REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

PETITION NO. 2 OF 2011

IN THE MATTER OF ARTICLE 40 OF THE CONSTITUTION

AND

IN THE MATTER OF ALLEDGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 40 OF THE CONSTITUTION.

BETWEEN

SUSAN KAKAI (substituted with

SIMON KAMPALA KAKAI).....PETITIONER

VERSUS

MINISTRY OF CO-OPERATIVE DEVELOPMENT....1ST RESPONDENT

COUNTY GOVERNMENT OF BUNGOMA.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

J U D G M E N T

SUSAN KAKAI (the Petitioner herein and now substituted with **SIMON KAMPALA KAKAI**) moved to this Court by her Petition dated 14th April 2011 seeking the following orders against **THE MINISTRY OF CO – OPERATIVE DEVELOPMENT**, **THE COUNTY COUNCIL OF BUNGOMA** and the **ATTORNEY GENERAL** (the 1st, 2nd and 3rd Respondents respectively) with respect to the land parcel **NO BOKOLI/CHWELE/1014: -**

1. A declaration do issue that the manner in which the Petitioner's land was acquired was unconstitutional and contravenes Article 40 (3) of the Constitution since she was not compensated by the Respondents.

2. The Respondents be directed to compensate the Petitioner for acquiring her land through compulsory acquisition at current rates.

3. The Respondents be directed to pay the Petitioner general damages from the loss she has suffered for over 60 years as a result of violation her rights by the Respondents.

4. A declaration do issue that the additional ½ an acre of land acquired by the Respondents and their agents on 14th September 2005 was unconstitutional and amounted to violation of the Petitioner's fundamental rights thus null and void.

5. The Respondents be directed to compensate the Petitioner by way of damages for the violation of her rights as stated in paragraph 4 above.

6. Costs for the Petition be provided for.

Annexed to the Petition is the supporting affidavit by **SUSAN KAKAI** dated 14th April 2011, Green Card in respect to the land parcel **NO BOKOLI/CHWELE/811** in the names of **KAKAI KAMBALA**, Green Card in respect to the land parcel **NO BOKOLI/CHWELE/1041** in the name of the then **BUNGOMA COUNTY COUNCIL**, Certificate of Search in respect of the land parcel **NO BOKOLI/**

CHWELE/1014, a map, letter dated 5th April 2004 from the 1st Respondent and addressed to **HENRY SIKUKU KAKAI** and a letter dated 13th July 2005 from **BENSON WANYAMA** a former **ASSISTANT CHIEF CHWELE**.

According to the Petitioner, on or about the year 1964, her late husband's land parcel **NO BOKOLI/CHWELE/1014**, measuring 0.06 Hectares was compulsorily acquired and allocated to **KUYWA FARMERS CO – OPERATIVE SOCIETY LTD** an entity under the jurisdiction of the 1st Respondent. The said land was then registered to the 2nd Respondent as Trust Land for purposes of setting up a Co-operative Society for farmers. Then on 14th September 2005 one **STEPHEN WAFULA NAKITARE** the area **ASSISTANT CHIEF** together with other Government agents and without any colour of right hived off another half-acre from the family's land parcel **NO BOKOLI/ CHWELE/811** and in the process destroyed her crops and uprooted her trees. It is the Petitioner's case that the act of acquiring her family's land without compensation amounted to a violation of her rights under Article 40 of the Constitution as well as **Article 8 and 17(2) of the UNIVERSAL DECLARATION OF RIGHTS** and **Article 14 of the AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHT**. That this Court therefore has the power to secure the Petitioner's rights.

On 5th September 2013, the Petitioners filed a supplementary affidavit dated 2nd September 2013 to which was annexed a valuation report dated 26th November 2012 by **CHRISCA REAL ESTATES**. That report makes the following finding of page 5 thereof: -

> ***"VALUATION***
>
> ***Having regard to the foregoing particulars, our terms of reference and other relevant factors, we value the freehold interest in the above stated property namely TITLE NO BOKOLI/CHWELE/1014 plus the extra 0.06 Ha on TITLE NO BOKOLI/CHWELE/811 free from all encumbrances as at to-days date in the sum of Kshs. 350,000/= (Kenya shillings three hundred and fifty thousand only).***
>
> ***BREAKDOWN***
>
> ***BOKOLI/CHWELE 1014 - Kshs. 300,000***
>
> ***0.06 Ha extra land - Kshs. 50,000***
>
> ***Total - Kshs. 350,000***
>
> ***For and on Behalf of CHRISCA REAL ESTATES***
>
> ***P. I. KHAOYA, B.A LAND (ECON)***
>
> ***HONS, MISK***
>
> ***REGISTERED/PRACTISING VALUER***
>
> ***VEMS***
>
> ***DATED 26th November 2012."***

The 1st and 3rd Respondents through **MR GILBERT TARUS STATE COUNSEL** filed a ***"response to Petition"*** in which they denied that the land parcel **NO BOKOLI/CHWELE/1014** measuring 0.06 Ha belonged to the Petitioner's husband. They also denied that on or about 14th September 2005, **STEPHEN WAFULA NAKITARE** an **ASSISTANT CHIEF** and other Government officials hived off ½ acre of the Petitioner's land parcel **NO BOKOLI/CHWELE/811**. Further that this Petition is time barred and no explanation has been given for the delay. Finally, the 1st and 3rd Respondents denied having violated the Petitioner's rights and put her to strict proof thereof.

On 6th October 2020, I directed that the Petition be canvassed by way of written submissions. The Petitioner's Counsel **J. S. KHAKULA ADVOCATES** having filed her submissions as far back as 5th September 2013, I directed that the Respondents file their submissions within 14 days. The record shows that the Respondents did not file any submissions.

I have considered the Petition, the supporting affidavit and annexture thereto, the response by the 1st and 3rd Respondents as well as the submissions by the Petitioner. The 2nd Respondent though represented by the firm of **J. O. MAKALI & COMPANYADVOCATES** who even signed the consent order dated 22nd December 2016 allowing the substitution of the Petitioner with **SIMON KAMPALA KAKAI** did not file any response to the Petition nor submissions.

Ordinarily, the Respondents ought to have filed either a replying affidavit, grounds of opposition or a notice of Preliminary Objection or a combination of any of the above in response to the Petition. Only the 1st and 3rd Respondents filed what they referred to ***"Respondent's response to Petition."*** I do not consider that to be a replying affidavit, grounds of opposition or Preliminary Objection. However, **Rule 15 (b)** of the Mutunga Rules provides that a Respondent may, in response to a Petition, file ***"a statement setting out the grounds relied upon to oppose the Petition."*** And in keeping with the provisions of **Article 159 2 (d) of the Constitution**, I shall consider that to be the 1st and 3rd Respondent's reply to the Petition. However, it must be remembered that the Petitioner having filed a supporting affidavit, the only way in which her sworn averments could be challenged was through another affidavit and not through a mere ***"response to Petition"*** which was not

sworn. It follows therefore that the Petitioner's supporting affidavit dated 14th April 2011 is not contested. In **DANIEL KIBET MUTAI & OTHERS .V. ATTORNEY GENERAL 2019 eKLR,** the Court of Appeal addressed this issue as follows: -

> ***"The position before us is that the appellants averred to certain facts under oath in an affidavit. These facts were not controverted by the respondent either through an affidavit in response or through cross – examination. An affidavit is sworn evidence. It occupies a higher pedestal than grounds of opposition that are basically issues of law intended to be argued. Two things flow from this. First, by the mere fact of the affidavits not having been controverted, there is an assumption that what is averred in the affidavit as factual evidence is admitted. Secondly, a question arises regarding the weight or probative value of the averred factual evidence. In other words, are the facts as averred in the affidavits sufficient to prove the appellant's claims?"***

The Court went on to hold that where an affidavit is not challenged, then the facts averred therein are ***"essentially admitted."***

The Petitioner has pleaded in paragraph 7, 8, 9, 10, 11 and 14 of her supporting affidavit as follows: -

> ***7 "That on or about the year 1947, my late husband KAKAI KAMBALA allowed the Government to use the land known as BOKOLI/CHWELE/1014 to set up a Co – operative Society for farmers on the agreement that he shall be compensated"***
>
> ***8 "That later in 1964 land adjudication was carried out by the Government and the land known as BOKOLI/CHWELE/1014 was allocated to an entity known as KUYWA FARMERS COOPERATIVE SOCIETY. Annexed herewith and marked "SK 2" is a certified copy of the Registrar (Green Card) in respect to the said parcel of land."***
>
> ***9 "That the Government proceeded to set up the CO – OPERATIVE SOCIETY in the land and even erected some structures thereon."***
>
> ***10 "That around the year 1969, the CO – OPERATIVE SOCIETY collapsed and my late husband assumed possession of the land and even grew coffee on it without the knowledge that the land had infact been registered under the 2nd Respondent as Trust land in 1964 without his knowledge."***
>
> ***11 "On or about 1990, the PROVINCIAL ADMINISTRATION through retired Chief one PIUS WASWA WANGA informed my late husband that the Government wanted to construct the office of the Chief on the land and that he will be compensated."***
>
> ***14 "That to – date, the Respondents have constructed on the land the office of the Chief, a Health Centre and a doctor's house."***
>
> ***15 "That when the land was acquired by the Respondents, they were supposed to have compensated my late husband for the same but to – date, no compensation has been done."***

In support of her Petition, the Petitioner annexed the Green Card for the land parcel **NO BOKOLI/CHWELE/1014** which indicates that it was first registered on 25th August 1964 under the name ***"TRUST LAND BOARD (NEW BUNGOMA COUNTY COUNCIL)."*** That would suggest that the said **COUNCIL** were the first registered proprietor of the said parcel of land. However, the Petitioner's further evidence as per paragraph 7 of her supporting affidavit, and which has not been rebutted, is that as far back as 1947 before the adjudication process the land parcel **NO BOKOLI/CHWELE/1014** belonged to her late husband who allowed the **GOVERNMENT** to use it for public purposes. The fact that the same **GOVERNMENT** allowed her late husband to repossess the said land when the **CO – OPERATIVE SOCIETY** collapsed can only be further proof that indeed the **GOVERNMENT** recognized the Petitioner's late husband and the proprietor of the same. In the circumstances, the 1st and 3rd Respondents claim in paragraph 3 of their **response to Petition** denying that the Petitioner's husband was the owner of the land parcel **NO BOKOLI/CHWELE/1014** remains hollow and as is now clear, is not a proper rebuttal of the Petitioner's affidavit. The fact that the **GOVERNMENT** through its agents approached the Petitioner's late husband with a request to utilize the land parcel **NO BOKOLI/CHWELE/1014** can only be a confirmation that the Respondents recognized his interests in the said land. Otherwise, how else could they have surrendered the land parcel **NO BOKOLI/ CHWELE/1014** to him following the collapse of the **CO – OPERATIVE SOCIETY?**

The Petitioner further claimed that the Respondent also hived off a portion of the land parcel **NO BUKUSU/CHWELE/811**. This is how she has put it in paragraphs 17 and 18 of her supporting affidavit.

> ***17 "That further, on 14/09/2005, the ASSISTANT CHIEF STEPHEN WAFULA NAKITARE and other GOVERNMENT agents without any colour of right hived off another half an acre from my family's land known as BOKOLI/CHWELE/811 and in the process destroyed my crops and up – rooted my trees."***
>
> ***18 "That the Respondents' actions have denied me access to my family's land which has affected my ability to earn income from my land through farming activities."***

Annexed to the said supporting affidavit is the Green Card for the land parcel **NO / BOKOLI/CHWELE 811** showing that it was first registered in the names of **KAKAI KAMBALA** on 25th August 1964. Therefore, the Petitioner's ownership of the said parcel of land cannot be disputed.

The Green Card to the land parcel **NO BOKOLI/CHWELE/1014** indicates that it was compulsorily acquired vide **GAZETTE NOTICE NOs 11778** and **11779** dated 25th April 1980. Although those **GAZETTE NOTICES** were not availed for my perusal, those are Public documents which this Court can take judicial notice of under **Sections 59, 60 and 85 of the Evidence Act**. This Court therefore perused the said **GAZETTE NOTICES No 11778** and **11779** of 25th April 1980 which were both in respect of parcels of land acquired for the

construction of the **BUNGOMA – CHWELE ROAD** under the then **LAND ACQUISITION ACT (CAP 295)** now repealed. Against parcel **NO BOKOLI/ CHWELE/811**, the registered proprietor is indicated as **KAKAI KAMBALA** and the portion acquired is indicated as measuring 0.0224 Hectares. As against land parcel **NO BOKOLI/CHWELE/1014**, the registered proprietor is indicated as **TRUST LAND BOARD (B.C.C.) TEREMI CO – OPERATIVE SOCIETY** and the portion acquired is indicated as 0.680 Hectares. And as I have already found above, the Petitioner's claim that the land parcel **NO BOKOLI/CHWELE/ 1014** belonged to her late husband before it was acquired by the Government during the land adjudication process has not been rebutted. If any compensation was paid to the Petitioner's late husband following the acquisition of portions of the land parcels **NO BOKOLI/CHWELE/811** and **1014**, those are matters within the knowledge of the Respondents to show that compensation was indeed paid. Once the Petitioner alleged that no compensation was paid, the onus shifted to the Respondents to disprove the same. **Section 112 of the Evidence Act** provides that: -

> ***"In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."***

It is also instructive to note that among the documents annexed to the Petitioner's supporting affidavit is a letter dated 13th July 2005 by the former **CHIEF CHWELE**. The contents thereof are important and I will reproduce it. It reads: -

> ***"THE SECRETARY***
>
> ***C.J.P.C***
>
> ***P .O. BOX 1690***
>
> ***BUNGOMA.***
>
> ***CHWELE***
>
> ***13th July 2005***
>
> ***Dear Sir***
>
> ***RE: LAND R. NO BOKOLI/CHWELE/1014 –***
>
> ***SAMUEL KAKAI KAMBALA (deceased)***
>
> ***This is to inform your office that the original owner of the above piece of land situated in SIKULU SUB – LOCATION CHWELE LOCATION within BUNGOMA DISTRICT was SAMUEL KAKAI (deceased).***
>
> ***SAMUEL KAKAI lodged a complaint demanding to repossess this land when the defunct KUYWA F C S NO 207 was liquidated but the then area ASSISTANT CHIEF PIUS WANGA encroached on it by making false pledges to compensate him.***
>
> ***It is de facto that KAKAI out of his development mind subdivided his land and gave to the CO – OPERATIVE SOCIETY in the late 1940's to run commercial business on.***
>
> ***It is fallacious for any other party to claim this land other than the KAKAI family. It has absolute colour of right to demand compensation since the society is extinct.***
>
> ***Please accord it necessary assistance in pursuit of this matter.***
>
> ***Yours faithfully***
>
> ***BENSON WANYAM***
>
> ***former CHIEF – CHWELE."***

There is therefore evidence from another **GOVERNMENT** agent confirming that as far back as 1940, the land parcel **NO BOKOLI/CHWELE/1014** was the property of the late Petitioner's husband. That evidence is not rebutted. I have no hesitation in making a finding that both land parcels **NO BOKOLI/CHWELE /811** and **1014** belonged to the Petitioner's family and portions therefore were acquired by the Respondents without payment of any compensation and therefore in violation of **Article 40(3) of the Constitution** 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 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, or 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 land" Emphasis added.

Similar provisions were found in **Section 75 of the repealed Constitution** which was the applicable law and which also provided that ***"prompt payment of full compensation"*** be paid for any land that is compulsorily acquired. Both **Section 8 of the repealed LAND ACQUISITION ACT** and **Section 111 of the new LAND ACT** also provide for the prompt payment of compensation when land is compulsorily acquired.

Notwithstanding the fact that the 1st and 3rd Respondents response to the Petition does not adequately rebut the Petitioner's affidavit, I must however address the issue of Limitation because that is a matter that goes to the jurisdiction of this Court. In paragraph 7 of the said response, the 1st and 3rd Respondents state that this Petition is statute barred and no explanation has been given for the delay in filing it.

It is true that the matters complained of occurred first in 1964 when a portion of the land parcel **NO BOKOLI/CHWELE/1014** was first acquired for use by **KUYWA FARMERS CO – OPERATIVE SOCIETY** and later in 1990 when part of parcel **NO. BOKOLI/CHWELE/811** was acquired for the office of **CHIEF**. The **GAZETTE NOTICES** referred to above indicate that the acquisitions were for purposes of the construction of a road. Nonetheless, both those purposes were for the benefit of the public. The causes of action therefore arose 47 and 21 years ago. This is a Constitutional Petition alleging a violation of the right to property which is one of the fundamental rights in the Constitution. There is no limitation of time within which such a Petition can be filed. In **KARIUKI KIBOI .V. A – G 2017 eKLR**, the Court heard and affirmed a claim that arose in the 1980's but was filed in 2010. In **CHIEF LAND REGISTRAR & 4 OTHERS .V. NATHAN TIROP KOECH & 4 OTHERS C.A CIVIL APPEAL No 51** and **58 of 2016 [2018 eKLR]**, the Court addressed that issue as follows: -

"Unless expressly stated in the Constitution, the period of Limitation of Actions Act does not apply to violation of rights and freedoms guaranteed in the Constitution. The law concerning limitation of actions cannot be used to shield the state or any person from claims of enforcement of fundamental rights and freedoms protected under the Bill of Rights."

The Court went on to state that: -

"In our view, subject to the Limitations in Article 24 of the 2010 Constitution, fundamental rights and freedoms cannot be tied to the shackles of Limitation of Actions Act. However, each case is to be decided on it's own merits and a caveat need to be stated as correctly observed in JOHNSTONE ORECHI .V. NATIONAL POLICE SERVICE 2017 eKLR."

In the circumstances of this case, it is clear from the supporting affidavit that the late Petitioner's husband was assured as far back as 1947 that he would be compensated by the Government for the use of the land parcel **NO BOKOLI/ CHWELE/1014** to set up a **CO – OPERATIVE SOCIETY**. Again in 1990, a similar assurance was given by the **CHIEF**. Then there is the letter dated 13th July 2005 by his former **CHIEF** and contents of which I have already referred to above and which demonstrates that the Petitioner's late husband had been pursuing his rights over the suit properties. By a letter dated 5th April 2004, the 1st Respondent addressed one **MR HENRY SIKUKU KAKAI** as follows: -

"Dear Sir

RE: KUYWA FARMERS CO – OPERATIVE DEVELOPMENT SOCIETY LIMITED

I wish to acknowledge with thanks the receipt of your letter dated 2nd February 2004 which was addressed to the MINISTER FOR CO – OPERATIVE DEVELOPMENT AND MARKETING.

The facts and concerns raised in the letter have been noted. However, since it is the ASSISTANT CHIEF who constructed an office on the said land, the matter falls under the Office of the President.

Kindly pursue the issue of compensation with the Office of the President.

Yours faithfully

JUSTUS KIAGO

P.A to the MINISTER."

No doubt there has been a delay in filing this Petition. The delay of close to 47 years is clearly unreasonable. However, in considering whether or not such delay should disentitle a Petitioner to the remedy sought, the Court must take into account several factors. To start with, and has already been demonstrated above, neither the Petitioner nor her late husband can be said to have slept on their rights. There is evidence that they were assured of compensation by **GOVERNMENT** officials and acted in good faith in making their land available for public use only for the same to be compulsorily acquired even without notice or any compensation. Infact, the **GOVERNMENT** acted like

a thief stealthily taking away land that had been freely and voluntarily made available for Public use. Secondly, the unreasonable delay must be such that the other party has been prejudiced. As I have already stated above, none of the Respondents filed any replying affidavit to rebut the Petitioner's averments. There is therefore no suggestion that due to the delay, the Respondents could not mount any reasonable defence to the Petitioner's claim due to loss of evidence or witnesses. On the contrary, the available evidence suggests that as far back as 1940, the Respondents, taking advantage of the late Petitioner's husband's ***"development mind sub – divided his land and gave (it) to the CO – OPERATIVE SOCIETY"*** for the noble purpose of putting up a **COOPERATIVE SOCIETY** for farmers. Having assured the Petitioner's late husband on payment of compensation, it would be inequitable for the Respondents to now complain about laches. The exercise of the Court's judicial discretion should be geared towards dispensing justice and not subverting it. Thirdly, **Article 10(2)(b) of the Constitution** recognizes the following national values and principles of governance: -

> ***"human dignity, equity social justice, inclusiveness equality, human rights non discrimination and protection of the marginalized."***

Equity connotes fairness and social justice is defined in **BLACK'S LAW DICTIONARY 10TH EDITION** to include: -

> ***"Justice that conforms to a moral principle such that all people are equal."***

The same dictionary defines human rights as: -

> ***"The freedoms, immunities and benefits that, according to modern values …….. all human beings should be able to claim as matter of right in the society in which they live."***

The Respondents can hardly be said to have espoused the national values and principles of governance expected of them under **Article 10 of the Constitution** in the manner in which they treated the Petitioner in this case with respect to her rights over the land parcels **NO BOKOLI/CHWELE/811** and **1014**. Nothing could be more immoral than acquiring property from it's citizen with a promise for compensation, fail to pay for it and instead put it to it's own use. It is clear to me that the Petitioner has proved a violation of her right to property and is entitled to a remedy from this Court.

What orders should this Court grant?

The first prayer sought is a declaration that the manner in which the Petitioner's land was acquired was in contravention of Article 40(3) of the Constitution as no compensation was awarded. That prayer is well merited.

The Petitioner also sought compensation for the land at current rates. Attached to her supplementary affidavit is a valuation report dated 26th November 2012 prepared by **CHRISCA REAL ESTATES** a firm of registered valuers. As at the time of the report in 2012, the value of the two parcels of land was as follows: -

1: BOKOLI/CHWELE/1014	**- Kshs. 300,000/=**
2: 0.06 Ha from BOKOLI/CHWELE/811	**- Kshs. 50,000/=**
Total	**- Kshs. 350,000/=**

No doubt the value of both parcels must have appreciated by now. But this being a special damage claim, the Court can only grant what was specifically pleaded and proved. Nothing less and nothing more.

The Petitioner also sought general damages for the violation of her rights to property and for the loss that she has suffered. In his submissions, **MR KHAKULA** urged this Court to award a sum of Kshs. 2,000,000/= with respect to the land parcel **NO BOKOLI/CHWELE/1014** and Kshs. 500,000/= with respect to the acquisition of 0.06 Ha out of land parcel **NO BOKOLI/CHWELE/811**. I find that assessment to be reasonable and I therefore award the sum of Kshs. 2,500,000/= being general damages for the violation of the Petitioner's rights to the said property.

I also award the Petitioner the costs of this Petition.

Ultimately therefore and having considered all the evidence herein, I am satisfied that the Petitioner has proved her case against the Respondents. There shall be Judgment for the Petitioner as against the Respondents jointly and severally in the following terms: -

1. A declaration is issued that the manner in which the Petitioner's land was acquired was unconstitutional and contravened Article 40(3) of the Constitution.

2. Special damages of Kshs. 350,000/=.

3. General damages of Kshs. 2,500,000/=.

4. Costs.

5. Interest on (2) and (3).

6. Interest on (2) shall be from the date of filing this Petition while interest on (3) shall be from the date of Judgment.

Boaz N. Olao.

J U D G E

12th November 2020.

Judgment dated, delivered and signed at **BUNGOMA** this 12th day of November 2020. The same is delivered by way of electronic mail as was advised to the parties and in keeping with the **COVID – 19** pandemic guidelines.

Boaz N. Olao.

J U D G E

12th November 2020.