



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL PETITION NO. 3 OF 2018**

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 21, 22, 40, 47, 165, 258 & 259 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF SECTIONS 107-133 (BOTH INCLUSIVE) OF THE LAND ACT NO.6 OF 2012**

**AND**

**IN THE MATTER OF VIOLATION OF ARTICLES 10, 40 & 47 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF INFRINGEMENT OF SECTIONS 107-133 (BOTH INCLUSIVE) OF THE LAND ACT NO.6 OF 2010**

**BETWEEN**

**GREGORY KIEMA KYUMAA .....PETITIONER**

**AND**

**CABINET SECRETARY, MINISTRY OF**

**WATER AND IRRIGATION .....1<sup>ST</sup> RESPONDENT**

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

**ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

1. By his petition dated 26<sup>th</sup> March, 2018 and filed in court on even date, the Petitioner prays for judgement against the Respondents jointly and severally for: -

- 1) A declaration that the Respondents actions and activities on the Petitioners land parcel number MAKUENI/KAKO/156 are a violation to the provisions of articles 10, 40 and 47 of the Constitution.
- 2) A declaration that the Respondents are in breach of the procedure set out in sections 107-133 (both inclusive) which bring to effect the provisions of Article 40(3) of the Constitution.
- 3) An award of damages for the violations above.
- 4) An order directing the Respondents to carry out a survey to establish the acreage of the land acquired for the public utility; an assessment the value of the said portion; and payment of compensation thereof within strict timelines as the court shall direct.
- 5) Any other relief that the court may deem fit and just to grant.

## 6) Costs of this petition.

2. The petition is supported by the supporting affidavit of the Petitioner sworn at Machakos on the 26<sup>th</sup> March, 2018.
3. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents were served with the petition on the 16<sup>th</sup> October, 2019, while the 3<sup>rd</sup> Respondent was served on 14<sup>th</sup> October, 2019. The Petitioner filed the affidavit of service sworn on 28<sup>th</sup> October, 2019 by Alphonse Kyalo, a licenced process server.
4. The Respondents neither entered appearance nor did they file their reply to the petition and as such it proceeded as an undefended suit. It was canvassed by way of written submissions.
5. In paragraphs 2, 3, 4, 5, 6, 7 and 8 of his supporting affidavit the Petitioner has deposed that he is the absolute registered proprietor of the land title number Makueni/Kako/156 as can be seen from the copy of a title deed marked as GKK1, that sometime in the year 2017 the Respondents through their agent Pioneer Engineering and Construction Company Limited entered into his land and started to excavate thereof in a bid to create a water dam as seen in a photograph of a signboard showing persons on the ground marked as GKK2, that the excavations effected a substantial chunk of his land which is yet to be established and left a trail of destruction of the remainder thereof as can be seen from photos marked as GKK 3, that the Respondents then created a public road to the water dam through the Petitioner's land and fenced it off completely severing the land from the rest of the Petitioner's land, that the Petitioner has not been informed either informally or otherwise by the Respondents or anyone at all as to the reasons for the Respondents actions and activities in his land and neither has he been approached either for negotiation or compensation at all, that he believes that a portion of his land has been acquired compulsorily by the Respondents for some public use but in utter and blatant violation of his right as enshrined under Articles 40 and 47 of the Constitution and that he is not averse to the public use of his land especially noting that the Respondents have completed the said project but he claims for prompt and adequate compensation together with damages for violation of his rights.
6. In their written submissions, the Counsel for the Petitioner framed two issues for determination. These were: -
  - a) ***Whether the Applicant has locus standi to file (emphasis mine) this matter.***
  - b) ***Whether the threshold for a conservatory order has been met.***
7. With regard to the first issue, the Petitioner's Counsel submitted that the Petitioner being the proprietor of the suit land, he has been adversely affected by the Respondents' actions in that his constitutional rights and fundamental freedoms under Articles 40, 43 and 47 have been contravened. These rights include the right to acquire and own property. The Counsel added that Article 2 of the Constitution establishes the supremacy of the Constitution and that it binds all state organs at both levels of government.
8. It was further submitted that the Respondents' actions are in contravention of the Constitution for failure to compensate the Petitioner as well as not following the procedure provided for acquisition of land. The Counsel added that the Respondents' actions of entering the Petitioner's parcel of land and carrying out excavation therein contravenes Article 40 which abhors arbitrary deprivation of one's property. It was also submitted that the Respondents' failure to respect the rights that have accrued to the Petitioner to peacefully enjoy his property. Further that the Respondents failed to uphold the national values and principles set out under Article 10.
9. In support of his submissions, the Counsel cited the case of **Everlyn College of Design vs. Director of Children's Department & AG [2013] eKLR** where Majanja, J stated thus: -

*"I would once again emphasise that a finding of "unlawful acquisition" referred to in Article 40(6) of the Constitution must be through a legally established process and not by forceful occupation of the property by the state institutions or by preventing a person from enjoying the incidents of ownership of property."*
10. Regarding the issue of whether the threshold for conservatory order has been met, the Counsel submitted that courts have adopted the precedence set by the Supreme Court in the case of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others [2014] eKLR** where it was held at paragraph 86 of its ruling as follows: -

***"Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.***
11. The Petitioner's Counsel concluded by urging the Court to grant the orders sought.
12. Having read the petition together with the supporting affidavit and the submissions filed by the Counsel on record, I am of the view that the only issues for determination is whether or not the Respondents have arbitrarily deprived the Petitioner of his right to property in respect of land parcel number Makueni/Kako/156 without prompt and just compensation, whether the Respondents are in breach of the procedure set out for compulsory acquisition and whether the Petitioner is entitled to an award of damages for violation of his right.
13. There is no doubt that the Petitioner is indeed the registered proprietor of land parcel number Makueni/Kako/156 measuring 17.2 hectares. Of importance to note is that the Petitioner has not had any survey carried out to know the extent to which his land has been acquired and the value of such land. This would raise the question of whether the Petitioner knows the boundaries of his parcel of land. This

is borne out by the fact that in paragraph 7 of his supporting affidavit to the Petition, he has deponed that he believes that a portion of his land has been compulsorily acquired by the Respondents for some public use but in utter and blatant violation of his right as enshrined under Articles 40 and 47 of the Constitution. Believing that a portion of his land has been compulsorily acquired without providing evidence of why he believes the same was compulsorily acquired cannot hold. It would appear that what the Petitioner claims to have been compulsorily acquired was idle land and there is no evidence to show that it was part of the 17.2 hectares that the Petitioner owns. It could probably have been public land judging from the manner in which the Respondents are said to have moved on the said land. However, this remains a mere speculation. One would have expected the Petitioner to at least engage the services of a Surveyor so as to find out the size of his land and the boundaries before filing this suit. His failure to do so leaves this Court with no choice but to hold that the Petitioner is on a fishing expedition. It is, therefore, doubtful if the Petitioner has been deprived of his right to his land without prompt and just compensation. As for conservatory order, the same cannot be granted at this stage of the disposal of the petition. The Petitioner had the liberty to apply for the same pending the hearing and determination of this petition so as to give interim protection against continued or threatened violation of the Petitioner's constitutional rights but chose not to. In any case he has already stated that the Respondents have completed the project. The submissions therefore by the Petitioner's Counsel on this issue are of no probative value to these proceedings. It follows therefore that the court cannot surmise that the Respondents are in breach of the procedure set out for compulsory acquisition to warrant the Petitioner to be awarded damages.

14. Arising from the above, the end result is that the Petitioner's claim against the Respondents must fail. In the circumstances, I hereby proceed to dismiss the Petition dated 26<sup>th</sup> March, 2018 and filed in court on even date with no orders as to costs since the Respondents did not enter appearance nor did they file their response.

**Signed, dated and delivered at Makueni via email this 7<sup>th</sup> day of October, 2020.**

**MBOGO C.G.,**

**JUDGE.**

**Court Assistant: Ms. C. Nzioka**