



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

CONSTITUTIONAL PETITION NO. 849 OF 2017

IN THE MATTER OF: ARTICLES 3, 10, 20, 22, 162, 40(3) AND 47(1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: SECTION 13 RULES (1) & (2) OF THE ENVIRONMENT & LAND COURT ACT NO. 1934/2011

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF THE BILL OF RIGHTS UNDER THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: THE LAND ACQUISITION ACT (CAP 295)

BETWEEN

SPRINGDEW PROPERTIES LIMITED.....PETITIONER

-VERSUS-

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

KENYA NATIONAL HIGHWAYS AUTHORITY.....2ND RESPONDENT

JUDGMENT

By a **Petition** dated 29th November 2017, the Petitioner herein sought for the following orders against the Respondents:-

i) A declaration that the Petitioner's rights as enshrined under Articles 40(3) and 47(1) of the Constitution of Kenya 2010, have been violated and infringed by the Respondents, jointly and severally in the manner pleaded herein above.

ii) A declaration that in the absence of compliance with the provisions of the Land Acquisition Act and compensation to the Petitioner in accordance with the said Act as read together with among others Article 40(3) of the Constitution 2010, the Gazette Notice No.7521 published on 4th August 2017 revoking Gazette Notice No. 758 of 2015 is itself null and void ab initio and thereby be and is hereby revoked.

iii) In the alternative to (ii) hereinabove an order do issue directing the 1st Respondent to immediately comply (and in such period as the Court may deem reasonable) with relevant provisions of the Constitution 2010 and the Land Acquisition Act (Cap 295 laws of Kenya) in the acquisition of the suit property (L.R No. 12861/253) and in particular ensure that the compensation due to the Petitioner is assessed (all relevant factors considered) and payment thereof made promptly before the Respondent can take over the suit property for the intended public utility purposes in accordance with and/ or before Gazette Notice No. 7521 published on 4th August 2017 can have the intended legal effect.

iv) An injunction directed at the Respondents, either by themselves, their servants, agents and/or person acting under their direction from carrying on any construction works, howsoever, on the suit property until the Petitioner herein is fully compensated as by law provided.

v) *An order conserving the suit property pending the hearing and determination of the Petition herein to avert wastage.*

vi) *Costs of the Petition be borne by the Respondents.*

The Petitioner averred that it initially acquired the suit property through purchase for valuable consideration from a third party in 2007. That around 2008/2009, the issue of expanding of the then **Thika Road** came up to give room for the construction of the **ultra-modern Thika Super Highway**, to which the suit property was acquired. That after due process, the Petitioner was compensated through the 1st Respondent in the sum of **Kshs. 29,600,000/=** towards the end of 2009 and thereafter the issue of construction of the **Thika Super Highway** was completed. However, the Petitioner noticed that the suit property had not been utilized at all for the construction of the said Super Highway. That the Petitioner embarked on the process of engaging the 1st Respondent on the possibility of the suit property reverting back to it and the Petitioner was finally advised in 2015 to do a formal Application, which it did through its Advocates. That vide a letter dated **19th August 2015**, the Petitioner was requested to refund to the Government through the 1st Respondent **Kshs. 29,600,000/=** which it had been paid as compensation.

That the Petitioner refunded the said sum and the payment triggered the degazettment of the suit property vide **Notice No.7389 of 2015** to which the Petitioner retook possession and embarked on plan to subdivide the suit property to sell. However, it finally settled on plans to construct a shopping mall instead. That it has since spent in excess of **Kshs. 25,000,000/=** in professional fees and other disbursements towards fruition of the plans to construct the said shopping mall.

That while awaiting to commence the construction of the Mall, on or around mid **September 2017**, the Petitioner got wind of the fact that the suit property had appeared in the Kenya Gazette of **4th August 2017**. Alarmed at the turn of events and taking into account that neither the Respondents had communicated to them the intention to re-acquire the suit property, they instructed their Advocate to write a demand letter to the 1st Respondent who had prompted the Gazette Notice. However, the 1st Respondent is yet to respond to the said demand letter. It was its contention that the Respondents intend to get the said property in total violation of the Land Acquisition Act and the Constitution.

That the basis of the Petitioner's claim is that the 1st Respondent is tasked with evidencing and assessing the value of the land to be acquired by the Government pursuant to the provisions of **eminent domain**. That the 2nd Respondent is the beneficiary of the acquisition of the suit property through **eminent domain** and the request for compensation is to be channelled through it. That relying on **Articles, 3,10, 20,22, 23 & 162** of the Constitution, the Respondents have infringed upon the Petitioner rights under **Article 40(3) and 47 of the Constitution** as the action by the 1st Respondent to compulsorily acquire the suit property without following due process contrives its rights to **fair and administrative action** and to full and prompt compensation.

That the Petitioner had set out plans to develop the land for commercial purposes and had invested heavily and is therefore entitled to due process and prompt compensation.

The Petition is opposed and the 1st Respondent swore a Replying Affidavit sworn by **Edmond Gichuru** on **23rd April 2018**, who is the Deputy Director, Legal affairs and Enforcement. He averred that on **20th February 2009**, the suit property was gazetted in **Vol.CXI-16** of the Kenya Gazette as the government had an interest in acquiring it through the 2nd Respondent. That the 1st Respondent (then Commissioner of Lands) identified the Petitioner as the owner of the suit property and followed all the processes set out in law and compulsorily acquired the said property. That all the processes were followed on behalf of the 2nd Respondent and an award was offered and promptly paid to the Petitioner.

He averred that the initial construction of the **Thika Superhighway** was concluded without using the Petitioner's land and the Petitioner's became interested in recovering the land and wrote to the Commission making inquiries. That the Petitioner was advised to reimburse the monies that had been paid to it and **9th October 2015**, a Notice was placed in the **Kenya Gazette** revoking the acquisition of the suit property and reverting the title immediately to the Petitioner, Further that the Commission received a letter from the Ministry of Lands and Physical planning dated **24th April 2017**, wherein the Director of Land Valuation stated that his department had not received any instructions from the acquiring body to degazette the land. Further that the Commission received a letter dated **17th July 2017**, from the 2nd Respondent stating that it had not issued instructions to degazette the acquisition of the subject property prompting the Commission to conduct an investigation into the Gazette Notice of **9th October 2015**. Through the investigation, the Commission was able to establish that the letters between the Petitioner's Advocate and itself which led to the refund of the compensation sum and publication of the **Gazette Notice** were not authorized by the full Commission and that the said communications were effected without the full Commission's

authority and as such the Commission takes no ownership of the same.

He averred that upon conclusion of the investigations and the resultant findings, the Commission on **4th August 2017**, published in the Kenya Gazette **Vol. CXIX-No.109** a Notice that it was reinstating acquisition of the suit property on behalf of the 2nd Respondent as per the **20th February 2009**, Gazette Notice, which consequently gave rise to the instant proceedings. That the **National Land Acquisition Commission's Committee** reversed the transaction as ordered and begun the process of refunding the compensation money to the Petitioner once more.

However, the Petitioner is opposed to the said action and insistent on either a fresh valuation process or on being given possession of the suit property both of which are not feasible. He contended that the land remains public land to be used for purpose of construction of a **bus park** and expansion of the **Thika Super Highway Interchange**, which is the original reason why the land was acquired and therefore the Petitioner should not be allowed to develop the said land.

The 2nd Respondent filed a Replying Affidavit sworn on **17th August 2018** by **Daniel K. Mbuteti**, who averred that the Petitioner's

averments that the land was acquired by the 1st Respondent but that the 1st Respondent was non-existent and only came into being on **2nd May 2012**, when the **National Land Commission Act** became operational. It was his contention that the **Commissioner of Lands** had sought to compulsorily acquire the suit property, and upon completion of inquiries on compensation, the Commissioner of Lands directed the Authority to pay the Petitioner **Kshs.29,600,000/** compensation for the compulsory acquisition which the Petitioner admits to receiving. He averred that **L.R 12861/253** is public land compulsorily acquired by the Commissioner of Lands for use by the 2nd Respondent as a road reserve. That the 1st Respondent unilaterally and unlawfully purported to revoke the acquisition of the suit property and allocate the land to the Petitioner.

Further that the Authority never issued any instructions to the 1st Respondent to allocate the suit property to the Petitioner and the reversion of the land to the Petitioner was done contrary to the **Land Act** provisions on management and allocation of public land and is therefore **illegal** and a **nullity** ab initio. That the Authority learnt of the illegal reversion on **25th April 2017**, when it received a letter from the Director, Land Valuation which the Authority responded to vide its letter dated **17th July 2017**, asking the 1st Respondent to nullify the revocation of the Compulsory acquisition of the property which the Authority intends to use for construction of a bus park. It was his contention that the purpose of the acquisition still exists and the Authority has since engaged contractors with a view of constructing a foot bridge. He contended that the Pre-emptive rights of the Petitioner to reacquire the land as provided by **Section 110** of the **Land Act**, cannot be construed in a manner that is inconsistent and in contravention with **Section 7** as read with **section 12** of the **Land Act**. That the Petitioner knew or he ought to have known that the land was acquired by the **Authority** for the development and improvement of the **Nairobi - Thika Super Highway** and it could not be allocated to it in the manner alleged in the Petition, which is contrary to the due process as stipulated in the law.

That the letter dated **17th August 2015**, by the Petitioner is mischievous and orchestrated to keep the Authority in the dark to further the Petitioner's illegal scheme to unlawfully deprive the public of the road reserve. That the 1st Respondent acted ultra vires in purporting to revert back land meant for a road reserve and that the Authority is not aware of any funds paid to the Petitioner or compensation being reimbursed following the impugned Gazette Notice. That the 1st Respondent reinstated the compulsory acquisition of the suit property in recognition of the fact that the reversion of the land to the Petitioner was ultra vires, illegal and irregular.

He alleged that the Petitioner has not laid the basis for the prayers sought in the Petition and that the Prayers sought are not available as the Authority complied with the mandatory requirements of the **Land Acquisition Act**, and an award paid out to the Petitioner. That the Petitioner does not have any interest in the suit property and that the land is a road reserve. He urged the Court to dismiss the Petition.

After Close of pleadings, the matter proceeded by way of **viva voce evidence** wherein the Petitioner called one witness and the Respondents called two witnesses and closed their case.

PETITIONER'S CASE

PW 1 Jitedra Shah, the major shareholder in the Petitioner Company, relied on his Affidavits dated **29th November 2017**, and **23rd July 2018**, as his evidence. He further produced his list of documents dated **6th July 2018**, as Exhibit **1 to 10**. It was his testimony that the suit property had initially been acquired by the Government to build part of the **Thika Super-Highway**. That the Company was compensated and paid **Kshs.29,497,500/=**. That upon completion of the **Thika Super-Highway**, the land was not utilised by the **Super Highway** and the Petitioner wrote to the **National Land Commission** seeking to reacquire the land and the NLC agreed to give them back the land. Further that the Petitioner was told to pay **Kshs.29,600,000/=** which it paid back and gazettement was done to revoke the title.

That the Petitioner had the original title as it had not returned it back to the Government. Then the Petitioner took back possession of the land and has used substantial amount of money to plan and develop a mall. That the plans had been approved by **Kiambu County Government**, but the Petitioner did not proceed with the construction as it was dealing with National Land Commission. That they learnt through another gazette Notice dated **2nd May 2017**, that their title was revoked and the plot degazetted and reverted back to the government. He testified that the **NLC** did not consult him on what they were planning to do nor was he paid back his **Kshs. 29,600,000/=**.

That the Petitioner seeks compensation at the market rate as the land is **6 acres** and the footbridge is on the reserve land and not on his land. That the date of the award is **2nd October 2009**, and the award was paid in full. Further that the compensation was done by **KENHA**, but he was not aware if **KENHA** was operating then. That when the Petitioner wrote to the NLC informing it that the land was not being used for the purpose it was acquired. For the same as copied to other agencies. However, that letter was not copied to **KENHA** and that he did not have any reason why he did not ask **KENHA** to revert the land back to them. That the land was acquired through Kenya Gazette Notice dated **20th February 2009**, and that the Commissioner of Lands issued the said gazette Notice and NLC does not appear in the Kenya Gazette.

It was his further testimony that he did not involve the Commissioner of Lands in the acquisition of the land and the Application for reversion. That he wrote the letter for reversion on **17th August 2015**, to the **Chairman of the National Land Commission** and the letter elicited a report of **19th August 2015**, and the land reverted back to the Petitioner on **24th August 2015**. He further testified that he followed due process and he paid the money back on **10th September 2015**. That he was not unhappy with the reward and, was not aware that the land had been acquired on behalf of **KENHA** as he paid back the money to **National Land Commission** and the said Commission has not sent the money back. Further that **KENHA** is not mentioned in the initial Kenya Gazette and he did not engage with **KENHA** over the award so he did not know that it was the one that paid the award.

DEFENCE CASE

DW1 Edmond Gichuru, an Advocate of the High Court of Kenya working as a Deputy Director, Legal Affairs and enforcement at National Land Commission adopted his Affidavit dated **23rd April 2018**, as his evidence. He testified that the Chairman of the NLC is

the head of the institution and that in **April 2018**, the Chairman was **Mohammed Swazuri** and when the Commission did its Investigations, the witness confirmed that he did the letters to the Petitioner. He further testified that the land was acquired for construction of the **Thika Super-Highway** and by the time the Super Highway was completed, the parcel of land had not been used. That if the land was acquired, it could not be used for other purpose. He further testified that as per **Section 110 of the Land Act**, the Petitioner could request the land to be reallocated back to him. He confirmed that the Petitioner was required to reimburse the government **Kshs. 29,600,000/=** and that the money had been refunded, though he did not have a documents to prove it, although the refund was done in **September 2019**.

That Kenya Gazette was done vide gazette Notice **No. 7589** dated **9th October 2015**, and the same is signed by **Mohammed Swazuri**. It was his testimony that the Chairman signed without following the right procedure, but that the revocation was done by the Commission and the land reverted back to the registered owner though he do not agree with the position. That after gazette, the land became public land and that there was no process of reverting the land back to private individual after the land became public land. That the Commission revoked the acquisition and it was correcting the position that was wrongly done. Further that the Commission authorised the investigations and that there were minutes to that effect. He testified that the Commission did not inform the Petitioner of their investigations and the petitioners views were not sought. That the title was revoked without involving the Petitioner and he was not aware if the land was vacant.

He further testified that the letter dated **17th August 2015**, written by the Petitioner addressed to the **Chairman, National Land Commission** requested that the land revert back to the Petitioner as the same had not been utilized and the letter dated **19th August 2015**, acceded to the request with a **caveat** that compensation be refunded to the government. It was his evidence that the **Chairman of National Land Commission**, had no authority to write such a letter as he ought to have referred the matter to the committee on land acquisition and later to a full committee for deliberation and decision. Therefore, the Chairman did not comply with the law.

It was his evidence that the National Land Commission did not have any obligation to consult the Petitioner as it could only consult internally. Further that within the two days which the request was made and acceded to, it was not possible to comply with the law as the quorum required was a minimum of five. Further that gazette **Notice** is not proof of title.

It was his evidence that the Chairman is the Senior most Commissioner, but he could not act unilaterally and the unilateral decision is not binding on the Commission. That after the land has been acquired and transferred to the acquiring authority, they do not follow up on how it is to be utilized and that the Commission had no authority from the 2nd Respondent to revert the land back.

DW2 Daniel Mbuteti, testified that he is a Land Surveyor working with KENHA. He adopted his Replying Affidavit sworn on **17th August 2018**, as part of his evidence. Further that KENHA was carrying out improvements on the **Thika Super-Highway** and it was acquiring land for interchanges as the project required them to acquire land. It was his evidence that some projects were not completed as the Contract ended, but they have started now constructions of footbridges. He produced documents No and 4 in the bundle of documents as Exhibits 1 and 2. The 2nd Respondent wrote to National Land Commission to acquire several parcels of lands compulsorily. He produced the gazette Notices as Exhibit 3, 4 and 5. Further that the inquiries took place and the owners were compensated and the award was made on **2nd October 2009**, and the Petitioner's award was about **Kshs.29,000,000/=**. That the Authority complied in full by depositing the money to the Petitioner's Account. He produced the letter dated **10th May 2011**, as Exhibit 6, Bank Deposit slip to Bank of India dated **21st April 2011** as Exhibit 7, Cheque dated **21st April 2011** as Exhibit 8.

That although the land was acquired in 2011, the same was not utilized as KENHA relies on Exchequers budget. It was his testimony that the 2nd Respondent paid the money and upto the payment point the Commissioner of Lands was involved as National Land Commission had not come into being by then. That the letters to the NLC were not copied to them. He produced the letter from the Director of Valuation dated **24th April 2017** exhibit 8, and told the Court that when KENHA became aware of the letter, it responded to the NLC on **17th July 2017**, and protested that it had not given instructions to revoke the title and revert the land to the Petitioner.

That KENHA asked the Chairman of National Land Commission to revoke the Gazette Notice that revoked the compulsory acquisition being **gazette Notice No 7589**. He produced the letter of protest as Exhibit 9. It was his testimony that the Gazette Notice had many anomalies and that they did not pay for the Kenya Gazette and it had not Identified the project. Further that the Petitioner did not pay any monies to KENHA and that though the land might have been vacant, it still remained public land. Had KENHA, been involved, the Petitioner would have known that the purpose of the land was for interchange.

It was his testimony that the revocation of the acquisition was done procedurally. He testified that KENHA was not involved in the reversion of the land back to the Petitioner. Further that he is a Surveyor and he is involved with survey works and not gazette.

That KENHA came into operation in **2009**, and they were in transition in **2008** when the acquisition was done. That normally KENHA communicates to the entity acquiring the land to compulsorily acquire the land depending on their need for the said land. That payment in 2011 was facilitated by the Commissioner of Lands and KENHA did not come into contact with the land owners on the issue of acquisition. That the communication was through the Commissioner of Lands and once the land has been acquired, it becomes **public land** and the land cannot be utilized for other projects. Further that the land was acquired for an interchange and that the gazette for compulsory acquisition was done in **2008**, and the document in Court was prepared in **2018**, when the instant Petition was in Court and that there is no document prepared in **2008** to show the interchange. It was his further testimony that the drawing does not show the interchange as it is a land acquisition drawing.

That **Thika Super-Highway** was completed, but the project had not been fully completed as the **Super-Highway** is still being improved. That the footbridge is not on the suit property and that although the Contract ended, they are still improving the **Super-Highway**. Further, that the person whose land was acquired can still reapply for its acquisition once the purpose of the acquisition is complete. He told the Court that the Petitioner was to write to NLC, but through KENHA as the acquiring entity. He acknowledged that the Petitioner refunded the money to NLC and what was refunded was more than what he was paid as the amount was quoted by the NLC. He confirmed that that if NLC received the money, it was supposed to send to KENHA. That when KENHA learnt what had happened, it reacted. He testified that they wrote to the NLC and other entities, but that the letter was never copied to the Petitioner nor did they ever call the Petitioner to a

meeting. That KENHA only wrote to NLC as it was the one dealing with the issue. He confirmed that the NLC took over the functions of the Commissioner of Lands and the Petitioner took about five years before seeking for revocation.

On re-examination, he testified that KENHA had contact with the Petitioner during the inquiries and that the drawings was for land acquisitions. It was his testimony that the drawing was printed in **2018**, and that it is not for interchange as it confirms the land acquisition and not interchange. It was his further testimony that the acquiring body is the one that normally pays for the gazette Notice and from legal **Notice 7589**, there was mischief as the project was not identified and one would not know that land was being reverted back to the previous owners.

Parties thereafter filed written submissions which the Court has carefully read and considered and renders itself as follows:-

It is not in doubt that the suit property initially belonged to the Petitioner. Further it is not in doubt that in **2008**, the suit property was compulsorily acquired by the Government and the Petitioner was paid **Kshs. 29,497,000/=** as compensation. It is further not in doubt that the 2nd Respondent was acquiring the said land. The said land was initially acquired by the Commissioner of Lands as the 1st Respondent was not in existence. That the Land was initially acquired for the development and improvement of the **Thika – Nairobi Superhighway**. It is also not in doubt that upon the completion of the said **Super-Highway**, the land had not been utilized and in the year **2015**, the Petitioner sought to exercise its pre-emptive rights and re-acquire the suit property. Through its Advocates, the Petitioner wrote a letter to the 1st Respondent and through its Chairman, the 1st Respondent responded to the Petitioner indicating that there would be no problem reverting the land to it.

In furtherance to its letter, the 1st Respondent would then gazette the said reversion and the suit property reverted back to the Petitioner. However, in a twist of events, the 1st Respondent vide a **Gazette Notice** dated **4th August 2017**, rescinded its decision and revoked the reversion of the suit property forming the basis of this Petition.

It is the Petitioner's contention that when it sought to **re-acquire** the suit property, the same was not in use and the said land had not been utilized for the purpose it was intended for. Further the Petitioner contends that it followed the due process of law in seeking to reacquire the suit property. That since it had reacquired the suit property, the 1st Respondent could not just seek to revoke the same through the said gazette Notice. Further that since the Petitioner is the owner of the suit property, the Respondents wanted to acquire the land, all they need to do is to follow the due process and compulsorily acquire the suit property in accordance with the laid down procedure. The Petitioner further contended that the Respondents violated his rights to **Fair Administrative Action** when it did not inform him of the revocation

However the Respondents contends that the Petitioner has no interests in the suit property as the land had already been acquired by the government. It was further averred by the Respondents that the Chairman of NLC acted **ultra vires** in purporting to gazette the **reversion**, without the authority of the 2nd Respondent who was the acquiring authority. Further that the Chairman of NLC did not follow the laid down laws and that he gazetted the said **reversion** using the repealed Land Acquisition Act, which reversion was therefore null and void ab initio. It was the Respondents contention that the said Chairman ought to have referred the matter to the Committee which was in charge of the said decision and the Chairman had no authority to degazette the compulsory acquisition. The Respondents acknowledged that the Petitioner was not informed before the **Gazette Notice No. 7589 of 2015** was degazetted.

The above being the undisputed facts, the Court's finds the issue for determination are;

- 1. Whether the Petitioner Validly re-acquired the Suit property**
- 2. Whether the Petitioners rights were violated**
- 3. Whether the Petitioner is entitled to the orders Sought**

1. Whether the Petitioner Validly reacquired the Suit property

The major issue in this matter seems to be whether or not the Chairman of NLC had the authority to degazette the initial acquisition of the suit property. This is so as it is not in doubt that the Petitioner had the right to pre-emptive rights and that in order to bring the said rights to fruition, it needed to engage the 1st Respondent, which is the body mandated to offer the owner the said rights as per **Section 110 (2)** of the **Land Act** which provides;

“If, after land has been compulsorily acquired the public purpose or interest justifying the compulsory acquisition fails or ceases, the Commission may offer the original owners or their successors in title pre-emptive rights to re-acquire the land, upon restitution to the acquiring authority the full amount paid as compensation.”

It is therefore not in doubt that the right authority to seek to exercise ones **pre-emptive rights** is the **National Land Commission**. Further there must be **restitution** to the acquiring body and the Petitioner did seek to exercise its pre-emptive rights through the National Land Commission. After seeking to do so, the Petitioner was directed where to make the payment which it did.

It is the 1st Respondent's contention that it carried out its investigations into the gazette Notice of **9th October 2015**, and the Commission established that the letters between the Petitioner and itself which led to the refund of the compensation and publication of the Notice were not authorized by the full Commission, and as such, it took no ownership. Further that **National Land Commission** Acquisition Committee reversed the transaction.

However, it is trite that 'he who alleges must prove'. The Commission having alleged that the said letter did not have their authority needed to prove the same by availing to Court the investigations report and the minutes by the Land Acquisition Committee. This has not been done and without proper evidence, the Court cannot authoritatively hold that the Chairman of NLC had **no authority** to act as he did.

The 2nd Respondent had relied on the case of **Salome Munubi & 5 others ...Vs... Muhammad Swazuri & 2 others; Emmanuel Busera (Interested Party) [2019] eKLR**. The Court having carefully perused the said decision, and notes that in the said decision, the Commission had produced in evidence minutes evidencing that the Chairman of NLC had acted **ultra vires**.

The Petitioner had a legitimate expectation and though in the case of **Salome Munubi & 5 others ...Vs... Muhammad Swazuri & 2 others; Emmanuel Busera (Interested Party) (Supra)**, the Court held that;

“No legitimate expectation can arise out of an illegitimate contract or promise. As was stated in the case of Royal Media Services Limited & 2 Others Vs Attorney General & 8 Others (2014) eKLR :

“...legitimate expectation, however strong it may be, cannot prevail against express provisions of the Constitution. If a person or a statutory body promises a certain relief or benefit to a Claimant or undertakes to do something in favour of the Claimant but in a way offends the Constitution, the Claimant cannot purport to rely on the doctrine of legitimate expectation to pursue the claim or promise.”

In the instant case, there is no evidence as noted above that there was a legitimate contract or promise. Therefore it is the Court's considered view that the Petitioner having exercised its **pre-emptive rights** and having **reimbursed** the **compensation** paid to it fully, validly reacquired land as the said land had not been utilized for the purpose it was intended for by the time it sought to exercise its rights. Therefore the Petitioner cannot be blamed for the misgivings of the 1st Respondent, who has an obligation to efficiently and effectively conduct its duties.

The Court further notes that the 2nd Respondent has submitted that the **Gazette Notice** was void. The purpose of a Gazette Notice is merely directive. See the case of **Republic ...Vs...President & 7 others Ex parte Wilfrida Itolondo & 4 others [2014] eKLR** where Justice G.V Odunga held that;

“The issue of gazettelement of the 1st interested party was also raised. In Catholic Diocese of Moshi vs. Attorney General [2000] 1 EA 25 (CAT), it was held that the requirement that administration and remission orders made by the Minister under two statutory provisions (section 7(1) of the Customs Tariff Act of 1976 (Act 12 of 1976) and section 28(1) of the Sales Tax Act 1976 (Act 13 of 1976)), being administrative acts with no legislative effect whatever, be given publicity in the Gazette was no more than directory. The failure to comply with the directive, it was held, did not affect the validity of the orders since the whole objective behind such publication is to bring the purport of the order concerned to the notice of the public or persons likely to be affected by it, thereby making the legal maxim “ignorance of the law does not excuse” more rational, in view of the growing stream of delegated legislation.’

Having analysed the available evidence as above, the Court finds and holds that the Petitioner validly re-acquired the suit property.

2. Whether the Petitioner's Rights were violated

It is not in doubt that the 1st Respondent did seek to reverse its decision and in a Gazette Notice, degazetted the **Gazette Notice** of 9th **October 2015**, without informing the Petitioner even with the knowledge that there had been a letter sent out to the Petitioner informing it that the acquisition of the property had been revoked. It has been acknowledged by the Respondents that the Petitioner was never informed before this was done.

Article 47 of the **Constitution** provides that:-

“(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 a right to be given written reasons for the action.”

Further **Article 50** of the **Constitution** provides that:-

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

Failure to abide by principles of **Natural Justice** renders the decision of the **National Land Commission** invalid and the court has no option but to proceed and quash it. See the case of **Republic...Vs...National Land Commission & 2 Others, Ex Parte Archdiocese of Nairobi Kenya Registered Trustees (St. Joseph Mukasa Catholic Church Kahawa West) [2018] eKLR**, where the Court held that;

“In my finding, a process by which an administrative body makes findings and proceeds to make recommendations before affording persons affected thereby cannot by any stretch of imagination be termed as fair in order to meet the provisions of Article 50 of the Constitution. For a hearing to be said to be fair not only should the case that the respondent is called upon to be met be sufficiently brought home to him and adequate or reasonable notice to enable him deal with it given, but also the

authority concerned ought to approach the issue with an unbiased disposition. In other words the authority ought not to be seen to be seeking representations from the respondent simply for the purposes of meeting the legal criteria. The fair hearing must be meaningful for it to meet the constitutional threshold.”

Section 7 of the National Land Commission Act provides;

“No revocation of title shall be effected against a bona fide purchaser for value without notice of a defect in the title.”

Further Section 8 of the National Land Commission Act provides

“In the exercise of its power under this section, the Commission shall be guided by the principles set out under Article 47 of the Constitution.”

It is clear herein that the *Petitioner* was condemned unheard and that goes against the doctrine of Natural Justice as was outlined in the *Halsbury Laws of England Volume 1(1) page 218*, which states as follows:-

“Natural justice comprises two basic rules; first that no man is to be a judge in his own cause (nemo iudex in causa sua), and second that no man is to be condemned unheard (audi alteram partem). These rules are concerned with the manner in which the decision is taken rather than with whether or not the decision is correct”.

Therefore, the Court finds and holds that the Petitioner’s rights to Fair Administrative Action were violated and the said gazette Notice dated 4th August 2017, is null and void.

3. Whether the Petitioner is entitled to the orders sought

The Petitioner had sought for a declaration that its rights were violated under **Article 40 (3) and 47(1)** and that the Gazette Notice published on 4th August 2017 is null and void. The Court has already held that the Petitioner was not afforded a **Fair Administrative Action**, as it was not given a chance to be heard before the gazette notice of 4th August 2017 was made. From the above analysis, the Court finds and holds that the prayers sought by the Petitioner are merited.

The Petitioner had also sought to be paid compensation and be paid out in accordance with the Law. The Court having held that the Petitioner validly re-acquired the suit property, then it follows that the process of compulsory acquisition has to be followed in accordance with the law.

Having now carefully read and considered the Petition herein, the evidence adduced and the written submissions, the Court finds and holds that the Petitioner has proved its case on the required standards of balance of probabilities. Consequently, the court enters judgment for the Petitioner against the Respondents herein jointly and severally as sought in the Petition. The Petition herein is merited and is allowed in terms of prayers **No. (i), (iii) and (vi)** accordingly. The 1st Respondent to comply immediately with the orders sought in prayer **no. III** above.

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 **Judgment** 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

No appearance for the Petitioner

No appearance for the 1st Respondent

No appearance for the 2nd Respondent

L. GACHERU

JUDGE

14/12/2020