



**REPUBLIC OF KENYA**

**IN THE ELC COURT OF KENYA AT NYAHURURU**

**PETITION NO 11 OF 2018**

**(FORMERLY NAIROBI PET 161/2018)**

**IN THE MATTER OF CONTRAVENTION OF ARTICLES 40 AND 64 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE LAND ACT No 6 OF 2012**

**AND**

**THE REPEALED REGISTERED LAND ACT no. 3 of 2012**

**BETWEEN**

**JOHN NJOROGE MAINA.....PETITIONER**

**VERSUS**

**HON ATTORNEY GENERAL.....1<sup>st</sup> RESPONDENT**

**NATIONAL LAND COMMISSION.....2<sup>nd</sup> RESPONDENT**

**JUDGEMENT**

1. On the 25<sup>th</sup> April 2018, the Petitioner herein filed his Petition dated an even date at the Nairobi Constitutional and Human Rights Division. On the 16<sup>th</sup> July 2018, when parties appeared before the Hon Justice Okwany, they agreed by consent that the matter be transferred to the Environment and Land Court sitting at Nakuru.
2. Service of the said Petition and a Mention Notice were effected upon the 1<sup>st</sup> Respondents on the 30<sup>th</sup> April 2018 and on the 2<sup>nd</sup> Respondent, on the 2<sup>nd</sup> May 2018, as per the affidavit of service filed on the 5<sup>th</sup> May 2018.
3. On the 12<sup>th</sup> July 2018, the 1<sup>st</sup> Respondent filed their notice of Preliminary Objection wherein they objected to the matter being heard at the Nairobi Constitutional and Human Rights Division stating that the appropriate forum would be at the Nyandarua High Court.
4. On the 17<sup>th</sup> September 2018, when the matter was placed before Hon Munyao Judge sitting in the ELC Nakuru, he noted that the subject matter fell within the jurisdiction of Environment and Land Court Nyahururu and directed that the file be transferred therein.
5. The matter was placed before me on the 9<sup>th</sup> October 2018, there was no appearance by either of the Respondents who had not filed any response to the said Petition. Counsel holding brief for the Petitioner therefore took directions to have the said Petition disposed of by way of written submissions.
6. Service of the mention date and directions was effected upon the Respondents on the 19<sup>th</sup> October 2018 as per the affidavit of service filed on the 23<sup>rd</sup> October 2018. There was still no response by the Respondents. The Petitioner therefore filed his submissions on the 23<sup>rd</sup> October 2018 and took a date for judgment thereafter.
7. From the Petitioner's submissions herein filed on the 23<sup>rd</sup> October 2018, the Petitioner's case is that in the year 2001, he bought the suit land measuring 39.5 hectares for Ksh 2 million, at a Public auction from the National Bank of Kenya. The parcel of land was subsequently

transferred to him wherein he obtained the title deed, marked as JNM1, on the 16<sup>th</sup> May 2002 and took possession of the land where he has lived to date.

8. In the year 2018, he saw a newspaper report, herein marked as JNM2, wherein the Cabinet Secretary for Environment and Natural Resources had announced that with effect from January 2018, Lake Ol Bolossat was declared as a wet land protected area and persons living within its vicinity were to vacate the said area within 90 days. That his land is about 2 kilometers from the said lake.

9. Following the publication of the said article, the Chairman of the National Commission also declared that all titles to the affected areas stood dissolved/cancelled as per the annexure marked as JNM3.

10. That following the said pronouncement, the County government of Nyandarua has undertaken to forcefully evict all land owners to actualize the pronouncements.

11. That the Respondents herein have not expressed any intention of acquiring the Petitioner's land in accordance with the Constitution, the Land Act and the Land Registration Act. That the indented compulsory Acquisition was therefore in breach of the law.

12. Based on the above history, the Petitioner thus prayed for the following reliefs:

- a. A declaration that the threatened cancelation of title No. Nyandarua/Ol Bolossat /2 and eviction of the Petitioner therefrom is unlawful, null and void.
- b. A declaration that the threatened cancelation of title No. Nyandarua/Ol Bolossat /2 and eviction of the Petitioner therefrom infringes on the Petitioner's Constitutional right to own land.
- c. A conservatory order maintaining the status quo and directing the Respondents , their servants or other Government or statutory bodies from interfering with the Petitioner's quiet possession and ownership of land parcel No. Nyandarua/Ol Bolossat /2.
- d. The Petitioner be awarded the costs of the Petition
- e. Any other orders, writes (sic) or directions this Honorable Court may deem fit.

#### **Petitioner's Submission.**

13. The Petitioner relied on the Provision of Article 40 of the Constitution to submit that although the Constitution provided for protection of its citizen's right to property, it also provided for instances under which a person may be deprived of his property.

14. That the Land Act also provided for the manner in effecting compulsory acquisition of private land, while the Land Registration Act provides the rights to be enjoyed by a registered proprietor of land.

15. That the Respondents' action did not amount to fair administrative action as is envisaged under Article 47 of the Constitution.

16. In so submitting, the Petitioner relied on the decided cases of:

- i. **Hezekiah Mavasi Ondego & 8 Others vs County Government of Vihiga & Another[2018] eKLR**
- ii. **Isaac Gathungu Wanjohi & Another vs Attorney General & 6 Others [2012] eKLR**

17. It was the Petitioner's submission that the revocation of his title and subsequent eviction was unlawful. That the prayers so sought be allowed.

#### **Analyses and determination.**

18. I have anxiously considered the content of the Petitioner's Petition, his supporting affidavit, the written submissions as well as the relevant provisions of the law and Authorities herein cited. I find the issues arising for determination as follows:-

- i. Whether the Petition discloses a legal interest capable of protection under the law
- ii. Whether the Petitioners' right to property has been violated contrary to Article 40 of the Constitution.

19. The Respondents neither filed their Defence, Replying Affidavit nor Grounds of Opposition and therefore the Petitioner's case is uncontroverted and unchallenged both in terms of facts and the law. I shall therefore proceed to evaluate the Petitioner's case based on the fact that it is uncontroverted evidence

20. In the decided case of **Kenya Bus Service Ltd & 2 Others vs. The Attorney General & 2 Others (2005) eKLR**, Nyamu J. stated as follows ;

“... fundamental right are contained in the Constitution and are principally against the State because the Constitution's function is to define what constitutes Government and it regulates the relationship between the Government and the governed. On the other hand the rights of individual interests are taken care of in the province of private Law and are invariably addressed as such.”

21. In the present case, the Petitioner has annexed his title deed to parcel No Nyandarua /Ol Bolossat/2 having registered as its proprietor on the 16<sup>th</sup> May 2012.

22. It was **held in the case of Republic vs Senior Registrar of Titles Ex-parte Brookside Court Limited (2012) eKLR**, the statutorily, the sanctity of title to land is assured and protected under **Section 24, 25 and 26** of the **Land Registration Act 2012** produced as herein under’;

23. Section 24 stipulates as follows:

Subject to this Act—

*(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and*

*(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.*

24. Section 25 of the act provides:

*(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—*

*(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and*

*(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.*

*(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.*

25. Section 26 is to the effect that:

*Certificate of title to be held as conclusive evidence of proprietorship*

*(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—*

*(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or*

*(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.*

*(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.*

26. From the above provisions of the law, I find that the Petitioner has disclosed a legal interest capable of protection under the law.

27. It was the Petitioner’s submission and based on information downloaded from the internet, which information has not been certified and or authenticated, that after the then Cabinet Secretary for Environment and Natural Resources declared Lake Ol Bolossat a wet land protected area, the Chairman of the National Land Commission had also declared that all titles to the affected areas stood dissolved/cancelled wherein the County government of Nyandarua had undertaken to forcefully evict all land owners to actualize the pronouncements.

28. It was therefore the Petitioner’s submission that both substance and procedure needed to be observed. The process leading to compensation needed to be adhered to and in the instant case there having been non-observance of the prescribed procedure, the compulsory acquisition was a nullity.

29. **Article 40** of the **Constitution of Kenya** provides that;

*(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-*

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person-

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that-

(i) requires prompt payment in full or just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired

**30. Lord Denning MR in Priest –v- Secretary of State [1982] 81 LGR 193,198 held that;**

*‘there is also no doubt that no citizen is to be deprived of his land by the State or any public authority against his wish unless expressly “authorized by law and public interest also decisively demands so’.*

31. **Articles 3, 12 and 17 of the Universal Declaration of Human Rights, 1948** provide that a State’s obligation is to respect and protect of private property as well as safety of the person.

32. **Article 2 (5) of the Constitution** recognizes International law as forming part of our domestic law or sources of law. In the circumstance thereof the invasion of the Petitioners’ suit land and failure of the State to protect their property run afoul of **Articles 3, 12 and 17 of the Universal Declaration of Human Rights 1948** herein above stated.

33. In the case of **R vs Chief Immigration Officer (1976) 3 AER 843** Lord Denning stated thus regarding the Universal Declaration of Human Rights;

*“... Among the important rights which individuals traditionally have enjoyed is the right to own property. This right is recognized in the Universal Declaration of Human Rights (1948). Article 17(1) which states that everyone has the right own property and Article 17(2) guarantees that “no one shall be deprived of his property” The contention of the State counsel negates this right. An intention to provide for arbitrary infringement of human rights cannot be attributed to the legislature unless such intention is unequivocally manifest. When Parliament is enacting a statute, the court will assume that it had regard to the Universal Declaration of Human Rights and intended to make the enactment accord with the Declaration and will interpret it accordingly...”*

34. The Petitioner has alleged violation of his constitutional rights, to property under **Article 40 of the Constitution**, facts in support of the allegation which have not been contested.

35. Section 5 (1) of Wildlife Conservation and Management Act provides that;

*The Cabinet Secretary shall, subject to subsection (5), formulate and publish in the Gazette a national wildlife conservation and management strategy at least once every five years, in accordance with which wildlife resources shall be protected, conserved, managed and regulated.*

36. Acquisition by the Government is ordinarily direct and by processes known to the **Land Acquisition Act (now repealed) by the Land Act**. The law governing compulsory acquisition is in Part VIII, Section 107 to 133 of the Land Act 2012.

37. The process of compulsory acquisition was laid down in the decided case of **Patrick Musimba v National Land Commission & 4**

others [2016] eKLR where the court held as follows;

*Under Section 107 of the Land Act, the National Land Commission (the 1<sup>st</sup> Respondent herein) is ordinarily prompted by the national or county government through the Cabinet Secretary or County Executive member respectively. The land must be acquired for a public purpose or in public interest as dictated by Article 40(3) of the Constitution. In our view, the threshold must be met: the reason for the acquisition must not be remote or fanciful. The National Land Commission needs to be satisfied in these respects and this it can do by undertaking the necessary diligent inquiries including interviewing the body intending to acquire the property.*

*Under Sections 107 and 110 of the Land Act, the National Land Commission must then publish in the gazette a notice of the intention to acquire the land. The notice is also to be delivered to the Registrar as well as every person who appears to have an interest in the land.*

*As part of the National Land Commission's due diligence strategy, the National Land Commission must also ensure that the land to be acquired is authenticated by the survey department for the rather obvious reason that the owner be identified. In the course of such inquiries, the National Land Commission is also to inspect the land and do all things as may be necessary to ascertain whether the land is suitable for the intended purpose: see Section 108 of the Land Act.*

*The foregoing process constitutes the preliminary or pre-inquiry stage of the acquisition.*

*The burden at this stage is then cast upon the National Land Commission and as can be apparent from a methodical reading of Sections 107 through 110 of the Land Act, the landowner's role is limited to that of a distant bystander with substantial interest.*

*Section 112 of the Land Act then involves the landowner directly for purposes of determining proprietary interest and compensation. The section has an elaborate procedure with the National Land Commission enjoined to gazette an intended inquiry and the service of the notice of inquiry on every person attached. The inquiry hearing determines the persons interested and who are to be compensated. The National Land Commission exercises quasi-judicial powers at this stage.*

*On completion of the inquiry the National Land Commission makes a separate award of compensation for every person determined to be interested in the land and then offers compensation. The compensation may take either of the two forms prescribed. It could be a monetary award. It could also be land in lieu of the monetary award, if land of equivalent value, is available. Once the award is accepted, it must be promptly paid by the National Land Commission. Where it is not accepted then the payment is to be made into a special compensation account held by the National Land Commission: see Sections 113- 119 of the Land Act.*

*The process is completed by the possession of the land in question being taken by the National Land Commission once payment is made even though the possession may actually be taken before all the procedures are followed through and no compensation has been made. The property is then deemed to have vested in the National or County Government as the case may be with both the proprietor and the land registrar being duly notified: see Sections 120-122 of the Land Act.*

*If land is so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined: See Section 111 of the Land Act. This is in line with the Constitutional requirement under Article 40(3) of the Constitution that no person shall be deprived of his property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation.*

*The Constitution dictates that acquisition be in accordance with the provisions of the Constitution itself and any Act of Parliament. The Constitution itself only provides for just compensation being made promptly.*

*The current procedure for acquisition of land by the State is as outlined above. As can be seen parliament took very seriously its constitutional duty to legislate on the State's powers of deprivation or expropriation. Perhaps conscious of the emotive nature of land issues, the Legislature appeared scrupulous and contemplative.*

38. In the present case, I find that the Petitioner has not annexed any copy of a Gazette Notice on the impending acquisition. There is further no evidence proving that the alleged trespass has been committed by the Respondents. The Petitioner and has not placed any evidence indicating that his parcel of land is due for compulsory acquisition by the government or any other body for that matter.

39. Section 107 of the Evidence Act stipulates as follows:

*(1)Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

*(2)When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

40. By dint of the provisions of Section 107 of the Evidence Act above, the duty of proving that suit land referred to herein had been earmarked for compulsory acquisition by the Respondents whereby the Petitioner's title would be revoked, lay with the Petitioner.

41. On the basis of the evidence before me, I am unable to return the verdict sought by the Petitioner that there are threatened violations of his Constitutional rights. No sufficient evidence has been tendered by the Petitioner, who had the burden, to show that Articles 40, and 64 of the Constitution have been violated. The Petitioner's Petition was based on mere speculations and no evidence thus he failed to discharge the burden to the required standard.

42. In view of what I have stated herein above, I find and hold that the Petitioner has not made up a case for being granted the orders sought. Consequently, I find the petition to be lacking in merit and strike it out with no orders as to costs as it was undefended.

**Dated and delivered at Nyahururu this 21<sup>st</sup> day of February 2019**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**