



REPUBLIC OF KENYA



KENYA LAW
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**Panari Centre Limited v National Land Commission & 2 others (Petition
1303 of 2016) [2019] KEELC 5106 (KLR) (24 January 2019) (Ruling)**

Panari Centre Limited v National Land Commission & 2 others [2019] eKLR

Neutral citation: [2019] KEELC 5106 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
PETITION 1303 OF 2016
SO OKONG'O, J
JANUARY 24, 2019

BETWEEN

PANARI CENTRE LIMITED PETITIONER

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. The petitioner brought this petition on 21st October, 2016 seeking the following reliefs:
 - a) A declaration that the intended compulsory acquisition of a portion measuring 0.0343 hectares from the petitioner's parcel of land comprised in title No. L.R No. 12928 by the respondents shall occasion a violation of the petitioner's right under Article 40 of the Constitution of Kenya 2010 relating to the right to ownership of property.
 - b) A declaration that the petitioner's rights relating to protection of private property under Articles 3, 12 and 17 of the Universal Declaration of Human Rights 1948, applicable to Kenya by dint of Article 2(5) and (6) of the Constitution of Kenya 2010 shall be violated by the compulsory acquisition of a portion measuring 0.0343 hectares from the petitioner's parcel of land comprised in title No. L.R No. 12928.
 - c) A declaration that the intended compulsory acquisition of a portion measuring 0.0343 hectares from the petitioner's parcel of land comprised in the title No. L.R 12928 is undeniably drastic with ramification to kick out the petitioner from business and has the effect of adversely affecting the petitioner's economic interest in contravention of Article 46 of the Constitution.



- d) A declaration that the construction of a Bus Rapid Transit Station and an overhead pedestrian foot bridge adjacent to the petitioner's parcel of land comprised in title No. L.R 12928 is undeniably drastic with ramifications to kick out of the petitioner from business and had the effect of adversely affecting the Petitioner's economic interest in contravention of Article 46 of the Constitution.
 - e) An Order of Certiorari do issue to bring into this Honourable Court for the purpose of being quashed Gazette Notice No. 809 dated 10th November 2015 setting out the fact that the 1st respondent intends to acquire a portion measuring 0.0343 hectares from the petitioner's parcel of land comprised in title No. 12928 for the 2nd respondent for the construction of JKIA Turn Off-Likoni Road Junction (A 104) Road Project in Nairobi City County.
 - f) An Order of Mandamus do issue to compel the Registrar of Titles to cancel any entry in the records at the Lands office relating to the intended compulsory acquisition by the respondents of a portion measuring 0.0343 hectares from the petitioner's parcel of land comprised in title No. L.R No. 12928.
 - g) An Order of Prohibition do issue to prohibit the 2nd respondent whether by themselves, servants, agents, employees or whomsoever from undertaking the construction of a Bus Rapid Transit Station and an overhead pedestrian foot bridge adjacent to the petitioner's parcel of land comprised in title No. L.R 12928.
 - h) An Order of Prohibition do issue to prohibit the respondents whether by themselves, servants, agents, employees or whomsoever from trespassing, alienating and/or in any way whatsoever interfering with the petitioner's quiet possession over all the parcel of land known as L.R No. 12918.
 - i) Costs of and incidental to this suit.
2. In its petition, the petitioner averred that it was the registered owner of all that parcel of land known as L.R No. 12918 on which it had constructed a 5 star hotel with related amenities such as a shopping mall, a theater and skiing centre. The petitioner averred that during a consultative meeting held on 19th May, 2015 which was attended by the petitioner's representatives and a representative of the 2nd respondent's agent, Gibb Africa Limited, the petitioner learnt that the respondents had planned to construct an overhead foot bridge for pedestrians to use while crossing Mombasa Road as well as a Bus Rapid Transit Station adjacent to the petitioner's said parcel of land, L.R No. 12918 (hereinafter referred to as "the suit property"). The petitioner learnt further at the said meeting that the base of the intended foot bridge was to be erected within the suit property next to the entrance of the hotel on the suit property and its parking area. The petitioner averred that the construction of the said foot bridge would entail the compulsory acquisition of a portion of the suit property measuring 0.0343 hectares.
3. The petitioner averred that its representatives informed Gibb Africa Limited which had been commissioned by the 2nd respondent to carry out engineering designs in respect of the project that it had an objection to the construction of the base of the said foot bridge on the suit property for various reasons among others that the same would degrade its hotel on the suit property by interfering with the aesthetics and image of the hotel and completely ruin its business. The petitioner averred that despite the said objection, the 1st respondent through Gazette Notice No. 809 dated 10th November, 2015 gave notice of its intention to acquire compulsorily on behalf of the 2nd respondent, among others, a portion of the suit property measuring 0.0343 hectares for the purposes of the construction of JKIA Turn Off-Likoni Road Project, Nairobi City. The petitioner averred that following the publication of the said Gazette Notice on 12th February, 2016, its representatives held a meeting with the representatives of 2nd



respondent at which meeting it once again raised objection to the construction of the proposed foot bridge. The petitioner averred that it objected to the compulsory acquisition of a portion of the suit property for the purposes of construction of the base of the said foot bridge and the construction of the Bus Rapid Transit Station adjacent to the suit property.

4. The petitioner averred that the 2nd respondent declined to take into consideration its objections and indicated that the designs for the project had been firmed up in readiness for construction to commence and that the only option that was open to the petitioner was to pursue compensation from the 1st respondent. The petitioner averred that the proposed construction of the base of the foot bridge on the suit property as well as the construction of the foot bridge and Bus Rapid Transit Station adjacent to the suit property would infringe on its rights in that it constitutes taking of the suit property in its entirety thereby ruining the petitioner's business without compensation. The petitioner averred that the said foot bridge and Bus Rapid Transit Station could be constructed on alternative sites and that the respondents had insisted on constructing the same adjacent to the suit property oblivious of the damage that will be occasioned to the petitioner's investment. The petitioner contended that the proposed construction of the said foot bridge and Bus Rapid Transit Station was unreasonable in view of the availability of alternative sites.
5. The petitioner averred that the intended acquisition of a portion of the suit property for the construction of the said base of the foot bridge violates its rights conferred under Article 40 of the *Constitution*. The petitioner averred further that the failure by the respondents to take into account the objections it had raised violated its right to fair administrative action under Article 47 of the *Constitution*. The petitioner contended further that the proposed project by the respondents was drastic as it had the effect of evicting the petitioner from its business premises and taking away its economic rights in contravention of Article 46 of the *Constitution*.
6. It is on account of the foregoing that the petitioner sought the reliefs that I have set out herein earlier. The petition was opposed by the 1st and 2nd respondents. The 1st respondent opposed the application through an affidavit sworn by Brian Ikol on 20th July, 2017. The 1st respondent contended that its role was limited only to acquiring land on behalf of the 2nd respondent and that it had no input in the decision of the 2nd respondent on the location of the foot bridge. The 1st respondent contended that it was wrongly joined in the petition.
7. The 2nd respondent filed a replying affidavit sworn by Eng. Daniel Cheronon on 30th May, 2017 in which it contended that the petition was frivolous, vexatious and amounted to an abuse of the process of the court. The 2nd respondent averred that it was at all material times acting in good faith in fulfillment of its statutory mandate to manage, develop, rehabilitate and maintain national roads. The 2nd respondent contended that the orders sought if granted would impair the 2nd respondent's mandate to construct roads, foot bridges or necessary amenities to facilitate transport and ease of movement of pedestrians and motor vehicles. The 2nd respondent averred that the petitioner having admitted that it had been given full assurance of prompt compensation for its land, the benefit to the public to be derived from the project in question was much greater in comparison to the petitioner's purely private and commercial interests. The 2nd respondent denied that the proposed construction of the said foot bridge and Bus Rapid Transit Station would kick the petitioner out of business. The 2nd respondent contended further that the relocation of the said foot bridge would have serious implications and would also subject it to enormous costs. The 2nd respondent averred further that the Bus Rapid Transit Station project was not a new project but was an improvement of the existing facility located at the site whose existence was not denied by the petitioner.



8. On 30th March, 2017, the parties agreed to dispense with the interlocutory application for conservatory orders, maintain the prevailing status quo and proceed with the hearing of the petition. On 23rd May, 2017, the court directed that the petition be heard by way of written submissions and gave timelines within which the parties were to file their submissions. On 27th July, 2017, the court set down the matter for highlighting of submissions on 6th November, 2017. When the matter came up for highlighting of submissions on 6th November, 2017, the petitioner had not filed its submissions as had been directed by the court on 27th July, 2017 and asked for more time to do so.
9. On 24th November, 2017 the petitioner filed an application by way of Notice of Motion dated 23rd November, 2017 seeking a certificate to the effect that this petition raises substantial questions of law and as such should be heard by uneven number of judges not less than three. This is the application which is the subject of this ruling. The application was brought on the grounds set out on the face thereof. The petitioner reiterated the contents of its petition which I have highlighted at length earlier in this ruling. The petitioner contended that substantial questions of law on violation of its rights have been raised in the petition to warrant empaneling of a bench of uneven number of judges under Article 165(4) of the *Constitution*.
10. The application was opposed by the 2nd respondent through grounds of opposition dated 12th January, 2018. The 2nd respondent contended that the application was an afterthought and a dilatory tactic since there was no explanation why the petitioner took a long time to make the application. The 2nd respondent contended further that the petition did not raise substantial questions of law to warrant the empanelment of a bench of uneven number of judges to hear the same.
11. The application was argued by way of written submissions. The petitioner filed its submissions on 23rd April, 2018. The respondents did not file submissions in reply. The petitioner referred to Article 165(4) of the *Constitution* and argued that the petition before the court raises substantial questions of law on its fundamental rights. The petitioner submitted that the intended acquisition of a portion of its property would lead to the closure of its hotel business and that some of the substantial questions of law that the court would be called upon to determine is whether the respondents' decision to construct the base of the said foot bridge on the suit property and the foot bridge itself adjacent to the suit property notwithstanding the existence of alternative sites for the said project violates the petitioner's constitutional rights and whether the intended use of public resources by the respondents in the project violates Article 201(d) of the *Constitution*.
12. The petitioner cited the cases of *Del Monte Kenya Ltd. v County Government of Muranga & 2 others*[2016]eKLR and *Kalpana H. Rawal v Judicial Service Commission & 3 others*[2015]eKLR in support of its submission that where a petition deals with issues of public importance, the balance tilts in favour of empanelment and that public importance is a factor to be considered in determining whether substantial questions of law have been raised. With regard to the 2nd respondent's contention that the application is a dilatory tactic, the petitioner referred to the case of *Okiya Omtatah Okoiti & another v Attorney General & 3 others*[2016]eKLR and submitted that considerations of dispensing justice without delay should not lead to the dismissal applications under Article 165(4) of the *Constitution* without considering their merit.

Determination:

13. I have considered the petitioner's application together with the grounds of opposition that was filed by the 2nd respondent in opposition thereto. I have also considered the submissions by the petitioner and the cases that were cited in support thereof. The only issue arising for determination in the application is whether the petition herein raises substantial questions of law to warrant a certification under



section 21(2) of the *Environment and Land Court Act*, 2011 as read with Article 165(3) and (4) of the *Constitution*.

14. The question as to what constitutes a substantial question of law was interrogated by the Court of Appeal in the case of *Okiya Omtatah Okiiti & another v Anne Waiguru, the Cabinet Secretary, Devolution and Planning & 3 others, Nairobi Civil Application No. 3 of 2015* (UR 3/2015) (2015) eKLR where the court stated as follows:

“The issue of what constitutes a ‘substantial question of law’ has fallen for interrogation before the High Court on several occasions. ...In these decisions, the courts have adopted with approval the persuasive authority of the Supreme Court of India in *Chunilal Mehta vs Century Spinning and Manufacturing Co.* AIR 1962 SC 1314 wherein the court held that:

“a substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial question of law.”

15. The petition before the court raises for determination the extent of the Government’s right to compulsorily acquire private land for public use as well as the petitioner’s right to own property. Intertwined with that is the process of compulsory acquisition of land. I am of the view that the petition does not raise any novel issue which has not been determined by the courts. I am unable also to see any issue of public importance which is peculiar in the petition. I am of the view that the law is clear on the issues raised in the petition and there are numerous precedents to guide the court.
16. The upshot of the foregoing is that I find no merit in the Notice of Motion dated November 23, 2017. The application is dismissed with costs to be in the cause.

DELIVERED AND DATED AT NAIROBI THIS 24TH DAY OF JANUARY 2019.

S. OKONG’O

JUDGE

Ruling read in open court in the presence of:

Mr. Pany h/b for Mr. Ngatia S.C for the Petitioner

N/A for the 1st Respondent

Ms. Maina h/b for Mr. Ogari for the 2nd Respondent

N/A for the 3rd Respondent

Catherine-Court Assistant

