



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

PETITION NO. 13 OF 2018

**IN THE MATTER OF CHAPTER 4, THE BILL OF RIGHTS ARTICLES 1(1),2(1),2(5),2(6),
3(1),10(1)(c),19,20,21,22,23,27(1),(2),35(1)(a),35(1)(b),40, 42,43(1)(b)(c)(d),47(1)(2),35(1)(b),40, 42,
43(1)(b), 46(1), (b), (c), (d), 47 (1), (2), 48, 50(1), 56(a)(d)(e),59, 60,69,70,159,165 AND PART 1
AND PART 2 OF THE FOURTH SCHEDULE THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
UNDER ARTICLE 40,42,43(1)(b) AND 47 OF THE CONSTITUTION OF KENYA , 2010**

AND

IN THE MATTER OF THE APPLICATION BY NGUGI MBUGUA.....PETITIONER/APPLICANT

VERSUS

THE CHAIRMAN NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE DIRECTOR GENERAL KENYA NATIONAL

HIGHWAYS AUTHORITY.....2ND RESPONDENT

CHINA WU YI COMPANY LIMITED.....3RD RESPONDENT

THE COUNTRY DIRECTOR WORLD BANK GROUP KENYA.....4TH RESPONDENT

THE CHIEF CONSERVATOIR OF FORESTS, KENYA FORESTS SERVICE.....5TH RESPONDENT

THE DIRECTOR GENERAL NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....6TH RESPONDENT

THE DIRECTOR GENERAL KENYA WILDLIFE SERVICE.....7TH RESPONDENT

THE KIAMBU COUNTY EXECUTIVE WATER,

ENVIRONMENT, ENERGY & NATURAL RESOURCES.....8TH RESPONDENT

THE HON. ATTORNEY GENERAL.....9TH RESPONDENT

THE CHAIRPERSON KENYA NATIONAL

COMMISSION ON HUMAN RIGHTS.....1ST INTERESTED PARTY

THE COUNTRY DIRECTOR UNITED NATIONS

ENVIRONMENT PROGRAMME.....2ND INTERESTED PARTY

RULING

There are **three matters** for determination. The 1st is the **Notice of Motion Application** by the Petitioner/ Applicant, the 2nd Application is the **Notice of Motion Application** by the 6th Respondent and the 3rd is the **Preliminary Objection**, by the 4th Respondent.

The **Notice of Motion Application** by the Petitioner/ Applicant is dated **23rd July 2018**, seeking for orders that;

- 1. THAT pending the hearing and determination of this Application and the substantive Petition herein, this Honorable Court be pleased to issue orders restraining the 1st, 2nd and 3rd Respondents, their agents, servants, employees or any other person acting on their behalf from trespassing, alienating, altering transferring and/or adversely meddling with any part of all that parcel of land commonly known as Sigona/1271 belonging to the Applicant and situated in Sigona, Kikuyu along the Nairobi/Nakuru Highway in Kiambu County in the Republic of Kenya.**
- 2. THAT pending the interparties hearing and determination of this Application and the substantive Petition herein, this Honourable Court be pleased to issue orders restraining the 1st, 2nd and 3rd Respondents, their agents, servants, employees or any other person acting on their behalf from demolishing, damaging, uprooting, defacing, wasting, displacing, altering and or adversely meddling with the structures , plants, crops, or items of any nature on all that parcel of land commonly known as Sigona/1271 belonging to the Applicant and situated in Sigona, Kikuyu along the Nairobi-Nakuru Highway in Kiambu County, in the Republic of Kenya.**
- 3. THAT the substantive Petition herein be declared a Representative suit and any other person interested in being enjoined in it be allowed to do so.**
- 4. THAT the costs of the Application be provided for.**

The Application is premised on the grounds that the 1st, 2nd and 3rd Respondents have embarked on a project along the **Nairobi-Nakuru Highway**, which if implemented will result in the destruction of the Petitioner's/ Applicant's entire natural environment in front of his residence, exposing him to numerous hazards that emanate from a busy **transnational highway**, which will pass in front of his residence in total violation of his rights under **Articles 42 and 69 (1)(a) (b)** of the Constitution.

Further that the 2nd Respondent has already deployed the 3rd Respondent, who has started works that will trample upon the Petitioner/ Applicant's environmental and property rights. That the 1st Respondent had caused to be published in the Kenya Gazette of **19th October 2017**, his intention to compulsorily acquire land for the project and the notice shows that the 1st Respondent intends to forcefully acquire a section of the suit land. That the 1st Respondent intends to alienate the Applicant's land which hosts **Graceland Memorial Park**, the Petitioner's/ Applicant's family shrine and in the interest of justice, the prayers sought should be granted as the Respondents actions will infringe upon the Applicant's rights and he stands to suffer irredeemably.

In his Supporting Affidavit, the Petitioner/ Applicant **Ngugi Mbugua**, averred that he lives on the suit property and that on **19th October 2017**, the 1st Respondent published in the **Kenya Gazette Notice No. 10477**, disclosing the NLC's intention to acquire a section of his land on behalf of the 2nd Respondent for the **National Urban Improvement Project Rehabilitation**, along the **Nairobi-Nakuru Highway**. That the 2nd Respondent had already deployed to the site the 3rd Respondent, which Company is ready to trample upon the Petitioner's/Applicants environmental and proprietary rights, without properly compensating him for his loss. He contended that his property constitutes his **mini forest**, and it also hosts **Graceland Memorial Park**, a family shrine which actions are a violation of his rights.

That on **24th August 2017**, agents of the 1st and 2nd Respondents visited his home unannounced and purported to evaluate his assets for forceful alienation, to which he filed his claim for compensation amounting to **Kshs.81,948,261.12**, which claim was acknowledged by the 1st Respondent. Further that in the **Kenya Gazette Notice No. 10477 of October 19th 2017**, the 1st Respondent indicated the area it intends to hive off his property is **0.384 ha**, but the actual area marked by the 2nd Respondent measures **0.053 ha** as per the independent Surveyor's report dated **22nd November 2017**.

He further averred that on **7th March 2018**, the 1st Respondent wrote to him an award of compensation which is below his claim and declined to disclose to him which factors were taken into consideration to arrive at the award of **Kshs. 16,242,124/=**. Further that on **28th March 2018**, the Petitioner appealed against the compensation award. It was his contention that the 1st Respondent did not peruse his claim documents and that his Appeal against the award has not been challenged. He further averred that his Counsel wrote to the 1st Respondent but the letter has elicited no response. He contended that the failure by the 1st Respondent to respond to his appeal and to his Counsel's letter contravenes **Article 47** of the **Constitution**. Further, by failing to carry out a proper, transparent and verifiable survey, the 1st Respondent has violated his rights as enshrined in **Article 40**, of the Constitution which shields him from arbitrary acquisition of his

property.

Further, should the Respondents proceed without a proper valuation, he will lose the health giving, aesthetic and economic value of his property. That the said **Nairobi-Nakuru Highway Project** will render his home uninhabitable.

The Application is opposed and the **9th Respondent** filed grounds of opposition dated **26th September 2018**, and averred that the Government has the right to **Eminent Domain**, upon just compensation of the proprietor for public use and the right of **compulsory acquisition** is an overriding interest. That part of the property subject of the suit herein was **compulsorily** acquired for the **purpose** of rehabilitation and capacity enhancement of **James Gichuru –Rironi Roads Junction**, and the Petitioner was fully compensated.

It was contended that the computation of compensation for properties compulsorily acquired by the Government is dependent on Government Valuers and not privately hired Valuers, for purpose of transparency and accountability. Further, that the **4th Respondent** and the **2nd Interested Party** enjoy **diplomatic immunity** and cannot be parties to these proceedings. That the complaints as to the **Environment Impact Assessment (EIA)** and construction plans are a concern of the **National Environment Management Authority (NEMA)** and not this Court.

It was further contended that the right to property is not an absolute right and can be limited in accordance with **Article 24 of the Constitution**. That the instant Application is thus an abuse of the Court process and a waste of judicial time since valuation and just compensation has already been done.

The Petitioner/ Applicant filed an Affidavit in response to the **9th Respondent's** grounds of opposition sworn on **22nd November 2018**, and averred that the grounds of opposition are replete with misrepresentations of the prevailing situation and he denied that he was justly or otherwise compensated. Further, that his Petition raises weighty health and environmental issues that are within the ambit of the **2nd Interested Party** and hence the **2nd Interested Party** is an essential stakeholder in the Petition. It was his contention that the **National Environment Management Authority (NEMA)**, cannot be an impartial arbiter in the matter, as it belongs to the Executive. He further averred that his Petition merely seeks just and satisfactory compensation and he has not received any compensation.

In opposing the Petitioner's Application, the **2nd Respondent**, swore a Replying Affidavit through **Daniel Mbuteti**, on **4th December 2018**, who averred that he is a Surveyor at the **Kenya National Highways Authority (KENHA)**. That the rehabilitation, expansion and improvement of the **James Gichuru Road**, is in line with the **2nd Respondent's** mandate and in order to achieve its mandate, it was necessary to acquire land from various property owners and it earmarked several properties for acquisition for purposes of development. That the **1st Respondent** upon receiving the request for acquisition of the land from the **2nd Respondent**, carried out inquiries and issued actual notices to the interested parties by publishing in the Kenya Gazette and notice for inquiries for hearings of claims for compensation for the interested parties.

That the **1st Respondent** wrote to the **2nd Respondent** vide letter dated **18th April 2018**, advising that it had inspected, carried out inquiries and issued awards and received acceptance for the **James Gichuru Road**, and all affected persons were cleared for compensation. That the **2nd Respondent** asked for a deposit of **Kshs.6,478,371,181.22** to the **1st Respondent's** account for compensation and according to the said letter, the Petitioner was to be paid **Kshs.16,242,123.90**.

It was his contention that due process was followed in accordance with the law. That the **2nd Respondent** does not participate in the acquisition process and such allegations against it are unfounded. That the **1st Respondent's** evaluation of the acquired portion of the Petitioner's land is in accordance with the law and based on the size of the land, the Petitioner has not cited any infractions he has suffered in the hands of the **2nd Respondent**.

Further that he has been advised by his Advocates that the **2nd Respondent** has no mandate to pay out any compensation and does not participate in the acquisition process and only makes payments. It was his further contention that the acquisition of the properties listed in **Gazette Notice No. 10477 of 19th October 2017**, is necessary to pave way for the improvement and rehabilitation of **James Gichuru-Rironi Roads Junction**, for the benefit of the public. That the Petitioner has not demonstrated that the **2nd Respondent** has breached its constitutional rights and cannot claim to be disenfranchised.

The Petitioner filed a Replying Affidavit sworn on **19th February 2019**, in response to the **2nd Respondent's** Replying Affidavit and contended that it was important that the deponent clarifies to the Court his role in the **James Gichuru Road Project** and if indeed he is a qualified and registered **land surveyor**, he would have verified the facts on the ground with regard to land size disparity issues that the Petitioner had raised. He contended that the land acquisition drawings annexed by the deponent is discernible and the **2nd Respondent** has never made available the compensation funds which has been the source of social unrest. Further averred that the **2nd Respondent** marked the buildings with **large red crosses** that were intended to public shame them as the said signs are usually marked on illegal structures.

The **7th Respondent** swore a Replying Affidavit on **16th July 2019**, through **Doreen Mutunga**, its Principal Legal Officer and averred that KWS has been wrongly sued as a party when described as the **Director General, Kenya Wildlife Services** and she urged the Court to expunge the name of the Director General. That having perused the documents filed in Court together with her Advocate's advise, the functions of the KWS are spelt out under **Section 7 of the Wildlife Conservation and Management Act 2013**, and that the Petitioner is aggrieved mainly by the fact that on **19th October 2017**, the **1st Respondent** published in Kenya **Gazette Notice No. 10477**, that a portion of his land would be compulsorily acquired. That the issues that aggrieved the Petitioner have neither been caused by KWS nor can they be solved by them, hence KWS and its presence in the matter is not necessary for the determination of the issues. It was her contention that there is no cause of action shown by the Petitioner against KWS and she urged the Court to remove the **7th Respondent** from the Petition.

The Petitioner filed a Replying Affidavit sworn on **7th November 2019**, to the 7th Respondent's Replying Affidavit and averred that the **Director General KWS**, is properly enjoined as any orders granted will be served upon the Director General. That one of the 7th Respondent's functions is to assist and advise private sanctuaries like his, thus the 7th Respondent is indispensable in the suit. He further averred that he has outlined his efforts into transforming the suit property to a **Mini Forest** as well as trees and birdlife property, and in the event that the site visit happens, then the necessity of the 7th Respondent would be seen as he had requested for the said site visit. It was his contention that the enjoinder of the 7th Respondent will assist the Court in determining if his claim for proper compensation for the impending loss of his private sanctuary is valid and therefore the 7th Respondent should not be removed from the Petition.

The **8th Respondent** filed grounds of opposition dated **21st January 2020**, and averred that the **Petition** and the **Notice of Motion Application** do not raise any cause of action against it and the orders sought are not in any way directed to it. It was contended that the alleged mandate of the **8th Respondent** is unfounded and misguided and thus the Petitioner is a forum shopper who has commenced the suit on falsehood and misconceptions and in the circumstances, the 8th Respondent should be expunged from the Petition.

The 3rd Respondent also opposed the Petitioner's/ Applicant's Application and swore **Replying Affidavit** on **18th August 2020**, through **Zhao Xin**, who averred that the Petitioner/Applicant has no case whatsoever and no cause of action against the 3rd Respondent herein and the suit ought to be dismissed. It was his contention that the Petitioner's application is misconceived and a deliberate abuse of the Court process and that the Petitioner's averments are riddled with blatant untruths and deliberate **non-disclosure** of material facts intended to mislead the Court.

That though the 3rd Respondent is a contractor of the 2nd Respondent, whose mandate in as far as this case may be is for the construction of the **Nairobi-Nakuru Highway**, it has adhered to the applicable laws and complied with the laws. It was his contention that the 3rd Respondent has only utilized permitted road construction equipment in the road construction and should any damage have occurred to the Petitioner's house, then the same is squarely as a result of his own as no other complaints has arisen. That being the only complaint received of this nature, the 3rd Respondent engaged a team of technical personnel from the Company to investigate and inspect the genesis of the complaint and the team found that the only plausible cause for the structural failure and cracks in the building is the wanting foundation for the construction coupled with the poor drainage system within and around the development. That the cracks appeared to have developed over a long period of time. It was therefore his contention that the Application has no merit and the Court was urged to dismiss it.

The 4th Respondent filed a **Notice of Preliminary Objection** dated **29th October 2018**, and sought for the dismissal of the suit against it on the grounds that;

- 1. The Honorable Court lacks jurisdiction to entertain this matter on account of the immunities and privileges enjoyed by the said entity under the Bretton Woods Agreement Act (Cap 464 Laws of Kenya) and under the general Principle of customary international law as domesticated under Article 2(5) of the Constitution of Kenya.***
- 2. That Country Director of the World Bank has no personal liability for the decisions of the World Bank.***
- 3. There is no cause of action against the Country Director named as the 4th Respondent.***
- 4. The claim therefore ought to be struck out with costs to the 4th Respondent.***

The Petitioner/ Applicant further filed a response sworn on **22nd November 2018**, to the 4th Respondent's **Preliminary Objection** and averred that the Constitution guarantees him access to justice and immunity does not imply or validate impunity as the 4th Respondent is funding the project giving rise to the Petition, thus becoming a party to the violation by the Respondents. He contended that the absolute immunity given to the **World Bank**, has been challenged and the Court has ruled that the said cases giving absolute immunity were wrongly decided and therefore pending determination of the decision by the US Court. He contended that the 4th Respondent ought to waive its immunity and participate in the case through the Court to its logical conclusion. That he has a right to institute a suit against the 4th Respondent in accordance with **Article 22** of the **Constitution** and **Article 23**, grants the Court unqualified jurisdiction to adjudicate over his Petition. That it is in the interest of justice that the Court **does not** entertain the **Preliminary Objection** herein.

The 6th Respondent filed a **Notice of Motion Application** dated **16th October 2018**, and sought for orders that;

- 1. That this Honourable Court be pleased to strike put the 6th Respondent from the suit herein as he is improperly enjoined to the suit.***
- 2. That the Costs of this Application be provided for.***

The Application is premised on the grounds that the Petitioner/ Applicant seeks no remedy from the 6th Respondent. That in execution of his mandate, the 6th Respondent's actions are not subject to this suit. Further that the 6th Respondent was improperly enjoined in the suit as the suit seeks no remedy capable of enforcement under the **Environmental Management and Coordination Act , Cap 387**.

In her supporting Affidavit, **Cynthia Julian Sakami**, reiterated the contents of the grounds in support of the Application and further averred that the Authority has been enjoined as the 6th Respondent, when the Petitioner has **not** sought any order or directions against it. She further averred that the Authority has **no** power to remedy the prayers as sought and it thus seeks to be removed as a party to the suit. It was her contention that enjoining the authority has been detrimental to it and leading to considerable strain as the Authority has to defend itself.

The Petitioner/ Applicant filed a further response to the **6th Respondent's** Application and averred that his Petition raises fundamental matters of the **green and built environment**, as the 6th Respondent describes itself as the Principal Instrument of Government for the Implementation of all policies to the Environment. It was his belief that such policies include the provisions under **Article 69 and 70** of the Constitution and therefore the 6th Respondent has been enjoined in the Petition to confirm to the Court whether or not the 2nd Respondent conducted a proper, thorough environmental and Social impact study. That in the interest of justice, the Court should not allow the 6th Respondent to dodge its statutory duties.

The **Applications and Notice of Preliminary Objection** were canvassed by way of written submissions which the Court has carefully read and considered. The Court finds the issues for determination are;

- 1. Whether the Notice of Preliminary Objection dated 29th October 2018, is merited.**
- 2. Whether the 4th, 5th, 6th, 7th, 8th and 2nd Interested Parties should be struck out from the suit.**
- 3. Whether the Petitioner's suit is a representative suit**
- 4. Whether the Petitioner is entitled to grant of injunctive orders**

1. Whether the Preliminary Objection dated 29th October 2018, is merited

The 4th Respondent has raised a notice of Preliminary Objection on account that Court lacks jurisdiction to entertain this matter on account of the immunities and privileges enjoyed by the said entity under the **Bretton Woods Agreement Act (Cap 464 Laws of Kenya)**, and under the General Principles of Customary International law, as domesticated under **Article 2(5) of the Constitution of Kenya**. That the Country Director of the World Bank has no personal liability for the decisions of the **World Bank** and there is no cause of action against the Country Director, named as the 4th Respondent.

A Preliminary Objection when raised ought to be purely on points of law, based on the assumption that all facts pleaded by the other side are correct and no facts are to be ascertained and what is being sought is not judicial discretion. See the case of **Oraro ...Vs... Mbaja [2005] eKLR** where the Court held that;

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. I am in agreement with learned counsel, Mr. Ougo, that “where a Court needs to investigate facts, a matter cannot be raised as a preliminary point.”

The questions as to whether the Court has jurisdiction and whether the Country Director has personal liability of the decision of the World Bank are pure points of law and therefore the said questions are properly raised as Preliminary Objection.

However, on the the question on whether the Petitioner has a reasonable cause of action against the 4th Respondent, the Court finds and holds that this is not a properly raised **Preliminary Objection** as it will require the probing of evidence.

It is the 4th Respondent's contention that it is protected by the **Bretton Woods Agreement Act (Cap 464 Laws of Kenya)**, which gives it immunities and privileges.

It is trite that jurisdiction is everything and without jurisdiction, the Court has no option but to down its tools. See the case of **Owners of Motor Vessel “Lillian” ...Vs...Caltex Oil Kenya Ltd 1989 KLR** where the Court held that:-

“.....Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs it tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

Section 3 of the **Bretton Woods Agreement Cap 464 Laws of Kenya** provides that;

“The fund, its property and its assets , wherever located and by whomsoever held shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract.”

Further **Section 8 (i) Provides;**

“All Governors, Executive Directors, Alternates, officers and employees of the Bank—

(i) shall be immune from legal process with respect to acts performed by them in their official capacity except when the Bank waives this immunity.”

From the above provisions of law, It is not in doubt that the 4th Respondent whether as an organization or the Director as an individual, enjoys immunity against Judicial Process. In this case, the 4th Respondent has been sued in his official capacity and as such, the Court finds and holds that it has no jurisdiction to adjudicate the said Judicial Process. Consequently the Court holds and finds that the Preliminary Objection is merited and the same is upheld.

2. Whether the 4th, 5th, 6th, 7th, 8th Respondents and 2nd Interested Party should be struck out from the suit.

In its grounds of opposition, the 9th Respondent averred that the suit against the 4th Respondent and the 2nd Interested Party is not tenable as they enjoy immunity. The Court has already held and founds that the 4th Respondent's Preliminary Objection is merited and the suit against it should be struck out.

The 2nd Interested Party is the **Country Director, United Nations Environment Programme (UNEP)** which is an International Organization. **Section 9** of the **Privileges and Immunities Act Cap 179** provide:-

Privileges, etc., of certain international organizations and persons connected therewith

(1) This section shall apply to an organization which the Minister may, by order, declare to be an organization of which Kenya, or the Government, and one or more foreign sovereign powers, or the government or governments thereof, are members.

(2) The Minister may, by order—

(a) provide that an organization to which this section applies (hereinafter referred to as the organization) shall, to such extent as may be specified in the order, have the immunities and privileges set out in Part I of the Fourth Schedule to this Act, and shall also have the legal capacities of a body corporate;

(b) Confer upon—

(i) any persons who are representatives (whether of governments or not) on any organ of the organization or are members of any committee of the organization or of an organ thereof;

(ii) such number of officers of the organization as may be specified in the order, being the holders of such high offices in the organization as may be so specified; and

(iii) such persons employed on missions on behalf of the organization as may be so specified, to such extent as may be specified in the order, the immunities and privileges set out in Part II of the said Fourth Schedule;

(c) confer upon such other classes of officers and servants of the organization as may be specified in the order, to such extent as may be so specified, the immunities and privileges set out in Part III of the Fourth Schedule,

The Vienna Convention provides as follows under Article 31:-

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

(a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

(b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

From the above provisions of law, the Court finds and holds that the 2nd Interested party also enjoys immunity and cannot be sued as has been done by the Petitioner herein.

This suit has also been filed against **'The Director General National Environment Management Authority (NEMA), The Director General Kenya Wildlife Service (KWS) and The Kiambu County Executive Water, Environment, Energy & Natural Resources'**.

While the 6th Respondent who is the **Director General, National Environment Management Authority**, has filed an Application **16th October 2018**, seeking to strike out the suit, the 7th and 8th Respondents have also filed Replying Affidavit and grounds of opposition seeking to be struck out from the suit and averred that the orders sought by the Petitioner are not directed at them.

The Petitioner/ Applicant in the instant Petition disputes the amount of money that he is supposed to be compensated. Further it is not in doubt that the issue in contention is what amount or size of land ought to have been acquired. While the 1st Respondent has acquired the Petitioner's/Applicant portion of land, the Petitioner/Applicant alleges that the 1st Respondent acquired more land than what was stated in the

award. Therefore, the claim of the Petitioner is that the acquired land was more than he had been compensated for.

Further it is not in dispute that the mandate to compulsorily acquire property is given to the 1st Respondent, while the acquiring body that the 1st Respondent would be acquiring land on its behalf has the mandate to pay the compensation. In this instant, the 2nd Respondent is the acquiring authority. Further the 3rd Respondent's is the contractor, and since the Petitioner has claimed that there has been damage to his house due to its activities, the Court finds and holds that the 3rd Respondent's actions or inactions would affect the outcome of the Petition and 3rd Respondent is therefore a necessary party.

However, with regards to the 5th, 6th, 7th and 8th Defendants, it is the Court's considered view that their presence in the suit is **not** necessary for the adjudication and determination of the questions in issue. It is the Petitioner's contention that the said parties are necessary in the suit as they will to guide the Court on various issues that the Court would be required to determine on and make a proper determination on what would be commensurable compensation for the Petition.

The Petitioner/Applicant alleged that the 6th Respondent is in charge of Environment in the County and therefore his presence is necessary so that he can guide the Court on whether the issue of **Environment Impact Assessment** were properly done. We regard to 7th Respondent, the Petitioner/ Applicant alleged that he has a mini-forest and in the event of the site visit that the Petitioner has requested, his input would be necessary.

However, the Court finds and holds that if the Petitioner/Applicant finds that there is need to have the said parties support his case, then he can seek to call them as his witnesses. He could even request the Court to summon them to appear in court as witnesses in support of his claim.

Given that the 5th, 6th, and 7th Respondents can still be called as witnesses by the Petitioner/Applicant, the Court finds that it was not necessary to sue them as Respondents in this Petition. Therefore the Court finds that the 5th, 6th, 7th and 8th Respondents ought to be removed from these proceedings and therefore the said parties are struck out as Respondents herein. See the case of **Humphrey Mbaka Nandi t/a Nyati Distillers Limited ...Vs...Equity Bank(K) Ltd & 2 others [2018] eKLR** where the Court held that;

“I am also minded that unlike in the D.T. Dobbie & Company (Kenya) Ltd (supra) case where the application for striking out was made under the then Order VI rule 13 of the Civil Procedure Rules, the 1st defendant invoked Order 1 Rule 10(2) which gives the court the power either on its own motion or an application by any of the parties to a suit to strike out the name of any party improperly joined to the suit or to order any person to be joined if, in the courts view, such a person is necessary for it to adjudicate upon and settle all the questions in the suit effectually and completely. I am convinced, however, that the rationale behind the decision in the D.T. Dobbie & Company (Kenya) Ltd favouring sustenance rather than dismissal or striking out of a suit based on the affidavit evidence is as much relevant to an application seeking to strike out the name of a party from a suit under Order 1 Rule 10(2) of the rules.”

Further in the case of **Alumark Investments Limited ...Vs... Tom Otieno Anyango & 4 others [2018] eKLR** the Court held that;

In respect to the application by the 5th defendant, the plaintiff contended that he had been sued in his capacity as the advocate who represented it and the association in the sale and purchase of the subject matter of this suit. The plaintiff has however not sought any order against the 5th defendant. According to the plaintiff, the 5th defendant was a necessary party because he would explain to the court the procedures used in the transfer of the suit property. In my view, the 5th defendant can explain the procedures as a witness without necessarily being a party to this suit. Order 1 rule 3 provides for who may be joined as defendants as follows:-

“3. All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”

17. In view of the fact that no prayer is sought against the 5th defendant, I do not find him to be a necessary party whose presence will enable the court to effectively and completely adjudicate upon and settle all the questions involved in the suit. In my view, the 5th defendant can properly be summoned as a witness at the instance of either party.

From the above quoted cases and the analysis of the pleadings herein, the Court finds and holds that the 4th, 5th, 6th, 7th, 8th, Respondents are not necessary parties for the Court to adjudicate the issue on the amount of money that the Petitioner/Applicant ought to have been compensated with. Consequently, the said parties ought to be struck out from the suit and are hereby struck out.

3. Whether the Petitioner's suit is a Representative suit

The Petitioner / Applicant has urged the Court to find that the instant Petition is a Representative suit. The requirements of a **Representative suit** are set out in **Order 1 Rule 8 provides of the Civil Procedure Rules**, which provides;

“One person may sue or defend on behalf of all in same interest.

(1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, by or against any one or more of them as representing all or as representing all except one or more of them.

(2) The parties shall in such cases give a notice of the suit to all such persons either by personal service, or where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

(3) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to Court to be made a party to such suit."

For the instant suit to be declared a Representative suit, it is clear that the law provides that there ought to be numerous persons who have interest in the said proceedings. Further that there ought to be a **notice** to all such persons who have been affected. The said **Notice** would either be by personal service and where it is not practicable by way of public advertisement.

It is not in doubt that the Petitioner/ Applicant is disputing the award of compensation to him over his property by the 1st Respondent. He contends that the acreage actually acquired is not what was gazetted. The Petitioner has not demonstrated to the Court which other parties have the interest in the said proceeding.

Further **Order 1 Rule 8** of Civil Procedure Rules has couched the issue of service to the said persons who have interest over the same to be personally served in mandatory terms. The Petitioner/ Applicant has not provided to this Court the number of people that have been targeted or has he provided any evidence that the said persons had either personally been served or served by public advertisement.

In the absence of compliance with the law, the Court finds and holds that it cannot hold this to be a Representative suit.

4. Whether the Petitioner is entitled to grant of injunctive orders

The Petitioner/Applicant has sought for temporary injunctive orders to restrain the Respondents from trespassing onto the suit property. It is evident that a portion of the Petitioner's/Application property has already been compulsorily acquired. The Petitioner's has not disputed that due process of law was followed in acquiring the property by the 1st Respondent. His only dispute has been that the compensation is not commensurate with the portion acquired.

The law on granting of interlocutory injunction is set out under **order 40(1) (a) and (b)** of the Civil Procedure Rules 2010 which provides:-

"Where in any suit it is proved by affidavit or otherwise—

(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or [Rev. 2012] Civil Procedure CAP. 21 [Subsidiary] C17 – 165;

(b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further."

It is not in doubt that for a Court to grant temporary injunctive reliefs, the Court must satisfy itself that the property in dispute is in danger of being, wasted, damaged or alienated.

Is the Petitioner/Applicant's property in danger of being wasted, damaged or alienated?

While the Petitioner/ Applicant has made allegations with regards to the damage that has been caused to the suit property by the 3rd Respondent's actions, the Petitioner/Applicant does not challenge the acquisition of the suit property, but rather the award that he is entitled to.

The law allows the government to compulsorily acquire land and in this instant, the Court finds that the suit property is thus not in danger of either being damaged, wasted or alienated. There is no need for the Court to grant interim injunctive orders. The Court cannot stop the eminent domain as long as it is within the law and therefore the Court is not satisfied that any interim orders are necessary.

Further the conditions for consideration in granting an injunction are now well settled in the case of **Giella ...Vs... Cassman Brown & Company Limited (1973) E A 358**, where the court expressed itself on the conditions that a party must satisfy for it to grant an interlocutory injunction:-

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

Has the Petitioner/ Applicant demonstrated that he has a prima facie case? In **Mrao Ltd ...Vs... First American Bank of Kenya and 2 others, (2003) KLR 125** which was cited with approval in **Moses C. Muhia Njoroge & 2 others ...Vs... Jane W Lesaloi and 5 others, (2014) eKLR**, the Court of Appeal defined a prima facie case as:

"A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been

infringed by the opposite party as to call for an explanation or rebuttal from the later”.

The Petitioner is the owner of the suit property, and a portion of it was acquired by the 1st Respondent for Road development. However, the Petitioner has averred that the 1st Respondent gazette a smaller portion of land than what it actually acquired. The 1st Respondent has denied this allegation. The Petitioner/applicant's averment can only be ascertained after calling of evidence. It cannot be ascertained through affidavit evidence which affidavit evidence is disputed. Therefore, the Court finds that the Petitioner/ Applicant has not established that it has a prima-facie case with probability of success at the trial.

On the second limb, the Petitioner/Applicant must establish that he will suffer irreparable loss which cannot be compensated by way of damages. In the case of **Pius Kipchirchir Kogo versus Frank Kimeli Tenai (2018) Eklr** the Court held that ;

“irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.

The Court has already held and found that the said portion of land has already been compulsorily acquired by the government and there is no danger of the same being alienated or wasted. Further, it is not in doubt that the Petitioner/ Applicant is seeking for a quantifiable amount and if he is to suffer any loss, then the loss can be compensated by an award of damages as the Petition is hinged on a mount that is quantifiable. The Court finds and holds that the Petitioner/ Applicant has not proved that he will suffer irreparable loss that cannot be compensated by an award of damages.

For a party to be granted injunctive orders, the above conditions must be sequential and the party must satisfy all the three limbs. If a party fails in one of them, then it means that all the limbs automatically fail. See the case of **Nguruman Limited ...Vs... Jan Bonde Nielsen & 2 Others [2014] eKLR; Civil Appeal No. 77 of 2012 (Nairobi)**, where the Court of Appeal held that

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,***
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and***
- (c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.***

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.

Therefore, the Court finds and holds that the Petitioner/ Applicant has not met the threshold for grant of the injunctive orders and is not entitled to the same.

The Upshot of the foregoing is that the Petitioner's/ Applicant's Notice of Motion Application dated 23rd July 2018, is not merited and the same is dismissed entirely with costs.

Further the Court finds and holds that the 4th Respondent's Preliminary Objection dated 29th October, 2018, is merited and the same is allowed entirely. Further the 6th Respondent's Application dated 16th October 2018, is also found merited and the same is allowed entirely too.

Consequently the Court orders and directs that the 4th, 5th, 6th, 7th, 8th Respondents and the 2nd Interested Party are not necessary parties to the Petition herein and ought to be struck out of these proceedings. For the above reasons, the said Respondents and 2nd interested party are struck out of the Petition herein. The Petition should be amended accordingly.

It is so ordered.

Dated, signed and Delivered at Thika this 14th day of December 2020.

L. GACHERU

JUDGE

14/12/2020

Court Assistant - Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Ngugi Mbugua the Petitioner/Applicant present in person

No appearance for the 1st Respondent

No appearance for the 2nd Respondent

M/s Akello for the 3rd Respondent

Mr. Miringu for the 4th Respondent and holding brief for

M/s Sakami for 6th Respondent

No appearance for the 5th Respondent

No appearance for the 7th Respondent

Mr. Muchiri for the 8th Respondent

No appearance for the 9th Respondent

No appearance for the 1st Interested Party

No appearance for the 2nd Interested Party

L. GACHERU

JUDGE

14/12/2020