



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHT DIVISION
PETITION NO. 23 OF 2011

BETWEEN

ELECTRICAL OPTIONS LIMITEDPETITIONER
AND
THE ATTORNEY GENERAL1ST RESPONDENT
THE COMMISSIONER OF LANDS2ND RESPONDENT

JUDGMENT

Introduction

1. The petitioner, Electrical Options Ltd, is the registered proprietor of LR No. 209/14146 measuring 0.2065 Ha (“the suit property”). It was allocated that property for a term of 99 years with effect from 1st January 1999 by a letter of allotment dated 17th December 1998. Upon payment of the stand premium, the petitioner was issued with a Grant Number IR 84063.

2. By Gazette Notice No. 6034 dated 27th June 2008 expressed to be under **section 6(2)** of the *Land Acquisition Act (Chapter 295 of the Laws of Kenya)*, the Commissioner of Lands gave notice to acquire the 0.0092 Ha of the suit property for purposes of the Construction of the Nairobi Thika Road Project. An “ADDENDUM” was further published to Gazette Notice No. 6034. Gazette Notice No. 1396 added a further 0.1974 Ha of the suit property to be acquired. Gazette Notice No. 6035 invited the petitioner to attend an inquiry at the Kariokor DO’s office.

3. Subsequently by Gazette Notice No. 454 issued on the 21st January 2011, the Commissioner issued a “corrigendum” which deleted LR No. 209/14146 registered in the name of Electrical Options Limited measuring 0.2066 Ha from the list of the properties intended for acquisition.

Petitioner’s Case

4. The petitioner’s complaint is that after the notices of acquisition were issued in 2011, the government took over the suit property and constructed part of the Nairobi Thika Highway on it. Thus, the purported revocation of the acquisition through the subsequent notice is violation of its right to protection of its property. Moreover, the purported revocation was done without notice to the petitioner, it is malafide, high handed and unjustifiable in a democratic society.

5. The petitioner avers that even if the notice of acquisition is revoked, the petitioner cannot take possession of the suit property as it is now part of the highway.

6. The petitioner prayed for the orders set out in the petition dated 10th February 2011 as follows;

(a) *A declaration be and is hereby issued that the decision by the 2nd Respondent to delete Gazette Notice No. 6034 of 11th July 2008 was unlawful and unconstitutional and it violates the Applicant's right to property as protected by Article 40 of the Constitution of the Republic of Kenya.*

(b) *A declaration to be and is hereby issued that the decision of the 2nd Respondent to delete Gazette Notice No. 6034 of 11th July 2008 vide Gazette Notice No 454 of 21st July 2011 was null and void to extent that it was in violation of the Applicant's rights to property as protected by Article 40 and 64 of the Constitution of the Republic of Kenya.*

(c) *A declaration be and is hereby issued that the decision of the 2nd Respondent to delete Gazette Notice No. 6034 of 11th July 2008 for LR No. 209/14146 Nairobi which the Government had already acquired compulsorily and constructed a road on it vide Gazette Notice No, 454 of 21st January 2011 violates the Applicant's right to secure protection of the law as protected by Article 40 and Article 64 of the Constitution of Kenya.*

(d) *The Respondents be and are hereby ordered:-*

(i) *To revoke Gazette Notice No. 454 of 21st January 2011.*

(ii) *To pay damages for the inconvenience and anguish caused to the Applicant for unlawful, unconstitutional, whimsical and illegal deletion of Gazette Notice No 6034 of the 1st July 2008 after the Government had acquired compulsorily and constructed a road on LR No. 209/14146 Nairobi.*

(iii) *The Respondent do pay for the costs of this action.*

7. The petition was supported by the three affidavits of Kells Mabale. The first one was sworn on 10th February 2011, a further affidavit sworn on 2nd February 2012 and a supplementary affidavit sworn on 16th February 2012. In addition, the petitioner's counsel, Mr Moindi, relied on written submissions filed on 19th January 2012 and further submissions filed on 17th February 2012.

Respondents' Case

8. The respondent relied on the replying affidavit of Thomas Gicira Gacoki sworn on 3rd February 2012 ("the replying affidavit") together with the written submissions dated 9th February 2012. Ms Gitahi, who appeared for the respondents, adopted the deposition and the written submissions.

9. According to Thomas Gicira Gacoki, the Manager (Survey), Kenya National Highways Authority, the suit property lies at the junction of the Limuru and Muranga Road which is part of the Thika Road Improvement Project. He depones that when the Notice of Acquisition was given through Gazette Notices Nos. 6034, 6035 and 1389, the petitioner was invited to appear at the Kariokor DO's office on 18th September 2008 in respect of the first gazettment and on 6th July 2009 for the 2nd gazettment to establish its claim. The petitioner did not attend either inquiry or furnish evidence to establish their right to any award payable under the ***Land Acquisition Act***.

10. Notwithstanding the failure to attend the inquiry by the petitioner, the land was valued and payment thereof made out to the Commissioner for Lands. But before completion of the acquisition process and upon perusal of various survey plans by the Kenya National Highways Authority, it became apparent that the land in question had been created out of the road reserve at the junction of Limuru and Murang'a Roads in the year 2000. Limuru and Murang'a Roads are part of the Thika Road Highway improvement project.

11. According to the Survey Plan made on 10th June 1970 and marked as exhibit 1b to the replying affidavit, LR No. 209/14146 did not exist as it was part of the junction between Limuru and Murang'a Roads reserved for road construction. The Survey Plan dated 26th June 2000 shows LR No. 209/14146 hived off from the triangle at the intersection of Limuru and Murang'a roads.

12. Mr Gacoki depones that these facts were the basis of Gazette Notice No. 454 of of 21st January 2011 cancelling the acquisition of LR No. 209/14146.

13. Ms Gitahi argued that the suit property was always a road reserve, a fact which the petitioner was aware and accordingly its acquisition was fraud within the meaning of **section 2** of the **Registration of Titles Act (Cap 28 of the Laws of Kenya)**. That provision provides that fraud shall, on the part of the person obtaining registration include proved knowledge of the existence of an unregistered interest on the part of some other person, whose interest he knowingly and wrongfully defeats by that registration. In the circumstances, the petitioner fraudulently and unlawfully acquired the title to this property knowing the same to be a road reserve.

14. Ms Gitahi further submitted that **Article 40(6)** of the Constitution does not afford protection to a proprietor of property that has been unlawfully acquired as subject by the petition herein. She urged the court to dismiss the petition with costs.

Petitioner's response

15. The petitioner's position is that it applied for allocation of the property through the Commissioner of Lands to construct a petrol station. It was duly allocated the property, paid the requisite amount and a title deed was duly processed. The petitioner denies that there was any illegality in the process.

16. Mr Moindi, drew the court's attention to the fact that the neighbouring LR No. 209/6397 which comprised a petrol station was duly compensated. In the circumstances, refusal to compensate the petitioner would amount to discrimination.

17. The petitioner's directors through the supplementary affidavit confirm that they attended the inquiry at the Kariokor DO's office on 18th September 2008 and provided proof of ownership. They confirm that the land was valued at Kshs.61,065,000.00 by the Commissioner for Lands.

Violation of Article 47 of the Constitution

18. **Article 47** of the Constitution provides as follows;

47(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

19. It is not disputed that the respondent is the registered proprietor of all the property known as LR No. 209/14146 which the Commissioner of Lands proposed to acquire vide Gazette Notices Nos 6034, 6035 and 1396 under the **Land Acquisition Act**.

20. The purported deletion of the suit property by Gazette Notice No. 454 was in total disregard of the petitioner's right to a lawful, reasonable and procedurally fair process. The petitioner was not notified of the intention to reverse the proposed acquisition. The petitioner had a legitimate expectation, as the registered owner, that he would be entitled to receive compensation particularly after the notice of acquisition had been issued under the **Land Acquisition Act**. The petitioner ought to have been given an opportunity to present its case before the Gazette Notice No. 454 was put into effect and since the decision was one where the right to property was affected then written reasons were required.

21. Even after the revocation of the proposed acquisition of the suit property, the State took possession of the property by constructing upon it part of the Nairobi Thika Road. As such the purported revocation was only a gloss on what had already taken place. The petitioner was left holding a mere piece of paper to signify that it is entitled to the suit property.

22. The inquiry contemplated under **section 9** and **10** of the **Land Acquisition Act** is for purposes of inquiry into the award of compensation. The side note to **section 9** reads, "***Inquiry as to compensation***" and deals in the manner in which such an inquiry is to be conducted. Upon conclusion of the inquiry the Commissioner is required to prepare a written award. Such award shall be final and conclusive evidence of the area of the land to be acquired, the value of land in the opinion of the Commissioner and the amount of compensation payable.

23. I do not read such inquiry to be a determination as to the legality of title as such a matter is outside the purview of the Commissioner of Lands under the Act. Further as demonstrated by schedule B annexed to the supporting affidavit of Kells Mabale, the land was valued at Kshs.61,065,000.00 after the inquiry and payments forwarded to the Commissioner of Lands. Thus it cannot be argued that the petitioner was given a hearing in respect of the determination of the legality of the title to the suit property.

24. My view in the matter is fortified by the case of ***Helena Kithinji v Attorney General Nairobi HC Misc. No. 7830 of 1989 (Unreported)***, the Commissioner of Lands had purported to cancel the petitioner's title through a circular. The court held, ***"in all respects the actions of Commissioner of Lands in cancelling the titles of the applicant is illegal, invalid and unconstitutional and has to be set aside by the courtI also declare that she has been deprived of the proprietorship of the land registered in her name in pursuance of a circular which is unconstitutional and in flagrant violation of the rules of natural justice."***

25. In this case the revocation of the notice of intended acquisition of land and the subsequent taking of the petitioner's land for purposes for constructing the Thika Highway without giving the petitioner the right to contest the decision is a clear breach of **Article 47(1) and (2)** of the Constitution and I so hold.

Violation of Article 40 of the Constitution

26. **Article 40(3)** of the Constitution protects a person from deprivation of property by the state unless the deprivation is for a public purpose or in public interest and is carried out in accordance with the Constitution or an Act of Parliament and prompt payment in full of just compensation.

27. In the circumstances of this case, the state evinced its intention to acquire the petitioner land in accordance with the law but thereafter breached **Article 40** in two respects. It purported to reverse the acquisition without notifying the petitioner or in other words arbitrarily taking away the petitioners rights to compensation once the acquisition had been put into effect in accordance with the law. The acquisition had in fact already taken place as the suit property is now part of the highway and could not be reversed by a mere notice in the Kenya Gazette unless physical possession of the suit property was delivered to the petitioner.

28. The question remains whether I should grant compensation having found that taking of the property was unconstitutional. The answer to this issue hinges on **Article 40(6)** which provides that, ***"The rights under this Article do not extend to any property that has been found to have been unlawfully acquired."*** [Emphasis mine]

29. The petitioner's position is grounded on the fact that it has an absolute and indefeasible title that it is capable of being protected under **Article 40**. As the registered owner, it is entitled to protection in accordance with the provisions of **section 23** of the ***Registration of Titles Act***. This position finds support in several cases of our courts; ***Wreck Motors Enterprises v The Commissioner of Lands and Others Nairobi Civil Appeal No. 71 of 1997 (Unreported)***, ***Nairobi Permanent Markets Society and Others v Salima Enterprises and Others Nairobi Civil Appeal No. 185 of 1997 (Unreported)*** and ***Joseph N K arap Ng'ok v Justice Moijo ole Keiuwa and Others Nairobi Civil Application No. NAI 60 of 1997(Unreported)***.

30. On the other hand, the respondent is of the view that the suit property was illegally and fraudulently acquired and as such, this Court cannot give a seal of approval to the applicant's title. This proposition is supported by the case of ***Milan Kumarn Shah & Others v City Council of Nairobi & Others Nairobi HCCC No. 1024 of 2005 (OS)(Unreported)*** and ***James Joram Nyagah & Another v The Honourable Attorney General and Another Nairobi HC Misc. 1732 of 2004 (Unreported)***.

31. I take the view stated in the case of ***Chemei Investments Limited v The Attorney General & Others Nairobi Petition No. 94 of 2005 (Unreported)*** at para. 64 that, ***"The Constitution protects a higher value, that of integrity and rule of law. These values cannot be side stepped by imposing legal blinders based on indefeasibility. I therefore adopt the sentiments of the court in the case of Milan Kumarn Shah***

& 2 Others v City Council of Nairobi & Another (Supra) where the Court stated as follows, ‘We hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest.’”

32. I also hold that a the finding of “*unlawful acquisition*” referred to in **Article 40(6)** of the Constitution must be through a legally established process and not by whim or revocation of the Gazette Notice as the Commissioner of Lands purported to do and definitely not by forceful taking of possession.

33. There is evidence that the suit property was part of a road reserve and in view of the fact that I have found that revocation of acquisition and taking of the suit property was contrary to **Article 47**, I think the logical consequence is to give the State the opportunity to test its case in the appropriate forum. I have therefore resisted commenting on other factual issues which may unnecessarily prejudice a fair trial of the matters in that forum.

34. In the case of ***Renton Company Limited v George Gachiri & Another Nairobi Petition No. 215 of 2010 (Unreported)***, the Registrar of Titles issued a notice in the Kenya Gazette purporting to revoke the title of the petitioner on the ground that it was a public utility plot. The court held, “*it is clear from the material before me that the respondents have acted in total disregard as the provisions of the Constitution which dictates no one shall be deprived of his right land without compensation This renders their decision null and void.*” The court proceeded to quash the Gazette Notice but declined to award damages as the quashing had the effect had the effect of revoking the cancellation.

35. Unlike the cases which I have cited, the petitioner’s title in this case was not revoked but the State took possession of the property, the result of setting aside the Gazette Notice No. 454 is that the petitioner is left with a mere piece of paper as it cannot take possession of the property and it is this respect that I shall consider the appropriate relief as I am entitled to under **Article 23** of the Constitution.

Relief

36. In view of the my finding that the petitioner’s property was taken without complying with the provisions of **Article 47(1)** and **(2)** of the Constitution I declare Gazette Notice No. 454 in so far as it relates to LR No. 209/14146 unconstitutional null and void. Since revocation of Gazette Notice No. 454 will leave Gazette Notices No. 6034, 6035 and 1396 intact, it would imply the petitioner would be entitled to compensation therefore those notices must also be declared null and void.

37. Under **Article 40(3)**, the state must pay just compensation in full but in view of the fact that there are allegations of fraud in the acquisition of the suit property, I decline to award compensation as provided under **Article 40(6)** and direct the state to follow due process to establish the lawfulness of the petitioner’s title.

38. As the issue of a fraudulent acquisition was raised ten years after the petitioner had acquired the suit property. The State has taken possession of the property which but for the fact that it asserts that the title is unlawful within the meaning of **Article 40(6)**, I would have awarded compensation.

39. As part of my jurisdiction to frame appropriate relief under **Article 23**, I direct that if the state wishes to commence legal proceedings as I have stated at paragraph 36 and 37 above, it must do so within the 6 months from the date of this judgment otherwise the petitioner is at liberty to apply to this court for determination of further relief.

Disposition

40. Having considered the pleadings, evidence, and submissions, I now enter judgment for the petitioner against the respondents as follows;-

(a) I declare that the Gazette Notices Nos. 6034, 6035, 1396 and 454 in so far as they relate to LR No. 209/14146 null and void as they contravene the petitioner's rights under Articles 47(1) and (2) of the Constitution.

(b) If the State wishes to commence legal proceedings to establish the legality or otherwise of LR 209/14146, it must do so within the 6 months from the date of this judgment, in default, the petitioner is at liberty to apply to this court for determination of further relief.

(c) The respondents shall bear the costs of this petition.

DATED and DELIVERED at NAIROBI this 2nd day of March 2012.

**D.S. MAJANJA
JUDGE**

Mr Moindi instructed by Mogire & Company Advocates for the petitioner.

Mrs Gitahi, Litigation Counsel, instructed by the State Law Office, for the Respondent.