



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**CIVIL APPEAL NO 2 OF 1992**

**MARITIME HAULIERS LTD..... APPELLANT**

**VERSUS**

**COMMISSIONER OF LANDS.....RESPONDENT**

**RULING**

On 5th December, 1991 the Commissioner of Lands wrote to Maritime Hauliers Ltd (the appellant herein) notifying it of an award of Shs 12,700,000/- for its property known as Mombasa/Block XII/155 following the compulsory acquisition of the property under the Land Acquisition Act. The appellant did not think the award was a full and adequate compensation within the meaning of section 75 of the Constitution of Kenya and of the Land Acquisition Act and they therefore instructed their lawyers M/S Pandya & Talati to take action as authorised by law.

The action the appellant's lawyers deemed appropriate was an appeal pursuant to section 75 of the Constitution and the Land Acquisition (Appeals to the High Court) Rules.

Consequently an appeal was lodged on 3.1.1992 by the appellant naming the Commissioner of Lands as the respondent.

Later on Banque Indosuez who hold a charge of the acquired property in respect of which a substantial amount, exceeding, I am informed, the amount of the award, were joined as an interested party. And finally on 8.9.93 the Kenya Railways Corporation on whose behalf the property was acquired also joined the fray as an interest party.

When the matter came up for hearing on 8.9.93 learned counsel for the Commissioner of Lands as well as learned counsel for the Kenya Railways Corporation raised a preliminary objection, notice of which they had given earlier, challenging the jurisdiction of this Court to hear the appeal.

The essence of the objection is that the appeal offends the provision of section 29 of the Land Acquisition Act .

Before proceeding to consider the said section it might be useful to have a look at section 75 of the Constitution from which the powers to make section 29 of the Land Acquisition Act are derived. The relevant part of section 75 of the Constitution provides-

“(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).....

(b).....

(c).....

(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.”

Sub-section (1) of section 29 of the Land Acquisition Act on the basis of which the objection is taken in the following terms:-

“(2) 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 ...

and sub-section (7) of the same section states:-

“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;

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

Both Mr Metho and Mr Gatonye submitted that the above provisions of the Constitution and the Land Acquisition Act make it abundantly clear that a person who is dissatisfied with an award made by the Commissioner of Lands under the Land Acquisition Act has no direct access to the High Court; he must first apply to the tribunal.

The practical situation that faced Mr Pandya when he was seen by the appellant was however quite different. Direct access to the High Court had been expressly removed by the Land Acquisition (Amendment) Act 1990 which created the tribunal. Although the date of the commencement of the Act is shown as 22/6/1990 the relevant tribunal was not constituted until 15/7/1993, more than two years after the date of commencement. No rules had been made under s 75 (3) of the Constitution to regulate the practice and procedure of the High Court or the tribunal in relation to applications and appeals arising from the amendment. Given these circumstances, what was an aggrieved party to do.

Learned counsel for the appellant Mr Pandya, submitted that the object of s 75 of the Constitution is to guarantee the right of a person to property and accordingly sub section (2) of the section should be read as giving persons whose rights are affected direct access to the High Court, if as was the case in this matter, there is no effective tribunal at the material time. To bolster his argument he referred to section 60 of the Constitution which gives the High Court unlimited original jurisdiction in civil and criminal matters and

said that this Court should not shrink from exercising its powers for the ends of justice. Mr Gor for the interested party supported the submissions by Mr Pandya.

Considerable time was taken by learned counsel on both sides on the issue whether or not the High Court does have unlimited appellate jurisdiction and several authorities were cited in connection therewith but I do not think the resolution of that issue is necessary for the purposes of deciding the matter before me.

The right of access to the High Court by a person whose property is compulsorily taken possession of is expressly conferred by section 75(2) of the Constitution, and we do not have to look elsewhere for the source of the courts jurisdiction, but the *proviso* to the same section gives Parliament the power to curtail the right of direct access to the High Court by creating a tribunal with jurisdiction to determine the matter which the High Court was hitherto dealing with.

When it amended the Land Acquisition Act, Parliament, delegated, as it is entitled to do, the power to constitute the tribunal under section 29(2) to the Minister for Lands but the Minister did not constitute the tribunal until 15.7.1993 and so although the date of commencement of the Act is shown in the Amending Act as 22.6.1990 the amendments enacted cannot be considered to have been in effective operation until after the Constitution of the tribunal. Even with the establishment of the tribunal no rules have been made in relation to application before the tribunal and appeals from it to the High Court and the position still remains unclear. In my view therefore, by failing to constitute the tribunal, the Minister, who by virtue of the delegated power, became part and parcel of the legislative process conferred by section 75(2), stalled the provision of matters which the law required to be provided before the right of direct access to the High Court conferred by section 75(2) of the Constitution is to be deemed to have taken away.

My views on the matter are, I think, supported by section 22 of the Interpretation and General Provisions Act which provides:-

“Where a written law repeals wholly or partially a former written law and substitutes provisions for the written law repealed, the repealed written law shall remain in force until the substituted provisions come into operation.”

In this respect, although I note that the word “Commencement” when used with reference to any written law, means the date on which the written law came or comes into operation, the phrase ‘comes into operation’ is not defined. According to the *Collins English Dictionary* the word ‘operation’ means:

“the state of being in effect, in action or operative (especially in the phrases in or into operation)”

It follows from the above definition that a written law which requires the constitution of certain organs for its effective operation cannot be said to be operative before such organs are fully constituted.

As submitted by Mr Pandya, the object of s 75 of the Constitution was to guarantee the right of citizens to property by giving them direct access to the High Court where, *inter alia*, their property is compulsorily acquired. It would in my view defeat that purpose if that right were to be deemed to have been circumvented by a piece of an in-operative legislation. Consequently until the amendment becomes fully operative, the right of direct access to the High Court under s 75 (2) remains available to the persons described in the section.

In the upshot I find that this Court has jurisdiction to hear the appeal and the preliminary objection is overruled with costs.

Dated and delivered at Mombasa this 22<sup>nd</sup> day of September, 1993

**T. MBALUTO**

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**JUDGE**