 6(2) of the Land Acquisition Act Cap 295 Laws of Kenya** embarked on a compulsory acquisition of a land exercise to facilitate the construction of what is known as the Nairobi Northern By-Pass Road Project. That the Commissioner of Lands vide Gazette notice Number 2240 of 2nd March, 2010 notified the Petitioner and other affected land owners of the intended acquisition as per the law.

5.Pursuant to **Section 9(1)** of the said **Act**, the Commissioner of Lands issued a further notice in Gazette Notice No. 2241 notifying the Petitioner herein of the dates, time and venue, when the hearing of claims to compensation by persons interested in the suit land should be conducted.

6.The Petitioner, at the hearing of claims aforesaid and relying on a report and valuation prepared by City Valuers Limited, submitted that its total claim for compensation would be Kenya Shillings One Hundred and Twenty Six Million (Kshs. 126,000,000/=). On its part, the Government through the 1st Respondent assessed the said claim for compensation, reviewed it and offered to pay compensation to the Petitioner amounting to Kenya Shillings Eighty Two Million Eight Hundred Thousand (Kshs. 82,800,000/=)

7.That this petition is related to ELC 66 of 2010 Republic vs. Commissioner of Lands & 3 Others Exparte Maisha Nishike Limited, wherein the Petitioner moved the court for certain Judicial Review Orders against the Respondents. On the 30th of July, 2010, the Petitioner herein was granted leave by Wendoh J, to commence Judicial Review proceedings and the leave operated as a stay, for 60 days, of the implementation of the decision by the Respondents to implement the compulsory acquisition of part of LR No. 5989/3 for purposes aforesaid.

8.That by an Application dated 30th of November, 2010 filed by the Petitioner herein, it was alleged that there had been non-compliance with the orders issued by Wendoh, J and in a ruling delivered on 14th July, 2011 the 5th Respondents was held in contempt of the orders of Wendoh, J and a fine of Kshs. 100,000/= was imposed by Musinga.

9.In an Application dated 4th of March, 2011, the 6th Respondents sought to vary/vacate the orders of Wendoh, J stating that the order of stay was costing the Government of Kenya at least Kenya Shillings Two Million (Kshs. 2,000,000/=) a day and that the said Government was ready and prepared to compensate the Petitioner. Musinga, J heard the said Application, vacated the orders issued by Wendoh, J and in doing so, stated that the greater public interest far outweighed the private interests of the Petitioner and that the Kenya Shillings Two Million (Kshs.2,000,000/=) accruing daily on account of idle equipment, idle plant and idle labour was an unnecessary financial loss to the Government.

10.Subsequently, the Respondents proceeded to construct and finalize the Nairobi Northern By-Pass Road and it is this action by the Respondents that has necessitated the filing of this Petition wherein the Petitioner alleges the contravention of diverse fundamental rights entrenched in the Constitution of

Kenya, 2010, The African Charter on Human Rights (Banjul) and the Universal Declaration on Human Rights. The Petition in summation seeks:

- a) Declaratory orders to establish the Petitioner's rights as articulated in the Petition;
- b) Compensatory orders for alleged damages occasioned by the Respondents on the Petitioner; and
- c) Mandatory orders compelling the Respondents to give effect to certain of the petitioner's rights as enshrined in the Constitution of Kenya.

11. In finer detail, the Petitioner alleges that the Respondents have violated their constitutional rights whether jointly, severally or in concert and in particular they cite violation of their Rights to Property, Fair Administration and Non-Discrimination as entrenched in **Articles 40, 47 and 27 of the Constitution, Article 14, 22(1) and 21(1) and (2) of the African Charter on Human and People's Rights as read with Article 2 (5) and (6) of the Constitution of Kenya, Article 17 (1) and (2) of the Universal Declaration of Human Rights as read together with Article 1(2) of the International Convention on Civil and Political Rights (ICCPR).**

12. The Petitioner relies on **Articles 20, 22, 23 and 260 of the Constitution of Kenya, 2010**, in stating that it has the right to institute this Petition and that this Court has the jurisdiction to grant the reliefs sought.

13. The Petitioner further submits that although the forceful occupation of the suit land took place before the promulgation of the Constitution of Kenya, 2010 nevertheless **Article 40 (3) (b) (i) of the Constitution** gives the State the power to interfere with a citizen's right to property only under very specific circumstances. That in the instant case, those circumstances were inexistent.

14. The Petitioners in that regard relied on **Commissioner of Lands & Anor vs. Coastal Aqua Culture Ltd KLR (E&L) 264** which in summation held that all procedures related to compulsory acquisition must be strictly pursued including the holding of an inquiry as to compensation.

15. In claiming for damages, the Petitioners invoked **Article 23 of the Constitution of Kenya 2010**, which empowers this court to grant appropriate relief(s) and it urges this court to take due regard of Article 20(4) of the Constitution of Kenya which enjoins the Court to interpret the Bill of Rights in a manner that promotes the values that underlie an open and democratic society based on human dignity, equity, freedom and the spirit, purport and objects of the Bill of Rights. The Petitioner's rely on **Crispus Karanja Njogu vs. The Attorney General Criminal Application 139 of 2000 and Rev Dr. Timothy Njoya & 6 Others vs. The Attorney General & 4 Others HC Miscellaneous Civil Application 82 of 2004 (OS)** which both held that Constitutional provisions must be read so as to give meaning to the values and aspirations of the people and championed that the Constitution is a living document with a soul and consciousness which must be upheld at all times.

16. The Petitioner has also made the point that interpretation of the Constitution necessitates that the Courts must adopt a liberal and broad approach and that in so doing the courts participate in developing the dimensions of the fundamental rights and freedoms and in giving them their full recognition and effect. This was the holding in Francis Ndyababo vs. The Attorney General (2002) AHRLR 243 (TzCA 2002) and the same spirit resonated in the interpretation of the Constitution of Bermuda by the Privy Council in Minister for Home Affairs & Another vs. Fischer (1979) 3 ALL ER 21; Kamlesh Mansuklal Damji Pattni & Anor vs. The Republic. The Petitioner in its submissions set in motion its view that the State has the fundamental duty of implementing the fundamental rights and freedoms of the individual as enshrined in the Constitution. The Petitioners rely on Thomas Patrick Gilbert Cholmondeley vs. The Republic (2008) eKLR

17. Further that following the case of Sammy Muhia & Others vs. Kenya Power and Lighting Company Limited Nairobi High Court Misc Civil Case No. 620 of 2004 the Petitioner submitted that the Court expanded the horizon of remedies in compensating violations under the Constitution and also cited the cases of Harun Thungu vs. The Attorney General Nairobi HC Misc. Appl. 1411 of 2009(OS); Wachira Waheire vs. The Attorney General HC Misc. Appln 1184 of 2003(OS) and Mwangi Stephen Mureithi vs. Daniel Moi Petition 65 of 2009 in arguing that the courts have progressively issued enhanced awards for damages for constitutional violations indicating a reflection that the days of impunity are long gone in Kenya.

18. The Petitioner's cited the United States of America case of Bivens vs. Six Unknown Named Agents of the Federal Bureau of Narcotics where on Appeal the Supreme Court held that; ***"Power once granted does not disappear like a magic gift when it is wrongfully used. An agent acting albeit unconstitutionally in the name of the United States possesses a greater capacity for harm than an individual trespasser exercising no authority other than its own."*** It was the Petitioner's submission in that regard that judicial remedy is available to the citizens through which they could secure monetary damages for breach of provisions of the rights contained in the Constitution; as was held in the Bivens case (supra). The Petitioner added that the US Supreme Court further affirmed this position in Hartman vs. Moore, 547 U.S 250 and Baranski vs. Fifteen Unknown Agents of the Bureau of Alcohol Tobacco and Firearms 452 f3d 433, 438.

19. The Petitioners in hammering the above point home submitted that the award of damages will serve the principal functions of compensating the Petitioner for the alleged breaches by the Respondent, vindicating the protection offered by the Bill of Rights and such ensuring that the sanctity of the Bill of Rights is protected from slow erosion as well as deterring any further breaches by the Respondents and the State generally.

20. The Petitioner in quantifying the damages payable makes reference to the leading text known as McGregor on Damages in which it was stated that where there has been a tort committed in respect to land the basic pecuniary loss is ***"the diminution in value or the cost of restatement (sic) and the market rental value of the property for the period of wrongful occupation."*** The Petitioner in its submissions also prayed for aggravated damages due to suffering, distress and intolerable anxiety by the actions of the Respondents and relied on Lord Lawton LJ's decision in Drane vs. Evangelou (1978) 1 WLR, 455 where the Learned Judge's findings in summary were that depriving one of a roof over his head is one of the worst torts that can be committed as it causes stress, worry and anxiety.

21. It is the Petitioner's further contention that the position taken by the Respondents in regard to the existence of an alternative remedy as stipulated under the Land Acquisition Act would only be applicable if and when the acquisition process is done within the parameter of statute. See Commissioner of Lands & Anor vs. Coast Aqua Culture Ltd case (supra). In this case it is argued that it was not.

22. The Petitioners also associated itself with the decision in Ramolgan vs. The Mayor, Alderman and Burgesses of San Francisco (1986) LRC 377 which emphasized that an aggrieved party was entitled to invoke the fundamental provisions in the constitution and that the existence of an alternative remedy was no bar to institution of proceedings citing violation of one's constitutional rights. The Petitioners submit that this was the position held in Maharaj vs. The Attorney General of Trinidad and Tobago (1978) 2 ALLER 6h 70; Kharak Singh vs. State of Uttah Pradesh (1963) SOAIR 1295 and K.K. Kochuni vs. State of Madras (1960) 3 SCR 887; AIR 1960 SC 1080; AIR 1959 SC 725; (1959) Supp. (2) SCR 316 and concluded that it was entitled to all the reliefs sought in the Petition.

Case for the Respondents

23. The Respondents submitted that they commenced a legitimate process in acquiring the subject property and that the filing of ELC 66 of 2010 Republic vs. Commissioner of Lands & 3 Others Exparte Maisha Nishike Limited slowed down the said acquisition process. As stated earlier Musinga J issued orders in public interest that vacated the previous orders of Wendoh, J thus giving the Respondents the go ahead to finalise the road construction and the requisite compensation to the Petitioner.

24. The Respondents submitted that in view of the said orders they continued with the project and acted within the parameters of the law in doing so. The Respondents also urged this court to note that public interest far outweighs the Petitioner's private interest in attempting to stall the acquisition of the property known as LR No. 5989/3 and they submitted that the Petitioner is also a beneficiary of the wider public interest.

25. The Respondents submitted that they acted in strict adherence of the law as per the Constitution and the **Land Acquisition Act Cap 295 Laws of Kenya** (now repealed) and that **Article 40(1)** of the Constitution on the right to acquire and own property has certain limitations as stated in **Article 40(3)** thereof. That these limitations are 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 the person; and

compensation to

(ii) allows any person who has an interest in, or right property a right of access to a court of

over, that law." (Emphasis mine)

26.The Respondents submit that as per Musinga J's order this property was acquired in public interest and a prompt compensation award offered. The project, the Respondents submit, was initiated to ease traffic movements and congestion and categorically state that pursuant to the **Land Acquisition Act** a public inquiry was held for the parties with interest in the property, on compensation, and that an offer of Kshs.82,800,000/= was made to the Petitioner being 66.7% of the amount they submitted as fit and apt as per the Petitioner's independent report and valuation.

27.The Respondents also submitted that contrary to the Petitioner's allegations, the Respondents took possession of the suit property after the court sanctioned the same through Musinga, J's orders. The Respondents further stated that they were not in occupation of the suit property between the dates of 30th July, 2010 and 11th April, 2011 as alleged.

28.The Respondents contend that the crux of this Petition is the difference in compensatory amounts between the Petitioner and the Respondents. The Respondents indicated that the Petitioner's have now made a further claim of Kshs.41,000,000/= for the unconstitutional taking over and destruction of the severed triangle bordering the southern boundary of the subject land, a matter raised for the first time in this Petition.

29.That compensation is a preserve of the 4th Respondents which acts on behalf of the acquiring government entity and that **Sections 9,10 and 11 of the Land Acquisition Act** (now repealed) put the obligation of determining the value of the land on the 4th Respondent and it obligates the 4th Respondent solely with minimal input from the Petitioner.

30.The Respondents have also argued that the law is clear under **Section 9** of the **Land Acquisition Act** (now repealed) that the 4th Respondent is obligated to hold an inquiry for hearing of claims for compensation by persons interested in the land and that this was done on the 17th of May, 2010 and that upon conclusion of the inquiry the 4th Respondents prepared a written award of compensation to the Petitioner. That the award was based on the **market value of the land and compensation for disturbance which is presumed to be 15% of the total value of the land** and the Respondents further submitted that the right forum to determine the amount owing to the Petitioner in compensation is the Land Acquisition Compensation Tribunal ("The Tribunal") as established under **Section 29 (2)** of the **Act** and **Section 29 (7)** of **the Act** which provide that:

"A person interested who is dissatisfied with the award of the Commissioner may apply to the Tribunal in the prescribed manner for-

(a) the determination of his interest or right in or over the land; or

(b) the amount of compensation awarded to him under section 10; or

(c) o amount of compensation paid or offered to him under section 5, 9, 23, 25 or 26.
(Emphasis mine)

31.The Respondents point that the decisions of the Tribunal established under the Act are appealable to the High Court under Section 29(1) of the Act which states that:

The right of access to the High Court conferred by section 75 (2) of the Constitution of an interested person shall be by way of appeal (exercisable as of right at the instance of the person interested) from the decision of the Tribunal.

The Respondents therefore argue that the Petitioner had not followed the two-tier appellate system and now urge this court to hold that the Petitioner's direct move to file a Judicial Review Application and later a Petition in the Constitutional and Human Rights Division, amounts to an abuse of court process and dismissal of a tribunal competent enough to determine issues it is mandated to.

32.The Respondents add that the Constitution should not oust other applicable statutes unless there are inconsistencies in them and that the Constitution should work in harmony with other statutes. Further that **Article 22 and 23** of the **Constitution** of Kenya 2010 cannot be invoked by the Petitioner as an excuse to circumvent the proper remedial measures under the Repealed Act. The Respondents and reliance thereon is placed on the decision in Speaker of the National Assembly vs. Karume Civil Application No. 92 of 1992 where it was held that where there is clear procedure for redress of any particular grievance by the Constitution or an Act of Parliament, that procedure should be followed strictly. The Respondents also relied on the case of Alphonse Mwangemi Munga & 10 Others vs. African Safari Club (2008) eKLR which adopted the ruling in Speaker of the National Assembly vs. Karume (supra) and Harrikissoon vs. Attorney General Trinidad & Tobago (1980) AC 265 which in summary restated the principle that the Constitution cannot unjustifiably displace the succinct provisions of statute and in the present case the Land Acquisition Act Cap 295 (now repealed).

33.The Respondent also raised the flag on whether this Petition raises constitutional issues. In stating this they relied on Rashid Odhiambo Aloggoh & 245 others vs. Haco Industries CA 110/01 where the Court of Appeal held that once one alleged violation or threatened violation of his fundamental rights, the court should hear him and the Respondents argued that if that be the case then this Division of the High Court in Nairobi would be clogged with many frivolous cases all clothed in constitutional gowns and which will give litigants the opportunity to forum shop at the highest courts of the land amounting to abuse of court process. (See Alphonse Mwangemi Munga & 10 Others vs. African Safari Club for an articulation of this point) (*supra*).

34.On the Petitioner's claims that it has a right to fair administrative processes because the Respondents flouted the provisions of the Act and re-designed the road by-pass without giving an explanation to the Petitioner, the Respondents submitted that the process of compulsory acquisition (as provided for in the Act) involves the owner of the land at all stages which is evident as follows in this case:

a)That the Petitioner admitted that it was informed of the intended acquisition;

b)The Petitioner also admitted that it was invited to the public inquiry on compensation and the same was advertised in the Kenya Gazette;

c)The Petitioner also admitted that it was invited to make a claim in terms of compensation which they made of Kshs. 126,000,000/=;

d) The Petitioner agreed that it was offered Kshs. 82,800,000/= as compensation.

35.The Respondents also note that in submissions, the Petitioner itemizes certain claims as follows: Kshs. 11,356,095/= for disturbance; Kshs. 27,555,000/= for severance; and Kshs. 11,356,095/= for affection and added that under Rule 4 of the Schedule to the Act, an extra payment of 15% of the market value of the land, upon compulsory acquisition, as compensation for disturbance is recognized. That indeed the alleged severed part of the Petitioner's land has not been severed in the sense of **Section 22** of the Act and as such no money compensation should be assigned to it specifically. The Respondents also added that the figure associated with the severed triangle of Kshs.

41,000,000/= if anything, contradicts with the figure issued by the independent professional retained by the Petitioners of Kshs. 27,555,000/=. The Respondents submitted that in any event, that the acquired land was derelicted and as such does not warrant compensation in terms of **Rule 2(c)** of the **Schedule** to the **Act**.

36. The Respondents also submitted forcefully that the foregoing points to the fact that the process was done lawfully, was fair and reasonable and it involved the Petitioner at times. The Respondents also stated that the Petitioner obtained orders in J.R Misc. Civil Application No. 66 of 2010 and the award in compensation could not be released to the it but later the Respondents forwarded the award to the District Officer, Ruiru, for distribution and has been ready for collection by the Petitioner since then

37. On the Petitioner's allegations that their rights to equality and freedom of discrimination have been infringed, the Respondents submitted that the acquisition process affected several other land owners as depicted in the Gazette Notice Number 2240 and the Petitioners were treated in a manner similar to all the other land owners and that the acquisition process was done in strict adherence to the Land Acquisition Act.

38 In response to the claim for damages, the Respondents stated that this court is not a gamble house and should not be used as an avenue for instant unjustified riches. The Respondents added in that regard that the figure of Kshs. 59,000,000/= prayed for by the Petitioners for the alleged breaches of the Constitution by the Respondents is unsubstantiated and the Respondents urge the Honourable Court to reject the same.

39. I should only add that in its replying affidavit the 5th Respondents state that they were Independent Contractors and as such they were not privy to the acquisition of the suit land and stated that it has completed construction of the Nairobi Northern By-Pass Road Project and have handed it over to the Kenyan Government. The 5th Respondents also contended that the Orders issued by the court on the 11th of April, 2011 varying the earlier orders of 30th July, 2010 still stand and unless challenged then the claim for violation of the constitution against the Respondents cannot stand.

All Respondents pray that for the above reasons the Petition should be dismissed with costs.

Issues for Determination

40. I have had the chance to look at rival pleadings and submissions of the Petitioners and the Respondents as a whole and I have come to the conclusion that this matter revolves around the compulsory acquisition of the Petitioner's land and the issue that seems contentious in my view is the compensation due to the Petitioner. Compulsory is defined in the 9th edition of the Black's Law Dictionary as: "**mandated by legal process or by statute.**" That definition is important for reasons to be seen shortly.

41. The process of compulsorily acquiring the Petitioner's property begun before the promulgation of the new constitution 2010 and as such the applicable law would be the Former Constitution of Kenya ("Former Constitution") but does the Constitution 2010 apply retrospectively? In answer to that question, I note that Protection from deprivation of property is contained under **Article 40 of Constitution 2010** as well as **Section 75** of the Former Constitution of Kenya and it is my finding that any right that was provided for under the former constitution and was carried over in the new constitution is still protected see: (Duncan Otieno Waga vs. The Attorney General High Court Petition Number 94 of 2011 and Section 6 and 7 of the Sixth Schedule of the Constitution, 2010.) I should only add that the Bill of Rights has no beginning nor end. The State cannot choose when to protect, promote and preserve those rights and it cannot also choose when it should not do so. The Bill of Rights, must, by its very nature transcends regime change and revolts. An argument may be made that third generation rights (social-economic rights) being relatively new have a recent beginning; whatever the merits of that argument all rights under **Section 70 - 81** of the **Repealed Constitution** continue to exist and are enforceable under the Constitution 2010. In that regard, **Section 75** of the **Former Constitution** provides that:

"(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied -

(a) the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit; and

(b) the necessity therefore is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and

(c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.

(2) Every person having an interest or right in or over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the High Court for -

(a) the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled; and

(b) the purpose of obtaining prompt payment of that compensation:

Provided that if Parliament so provides in relation to a matter referred to in paragraph (a) the right of access shall be by way of appeal (exercisable as of right at the instance of the person having the right or interest in the property) from a tribunal or authority, other than the High Court, having jurisdiction under any law to determine that matter."

42. **Article 40** of the **Constitution** of Kenya provides for the protection of right to property with an exception stated in sub-section 3 which states 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.

43. It is clear therefore that compulsory acquisition of land was and still is provided for under Constitution 2010, and virtually in the same wording as the Repealed Constitution. How then did the Land Acquisition Act (now repealed) provide for the procedure to be followed in the compulsory acquisition of property by the Government of Kenya. When this exercise begun the Act in force was said the Land Acquisition Act Cap 295 Laws of Kenya which was repealed by Act 6 of 2012. Part II - (Procedure for Compulsory Acquisition) the Act deals with preliminaries to acquisition. Section 3 of the Act stated that:

"Whenever the Minister is satisfied that the need is likely to arise for the acquisition of some particular land under section 6, the Commissioner may cause notice thereof to be published in the Gazette, and shall deliver a copy of the notice to every person who appears to him to be interested in the land." The evidence before me indicates that Volume CXII - No 20 of the Kenya Gazette of 2nd March, 2010 and Gazette Notice Number 2240 indicated an Intention to Acquire Land which included the suit land.

44. **Section 6** of the **Act** which deals with Acquisition of Land then provided that:

"(1) Where the Minister is satisfied that any land is required for the purposes of a public body, and that -

(a) the acquisition of the land is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of any property in such manner as to promote the public benefit; and

(b) the necessity therefore is such as to afford reasonable justification for the causing of any hardship that may result to any person interested in the land,

and so certifies in writing to the Commissioner, he may in writing direct the Commissioner to acquire the land compulsorily under this Part.

(2) On receiving a direction under subsection (1), the Commissioner shall cause a notice that the Government intends to acquire the land to be published in the Gazette, and shall serve a copy of the notice on every person who appears to him to be interested in the land.

The evidence before me indicates that on the 16th February, 2010 the Minister for Lands issued a directive that the suit land was required for public purpose and directed the same to be acquired compulsorily. On the same date, the Minister for Lands in accordance with **Section 2** of the Act authorized the 6 persons named therein to exercise the powers conferred on the Commissioner of Lands in respect to the Nairobi Northern By-Pass Project.

45. The Act further states that an inquiry must be held at a date not earlier than 30 days and not later than 12 months when the claims by persons interested in the land will be heard. **Section 9** of the **Act** states that:

"(1) The Commissioner shall appoint a date, not earlier than twenty-one days after the publication of the notice of intention to acquire, for the holding of an inquiry for the hearing of claims to compensation by persons interested in the land, and shall -

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

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

(2) The notice of inquiry shall call upon the persons interested in the land to deliver to the Commissioner, not later than the date of the inquiry, a written claim to compensation.

(3) On the date appointed under subsection (1), the Commissioner shall -

(a) make full inquiry into and determine who are the persons interested in the land;

(b) make full inquiry into the value of the land, and determine that

value in accordance with the principles set out in the Schedule; and

(c) determine, in accordance with the principles set out in the Schedule, what compensation is payable to each of the persons whom he has determined to be interested in the land.

(4) The Commissioner may for sufficient cause postpone an inquiry or adjourn the hearing of an inquiry from time to time.

(5) For the purposes of an inquiry, the Commissioner shall have all the powers of the Court to summon and examine witnesses, including the persons interested in the land, to administer oaths and affirmations and to compel the production and delivery to him of documents of title to the land.

(6) The public body for whose purposes the land is being acquired, and every person interested in the land, is entitled to be heard, to produce evidence and to call and to question witnesses at an inquiry.

The evidence before me indicates that pursuant to the above section of the Act, Gazette Notice Number 2241 was published informing the interested parties that the hearings would take place at 9.30 am on diverse dates at diverse times and; in reference to the suit land it was to be held on the 17th May, 2010 at the District Officer's office in Ruiru.

46. **Section 8** of the **Act** then stated that:

"Where land is acquired compulsorily under this Part, full compensation shall be paid promptly to all persons interested in the land."

On the 7th May, 2010, the Petitioners wrote a letter to the 4th Respondent in which they attached a Report and Valuation for their claim for compensation of Kshs.126,000,000/=.

47. **Section 10** of the **Act** then provided that:

"(1) Upon the conclusion of the inquiry, the Commissioner shall prepare a written award, in which he shall make a separate award of compensation to each person whom he has determined to be interested in the land.

(2) Every award shall be filed in the office of the Commissioner, and, subject to section 75 (2) of the Constitution and sections 18 and 29 of this Act, shall be final and conclusive evidence of -

(a) the area of the land to be acquired;

(b) the value, in the opinion of the Commissioner, of the land;

(c) the amount of the compensation payable, whether the persons interested in the

land have or have not

appeared at the inquiry.

(3) Subject as aforesaid, an award shall not be invalidated by reason only of a discrepancy which may thereafter be found to exist between the area specified in the award and the actual area of the land.

(4) Where an interest in land is held by two or more persons as tenants in common, the award shall state -

- (a) the amount of compensation awarded in respect of that interest; and*
- (b) the shares in which it is payable to those persons.”*

The evidence before me indicates that on the 31st August, 2010 the Valuation Department of the Commissioner of Lands wrote a letter to the District Officer, Ruiru enclosing copies of awards for distribution to registered land owners. Further on the 21st May, 2012, vide a letter from the Kenya Urban Roads Authority Kshs. 452,692,681/= meant for land compensation was transferred into to the Commissioner of Lands Account in Central Bank on the 24th April, 2012. It listed the suit property and indicated an award of Kshs.82,800,000/=.

48. **Section 11** of the **Act** further stated that:

“On making an award, the Commissioner shall serve on each person whom he has determined to be interested in the land a notice of the award and offer of compensation.”

The Respondents indicate in their submissions that they were unable to notify the Petitioner of the award because orders were already in place vide Misc. Application JR ELC 66 of 2010 restraining the respondents from carrying on with the Nairobi Northern By-Pass Project and as such implementing any further decisions in regard to the compulsory acquisition of the suit property. The Order of 30th July, 2010 indeed contained judicial review orders prohibiting the Respondents from taking any steps in enforcing the decisions to compulsorily acquire the suit land.

49. In that regard, as Lord Diplock said in AG v Times Newspapers (1973) 3 All ER 54 at p 71 “..... *In any civilized society it is a function of government to maintain courts of law to which its citizens can have access for the impartial decision of disputes as to their legal rights and obligations towards one another individually and towards the state as representing society as a whole. The provision of such a system for the administration of justice by courts of law and the maintenance of public confidence in it are essential if citizens are to live together in peaceful association with one another. “Contempt of Court” is a genuine term description of conduct in relation to particular proceedings in a court of law which tends to undermine that system and to inhibit citizens from availing themselves of it for the settlement of their disputes. Contempt of court may thus take many forms.*” At p 72 of the same judgment he said that *“once a dispute had been submitted to a court of law citizens should be able to rely on there being no usurpation by any person of the function of that court to decide it according to law. Conduct which is calculated to prejudice this requirement (among others) or to undermine public confidence that it will be observed is contempt of court. (Emphasis mine).* In my view issuance of a notification of the award to the Petitioner would have been in contempt of the court order issued because it would have expressly stated that the Respondents were acting in undue regard of the order issued. I digressed.

50. **Section 29** of the **Land Acquisition Act** and specifically **sub-section (2)** and **(7)** stated that:

“There shall be established a Tribunal to be known as the Land Acquisition Compensation Tribunal which shall consist of five members appointed by the Minister by notice in the Gazette of

whom -

(a) one shall be an advocate of not less than ten years' standing, who shall be the chairman; and

(b) two shall be registered valuers of not less than ten years' standing.

(c) one shall be a prominent businessman of not less than thirteen years standing; and

(d) one shall be a prominent farmer of not less than ten years standing.

(7) A person interested who is dissatisfied with the award of the Commissioner may apply to the Tribunal in the prescribed manner for-

(a) the determination of his interest or right in or over the land; or

(b) the amount of compensation awarded to him under section 10; or

(c) to amount of compensation paid or offered to him under section 5, 9, 23, 25 or 26.

Section 75 of the Repealed Constitution must be read together with Section 29(7) of the Land Acquisition Act which stated that "*Provided that if Parliament so provides in relation to a matter referred to in paragraph (a) the right of access shall be by way of appeal (exercisable as of right at the instance of the person having the right or interest in the property) from a tribunal or authority, other than the High Court, having jurisdiction under any law to determine that matter.*" This issue is important and I should note that I wholly agree with the decision of the Supreme Court of India in Hambardda Wakhana vs. Union of India Air [1960] AIR 554 where the learned Judges stated as follows; "*In examining the constitutionality of a statute it must be assumed the Legislature understands and appreciates the needs of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a Legislature enacts laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is therefore, in favour of the constitutionality of an enactment.*" There is no doubt that the above process laborious as it may be is wholly constitutional.

51. In reference to Section 72(3) of the Former Constitution, a party that was aggrieved by an order of the Tribunal was entitled to appeal to the High Court as provided for under Section 29(10) of the Land Acquisition Act which states that:

"A party to an application to the Tribunal who is dissatisfied with the decision of the Tribunal thereon may, in the manner prescribed under section 72(3) of the Constitution, appeal to the court on any grounds of the application to the Tribunal and on any of the following grounds, namely -

(a) the decision of the Tribunal was contrary to law or to some usage having the force of law;

(b) the decision failed to determine some material issue of law or usage having the force of law; or

(c) a substantial error or defect in the procedure provided by or under this Act has produced error or defect in the decision of the case upon the merits.

52. The Tribunal created under Section 29 of the Land Acquisition Act was established to address

grievances from dissatisfied land owners and/or interested persons whose property had been acquired compulsorily by the Government, on compensation. The composition of the Tribunal also indicated the expertise employed in having an all rounded Tribunal which could address diverse grievances placed before it. My view is that the Petitioner should have exhausted the remedies available to it through that Tribunal. I therefore agree with the holding of Odunga ", J in **Jimmy Mutinda V Independent Electoral And Boundaries Commission & 2 Others Exparte Shaileshkumarnata Verbai Patel & 2 Others [2013] EKLR** where he held that: "***Accordingly, where there is an alternative remedy provided by an Act of Parliament which remedy is effective and applicable to the dispute before the Court, the Court ought to ensure that that dispute is resolved in accordance with the relevant statute. Accordingly I agree with the decision in Pasmore vs. Oswaldtwistle Urban District Council (supra) that where an obligation is created by statute and a specific remedy is given by that statute, the persons seeking the remedy is deprived of any other means of enforcement. As was observed by the Court of Appeal in Speaker of the National Assembly vs. Karume (supra) Order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.***" I wholly agree.

53. Does this matter espouse a constitutional claim? The Respondents allege that this court must be wary of matters clothed in constitutional gowns while the Petitioner's in their submissions state that they have a right to institute these proceedings before this court. I am aware that a Judicial Review matter was filed in the Environment and Land Division seeking orders which were eventually set aside in view of the wider public interest. **Peter Ng'ang'a Muiruri vs. Credit Bank Ltd & 2 others [2008] eKLR**, the Court of Appeal firmly held as follows;

"There is no provision in the Constitution which establishes what Nyamu J. referred to as the Constitutional Court. In Kenya we have a Division of the High Court at Nairobi referred to as "Constitutional and Judicial Review" Division. It is not an independent Court but merely a Division of the High Court. The wording of Section 67 of the Constitution which donate the power to the High Court to deal with questions of interpretation of Sections of the Constitution or parts thereof does not talk about a Constitutional Court. Instead it talks about the High Court.

With regard to the protective provisions, Section 84 of the Constitution does not in any of its sub-sections talk about the Constitutional Court. Instead it talks about an Application being made to the High Court.

In view of what we have stated above, it is quite clear that Nyamu, J.'s remarks which we earlier reproduced were based on the mistaken belief that the Constitution had created a Court called the Constitutional Court with supervisory powers over all other Courts. The Hon. The Chief Justice must have been aware that no such Court is established under the Constitution and that, we think, would explain why he created a Constitutional Division and not a Constitutional Court. The creation of the Constitutional and Judicial Review Division was an administrative act with the sole object of managing the cause list. The Chief Justice would have no jurisdiction to create a Constitutional Court as opposed to creating a Division of the High Court.

Any single judge of the High Court in this country has the jurisdiction and power to handle a constitutional question. The fact that a constitutional Division was established did not by such establishment create a Court superior to a single judge of the High Court sitting alone. It would be a usurpation of power to push forward such an approach and whatever decision which emanates from a Court regarding itself as a Constitutional Court with powers of review over decisions of judges of concurrent or superior jurisdiction such decision is at best a nullity. Courts must exercise the jurisdiction and powers vested in them....

To conclude on this aspect, it is our view and we hold that Nyamu J. raised and considered this issue to give him the opportunity of answering his critics and to popularize his view as to the scope and extent of the jurisdiction and powers of his Division. The Law is not on his side. If his views were to be allowed to gain currency we opine that confusion in the administration of justice will be engendered and disharmony will ensue among judges of the High Court." It is my considered view that there exists

a court of competent jurisdiction created under **Article 162** of the **Constitution** to hear and determine disputes of the nature of the one before me.

54. The Petitioner may well argue that a prayer for compensatory damages was not available to him in the Judicial Review proceedings and as such it approached this Division as it is empowered to issue the same. However as discussed hereinabove, matters for compensation under the Land Acquisition Act have a clear channel through which land owners/interest persons realize these awards. The High court only has appellate jurisdiction from the Land Acquisition Compensation Tribunal in hearing the matters on compensation. The Constitution therefore clearly recognizes the role of independent tribunals in dispute resolution mechanisms and if at all the Petitioner insisted on by-passing the Tribunal above, then **Article 162(2) (b)** of the **Constitution** establishes a High Court to hear and determine disputes relating to the environment and use and occupation of, and title to land and the same court would determine the violation of fundamental rights, if any should be proved.

55. The Petitioner has alleged that its rights have been infringed as per **Articles 27, 40, 47** of the **Constitution** of Kenya 2010 read together with the concurrent provisions in the Banjul Charter and the Universal Declaration on Human Rights. In assessing whether the rights of the Petitioner have been infringed I must look at the balancing of rights between the Petitioner's right to protection of property and the Respondents right to compulsorily acquire the Property in wider public interest. From the evidence before me, I find that the process carried out by the Respondents in acquiring the land was conducted within the parameters of the law and at all times the Petitioner was fully aware of the process; had recourse before the Tribunal and if they so wished, an appeal before the High Court or a court with the status of the High Court under **Article 162 (2) of the Constitution**. The Petitioners in my view, have failed to demonstrate to this court that they were discriminated against because due process was followed through out.

Conclusion

56. The Petitioners made a spirited case for extra compensation which they termed necessary for purposes of disturbance, severance and affection. Sadly, for reasons, I have set out above, the wrong forum cannot attract the right reward. That is all to say on that aspect of the Petition.

57. What orders would be attractive this Court in this Petition?

I am aware that the **Land Acquisition Act** was repealed and with it, the Land Acquisition Compensation Tribunal was rendered void. The National Land Commission has also since been established. The Court with the status of the High Court to deal with the environment, and the use of and occupation of title to land, has also been established.

58. Without being seen to be telling the Petitioner what to do, I will merely advise it to seek counsel and noting my sentiments above, decide whether to take forward its single complaint on the quantum of compensation payable to it upon compulsory acquisition of the suit land.

59. Having noted however, that no constitutional violation or breach was committed by the Respondents, I can only but order that the Petition herein, be dismissed.

60. As to costs, the nature of the matter would necessitate that I order each party to bear its own costs.

61. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 5TH DAY OF APRIL, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court Clerk

Mr. Mugambi and Mr. Nyaribo for Petitioner

Mr. Obura for 1st, 2nd, 3rd, 4th, 5th and 6th Respondents

Order

Judgment duly read.

Copies to be supplied to parties

ISAAC LENAOLA

JUDGE

5/4/2013