



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

PETITION NO. 209 OF 2015

IN THE MATTER OF: ARTICLES 22 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: SECTION 10, 19, 20, 23, 162(3) AND 258 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF: SECTION 13 OF THE ENVIRONMENT AND LAND COURT, 2011

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF THE BILL OF RIGHTS UNDER ARTICLES 40, 47 AND 64 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

GEYSER INTERNATIONAL ASSETS LIMITED.....PETITIONER

AND

1. THE ATTORNEY GENERAL.....1ST RESPONDENT

2. KENYA RAILWAYS CORPORATION.....2ND RESPONDENT

3. NATIONAL LAND COMMISSION..... 3RD RESPONDENT

4. CHINA ROAD & BRIDGE

CORPORATION (KENYA).....4TH RESPONDENT

RULING

1. The petitioner herein, Geyser International Assets Limited vide a petition dated 10th September, 2015 and filed on the same date sued the Respondents seeking a declaration that the petitioner’s right to acquire and own property guaranteed under Article 40 of the Constitution of Kenya is threatened and will be contravened if the Government of Kenya, the 2nd Respondent and the 4th respondent forcefully enter upon and/or otherwise commence and/or implement and/or a carry out the intended construction of the Standard Gauge Railway on the suit property before prompt payment in full, of just compensation is made by the Government of Kenya and/or the Respondents to the petitioner; a declaration that the petitioner’s right to fair administrative action guaranteed under Article 47 of the Constitution of Kenya is threatened and will be contravened if the Respondents continue with the implementation and/or commencement and/or construction of the Standard Gauge Railway project on the suit property before the 3rd Respondent has delivered its written decision on the petitioner’s claim for compensation; an order of Judicial Review in the nature of prohibition and/or otherwise an order by way of a permanent injunction prohibiting and/or restraining the Government of Kenya, the 2nd Respondent and the 4th Respondent and their employees, servants, agents, assigns, representatives, contractors from unlawfully reentering upon and interfering in any way with the suit property, namely, LR No. Mainland North/Section VI/3892, before the petitioner has been paid just compensation in full; such other or further orders or directions as the court may deem fit to grant so as to meet the interest of justice; and that the cost of this petition be awarded to the petitioner.

2. Since the filing of the petition and before the petition could be heard, on 9th November, 2017 the petitioner was paid Kshs.

380,359,291.000 as compensation for both the suit property which was acquired by the Government of Kenya for and on behalf of the 2nd Respondent for purposes of construction of the Standard Gauge Railway and or the demolished wall.

3. By a notice of motion dated 28th May, 2018 the petitioner is seeking leave to amend the petition to include inter alia, an order that the Respondents do pay to the petitioner the sum of Kshs. 101,534,630 being the amount of interest accruing on the sum of Kshs. 380,359,291.00 paid to the petitioner from 19th October, 2015 when the Respondents unlawfully entered the suit property to 9th November, 2017 when the compensation was paid. The amendment sought also include an order for interest at commercial rates on the said sum of Kshs. 101,534,630.00 until payment in full and an award for general damages for violation of the petitioner's right to property and right to fair administrative action.

4. The application is supported by the affidavit of Peter Kimanga sworn on 28th May, 2018 and the grounds on the face of it. Briefly, the petitioner contends that there are new matters that have arisen and/or new information has come up and the facts and circumstances giving rise to the petition have changed since the filing of the petition. The petitioner further contends that the amendment is required and is necessary in order to plead and/or otherwise set out these new matters, facts and/or circumstances. The petitioner avers that the intended amendment are to enable the court effectively, justly and completely determine the real issues in controversy between the parties as well as obviate the need for multiple legal proceedings premised on the same subject matter and/or transactions as those pleaded in the petition.

5. The 2nd and 4th Respondents opposed the petitioner's application for amendment by filing grounds of objection dated 24th August, 2018 and filed on 1st October, 2018 on the following grounds:

1. The amendments do not disclose any bona-fide claim or any issue in controversy between the petitioner and the 2nd and 4th Respondents because,

a) The entire claim in the original petition was for compensation of land that was compulsorily acquired by the National Land Commission.

b) The amended petition pleads that the claim by the petitioner is for payment of interest since the value of the land acquired is admitted to have been paid in full.

c) The 2nd and 4th Respondents do not have any contractual or statutory obligation to pay the petitioner the award or the interest.

2. The statutory obligation is vested on the 3rd Respondent under the Land Act and the process is irreversible.

3. Section 112 of the Land Act vests the jurisdiction to determine disputes on the ownership, value and compensation payable on the recommendation by the commission's inquiry established under Section 112.

4. It is not alleged that the statutory framework of part VIII of the Land Act is unconstitutional or that the remedies provided are insufficient.

6. The 2nd and 4th Respondents sought to have their names struck out with costs and the petition amended accordingly.

7. The court will normally allow amendment of pleadings at any stage of the proceedings if it can be done without occasioning injustice or prejudice to the other party and on such terms as to costs or otherwise as may be just.

8. Rule 18 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 allows parties to amend their pleadings and in particular the petition, with leave of the court at any stage of the proceedings. Amendment of petitions once filed can only be done with the permission of the court. Additionally, the permission and consequent amendment may be granted and made respectively at any time or stage of the proceedings.

9. The question that I need to grapple with is whether I should exercise my discretion in favour of the petitioners, it being appreciated that the permission is not to be automatically granted.

10. The general rule when it comes to amendments of pleadings is that amendments ought to be freely allowed so long as they do not occasion any prejudice to the party facing them.

11. In the case of **Central Bank of Kenya –vs- Trust Bank Ltd** [2002] 2 EA 365, the Court of Appeal held that amendment of pleadings (and joinder of parties) was aimed at allowing a litigant to plead the whole of the claim he was entitled to make in respect of his cause of action and that a party should always be allowed to make such amendments as are necessary for determining the real issues in controversy or avoiding a multiplicity of suits. The court then went on to state that the amendments or joinder would be allowed provided (i) there had been no undue delay, (ii) that no vested interest or accrued right was affected and (iii) no injustice or prejudice would be occasioned to the other side that could not be properly compensated for in costs.

12. The 2nd and 4th respondents in the instant case state that the proposed amendments do not disclose any bona-fide claim or any issue in controversy between the petitioner and them. However, they do admit that the statutory obligation is vested on the 3rd Respondent under the Land Act. The 3rd Respondent has not filed any response and therefore has not opposed the application herein.

13. In the instant case, there is no dispute that the petitioner has been paid the sum of Kshs. 380,359,291.00 on 9th November, 2017 as compensation for both the acquired property and the demolished boundary wall. It must be noted that Section 115 of the Land Act requires the 3rd Respondent to promptly pay compensation to persons entitled to the payment. It is apparent that the petitioner was not paid promptly and therefore interest would be an issue for determination. Section 117 of the Land Act provides that if the amount of any compensation awarded is not paid, the commission (the 3rd Respondent) shall on or before taking of possession of the land, open a special account into which the commission shall pay interest on the amount awarded at the prevailing bank rates from the time of taking possession until the time of payment. In my view, these are some of the issues to be canvassed through the proposed amendments.

14. The respondents have not demonstrated what prejudice, if any, they will suffer if the application for amendment is allowed. On the contrary, if such leave to amend is granted, it would allow the court to effectively, justly and completely determine the real issues in controversy between the parties therein. The Respondents can adequately be compensated by costs.

15. Accordingly, and for the reasons herein above, I exercise my discretion and allow the petitioner's motion dated 28th May, 2018. I make the following orders specifically;

a) The petitioner is hereby granted leave to file and serve the amended petition upon the Respondents within fourteen (14) days from the date hereof.

b) The respondents shall thereafter be at liberty to file their responses or additional responses or amend any filed responses and serve the same within a period of fourteen (14) days following the service of the amended petition.

c) The costs of the application shall be paid by the petitioners to the Respondents.

DATED, SIGNED and DELIVERED at MOMBASA this 14th day of January, 2019.

C.K. YANO

JUDGE

In the presence of:

Moga for the petitioner

Karina for 2nd, 3rd and 4th respondent and holding brief for Makuto for 1st Respondent

Court Assistant-Yumna