



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

CONSTITUTIONAL PETITION NO.2 OF 2019

ETHICS AND ANTI- CORRUPTION COMMISSION.....PETITIONER

VERSUS

NATIONAL LAND COMMISSION.....1ST RESPONDENT

CLARENCE MATHENY LEADERSHIP TRAINING

INSTITUTE.....2ND RESPONDENT

ALTANA CORPORATION.....3RD RESPONDENT

DR. SALOME MUNUBI..... 4TH RESPONDENT

JOASIAH OINDO..... 5TH RESPONDENT

Ruling

INTRODUCTION

What is before Court for determination are two applications dated 19th February 2019 and 9th March 2019 and a Notice of Preliminary Objection dated the 24th April, 2019 and filed on 25th April 2019. The first application was taken out by the Petitioner seeking a mandatory injunction whereas the second application was taken out by the 2nd Respondent seeking conservatory orders.

The Petitioner herein took out a notice of motion dated 19th February 2019 brought pursuant to Article 3(1) and 162(2) (b) of the Constitution of Kenya, sections 13(2) (b), (3) (7) and 19(2) of the Environment and Land court Act, Sections 1A, 1B & 3A of the Civil Procedure Act, order 40(1), order 51(1) of the Civil Procedure Rules and all other enabling provisions of the law.

The orders on the face of the motion are as follows:

a) Spent

b) That pending the hearing and determination of this application, this honourable court be pleased to issue an order of mandatory injunction directing the 1st respondent to pay Kshs. 927,885,080 as directed by the honourable justice R. Nyakundi in Kajiado HCC No.43 of 2018.

c) That this honourable court do issue an order directing that the sum of kshs. 927,885,080 deposited with the deputy registrar of this honourable court does remain in the account of the court pending the hearing and determination of this petition

d) This honourable court be pleased to issue any other or further orders it deems fit and just so as to preserve the amount kshs. 927,885,080 pending the determination of the petition.

e) Spent

The orders are premised on the grounds that;

a) Under section 11(d) of the Ethics and Anti-Corruption Act, the petitioner/ applicant is mandated to investigate and

recommend to the director of public prosecution the prosecution of any acts of corruption or violation of codes of ethics or other matters prescribed under the Act or any other law enacted pursuant to chapter 6 of the constitution

- b) The applicant is investigating allegations of irregular compensation of private land known as L.R.No Ngong /Ngong /15559 by the 1st Respondent to the 2nd Respondent which compensation is the subject matter of this suit.*
- c) The applicant has received information that the amount of Kshs. 139,895,511 claimed by the 3rd Respondent is not fees for consultancy services a alleged but a bribe and/or kick back to public officers of the 1st respondent and Kenya Railways as a benefit for the exaggerated value returned for L.R.NO. NGONG/NGONG/15559.*
- d) The preliminary investigations have revealed that there was a collusion amongst public officials undertaking valuations on behalf of Kenya railways and the 1st Respondent on the one part, and the 3rd Respondent and the 2nd Respondent on the other part, to inflate the value of the parcel of land subject matter of this suit known as L.R.No. Ngong /Ngong /15559 to Kenya Shillings 914,349,734 to the detriment of the public.*
- e) If the said payment is made, the same will be contrary to the provisions of article 201(d) of the constitution requiring that public money be used in a prudent and responsible way, article 232(1)(b) of the constitution, and the public will suffer great loss which may not be recoverable from the defendant.*
- f) The 3rd Respondent had obtained a court order in Kajiado High Court civil case no 43 of 2018 to the effect that the amount of Kshs. 787,989,569 be deposited in a joint interest earning account or released to the 2nd Respondent by the 1st Respondent, and kshs.139,895,511 be paid to the 3rd Respondent.*
- g) To preserve the substratum of this suit, the learned Judge, Justice R.Nyakundi granted orders directing the 1st respondent to deposit the sum of Kshs. 927,885,080 with the deputy registrar of this honourable court within 7 days.*
- h) In light of the preliminary findings of these investigations, it is against public interest to release to the 3rd Respondent, the sum of Kshs. 927,885,080 before determination of the fair compensation value for the L.R.No. Ngong/Ngong 15559 as the public will suffer great loss, which may not be recoverable from the Respondents.*
- i) In view of the preliminary findings of the investigations being undertaken by the petitioner/applicant, the honourable court ought to grant an injunction restraining the 1st Respondent from releasing Kshs. 927,885,080 to the 2nd respondent before determination of the fair compensation value for the L.R.NO.NGONG/NGONG/15559.*
- j) The application and petition will be rendered nugatory if the amount 927,885,080 is paid to the 2nd and 3rd Respondents before the hearing and determination of this application and the petition.*
- k) There is a real danger that unless this honourable court issue orders that the said sum deposited with the deputy registrar remains in the court's accounts, the public will suffer great loss, which may not be recoverable from the 2nd and 3rd Respondents to the detriment of the public.*

The 2nd Respondent took out a Notice of Motion dated the 4th March 2019 brought pursuant to Articles 22 and 23(3)(b)(c) of the Constitution of Kenya and Rules 3 and 19 of the constitution of Kenya (Protection of Rights and Fundamental Freedoms) practice and procedure rules, 2013. The orders on the face of the motion are as follows;

a) Spent

b) That there be and is hereby issued a mandatory conservatory order directing the deputy registrar of the High court at Kajiado to release and pay to the cross petitioner immediately the sum of 690,697,077.76 held out of the sum of 927,885,080.00 deposited in court by the 1st respondent on account of compulsory acquisition of the Cross Petitioners property L.R.NO.NGONG/NGONG/15559 pending determination of the application interpartes and further orders of the court.

c) That there be and is hereby issued a mandatory conservatory order of injunction restraining the interested party from continuing to board and or use the cross petitioner's property L.R. No. NGONG/NGONG /15559 until fair and full compensation has been paid by the 1st Respondent, pending hearing and determination of the application and further orders of the court.

d) That there be and is hereby issued a mandatory conservatory order of injunction restraining the interested party from continuing to board and or use the cross petitioner's property L.R. No. NGONG/NGONG /15559 until fair and full compensation has been paid by the 1st Respondent, pending hearing and determination of the cross petition.

e) That the present Petition and Cross Petition be determined on expedited basis and on priority basis in the interest of justice.

f) That the honourable court be at liberty to issue such further directions and orders for purposes of meeting the ends of justice

g) That costs of this application be borne by the Respondents

Orders are premised on the following grounds

a) The 1st Respondent has purported to compulsorily acquire the Cross Petitioner's property for the Interested Party for construction of phase 2 of the standard gauge railway and the Interested Party has boarded the property and is undertaking works on it, yet the Cross Petitioner proprietor has yet to be compensated the fair and full compensation, in egregious contravention of the constitution at article 40(3)(b)(ii) which obligates the state to first compensate in full before compulsory acquisitions.

b) The impugned events above have constrained filing of the present Cross Petition and application herewith for conservatory orders and ultimately for writs and orders appropriate for protection of fundamental rights under the constitution;

c) To further delay and exacerbate the prejudice to the Cross Petitioner even though the 1st Respondent has deposited a compensation sum in court with the deputy registrar of the High court at Kajiado for payment of the Cross Petitioner of Kshs. 927,885,080.00 the Petitioner herein whilst conceding in the petition at prayer d) and e) that at the minimum the cross petitioner is entitled to kshs. 690,697,077.76 as compensation for compulsory acquisition for its property LRNO. NGONG/NGONG/15559, again seeks to delay payment of even this uncontentious sum to the Cross Petitioner further;

d) It is accordingly extremely necessary that the motion and cross petition herein an urgently determined, to obviate the otherwise devastating violations of fundamental rights of the Cross Petitioner, in the interest of justice;

e) The Cross Petitioner satisfies the twin requirements for grant of conservatory order, the arguability of Cross Petition and the irredeemable prejudice unless the conservatory orders are issued. Reliance is placed in the case of Centre for Rights Education and Awareness (CREAW) and 7 others vs. Attorney General [2011] eKLR.

The Petitioner's application is supported by the affidavit of ANNE MURIGIH who is its forensic investigator where she deposed that the applicant is investigating fraudulent compensation by way of exaggeration of the compensation value in respect to the subject land Ngong/Ngong/15559 by the National Land Commission. She alleges that part of the excess payment will be paid back to public officials who were instrumental in the compensation process. She avers that vide a letter dated 31st January, 2019 sent to the 1st Respondent they requested for documents relevant to the compensation process of the subject parcel of land. Further, on 5th February 2019 the 1st Respondent supplied the Petitioner with the documents and established that the compensation amount was exaggerated and unjustified increase of the same. She contended that their team of land valuers and surveyors valued the subject property (NGONG/NGONG/15559) to a tune of Kshs. 690,697,077.76 as the fair compensation value for the said land. Further, in the Petitioner's preliminary investigations it revealed that there was a collusion amongst the Kenya Railways (Interested Party) and the 1st Respondent on one part and the 2nd and 3rd Respondents on the other hand. She reiterates that they colluded to inflate the value of the suit land (Ngong/Ngong/15559) to Kshs. 927,885,080 in comparison to valuation by the 2nd Respondent done by Axis Real Estate Limited which was Kshs. 846,400,000 whereas the first award by the 1st Respondent was for Kshs. 914,349,742. She insists no reasons have been given by the 4th Respondent as to why the valuation was above the 1st Respondent's value by Kshs. 67,949,742. Further, the 1st Respondent through the 4th and 5th Respondents issued several awards to the 2nd Respondent culminating to an increase in the award to Kshs. 927,885,080 as at 29th October 2018. She reiterates that it is against public interest to release the sum of Kshs, 787,989,569 to the 2nd Respondent before determination of the fair compensation value for the suit property.

The Petitioner's application is further supported by the affidavit of its forensic investigator and valuer JAMES KITHINJI who contested the valuation carried out by the 5th respondent on the suit property and went ahead to state that the comparative analysis of the comparable parcels of land known as Ngong/Ngong/46088 at Kshs. 60,889,926.74 and Ngong/ Ngong /32954 at Kshs.50,000,000.00 does not reflect the best practices hence inapplicable and irrelevant in this Petition. He referred to the copies of the annexed mutations and stated that the said lands could not be compared with suit land as they were smaller in terms of acreage. He pointed out that the comparable Ngong/Ngong 89271 is incomparable to the suit land as it had a distance of 200 metres from it. He proceeded to dispute the amount of Kshs. 16,846, 270.00 adopted by the multi agency team as having been made in bad faith. Further, that the figure of Kshs. 98,000,000 stated as other statutory additions is not provided by the Land Act or the rules providing for compulsory acquisition of land and is a gross overstatement considering that Kshs. 16,000,000 has already been awarded to cater for relocation, then Kshs. 74,000,000 being alternative accommodation should not have been awarded and 8,000,000 stated to be professional fees is not a cost that should be transferred to the 1st Respondent as it is none of the items considered for compensation under the Land (Assessment of Just Compensation Rules) 2017.

The 2nd Respondent opposed the application and filed a replying affidavit sworn by BISHOP JOEL ABRAHAM CHOLA MNJALA who is its Executive Director where he deposed that the 2nd Respondent is the proprietor of the suit land, whose acquisition is the subject of the present Petition. He averred that whereas the suit land was assessed and an award issued in early 2018, the said land is being occupied by the Kenya Railways Corporation for construction of the Standard Gauge Railway, and the 2nd Respondent remains uncompensated.

He explained that the compensation payable in compulsory acquisition is done by the 1st Respondent. He produced a compensation claim, which they had prepared where it is indicated that aggregate amount payable for compensation is kshs. 1,088,672,385.00. He denied the allegations of fraud. Further, in response to the allegation that the 5th Respondent added a sum of Kshs. 98 million shillings as loss of income, he averred that the allegation only took into account the land and buildings with improvement valuation, and did not take into consideration justiciable claims provided by law in arriving at the sum. Further, he denied there was any impropriety in the compensation award issued by the 1st, 4th and 5th Respondents' as the award was diminished by a sum of 160,787,305.00.

He stated that the award dated 16th April 2018 for Kshs. 914,349,742.00 was the initial one, which was cancelled and published in the

Kenyan Gazette. Further, after rehearing and re-evaluation was conducted wherein the 2nd Respondent justified in an inquiry, the 1st Respondent assessed the claim as at 29th October 2018 to the sum of Kshs. 927,885,080.00. He reiterated that the consultancy agreement had no effect on the assessment of the award and it did not in any manner influence the award.

He referred to the provisions of the Land Act which provides that valuation for purposes of compulsory acquisition are to be undertaken by the 1st Respondent. He further reiterated that it was grossly illegal for the 1st Respondent and the Court to use the valuation report of private valuers as a basis for assessing the compensation value for compulsory acquisition under the Land Act. He further insisted that Article 40(3) of the constitution provides for prompt and fair payment compensation in compulsory acquisition but the compensation herein was fraught with delays, and they have a right to demand that its land be returned and Kenya Railway Corporation remove its pillars from their land. Further, that the Kenya Railways Corporation and the 1st Respondent to compensate them for the losses incurred. He pleaded with the Court to release the compensation sum to the 2nd Respondent and thereafter determine the 2nd Respondent's claim in the Cross Petition. He confirmed that the 2nd Respondent was open to receiving the non-contested sum of Kshs. 690,697,077.76 which is the sum that the Petitioner concedes is due for payment to them. Further, the 2nd Respondent is willing to subject the contested aspect of the award by the 1st Respondent for reassessment.

The 4th and 5th Respondents opposed the application and filed a replying affidavit sworn by JOASH OINDO the Acting Director of Valuations at the National Land Commission (1st Respondent) and a licensed as well as practicing valuer. He deposed that he was seized of the matter by the Ministry of Infrastructure, Housing and Urban development to compulsorily acquire the suit land for the purposes of the Standard Gauge Railway. He explained that the 1st Respondent assessed the suit land and issued an award of Kshs. 914,349,742.00. He averred that the 2nd Respondent had engaged its own valuers who determined the market value of the suit property as Kshs. 846,400,000.

He claimed vide a Kenyan gazette notice, the 1st Respondent revoked all awards including the award of Kshs. 914,349,742.00 in respect to the suit land. Further, a second valuation was conducted which brought the total value of the award to Kshs. 927,885,080. He insists that the value of the award is not inflated nor was there any illegality, irregularity or impropriety in respect to the compensation awarded to the 2nd Respondent. He denied that there was collusion between the 1st Respondent and any other officers so as to arrive at the sum of Kshs. 927,885,080.00. He challenged the Petitioner's valuation of the suit land in the sum of Kshs. 690,697,077.76. He contended that they valued the suit land at 40,000,000 for an acre by examining neighbouring property known as Ngong/Ngong/46088 with the collector of Stamp Duty valuing the land at Kshs. 60,889,926.74 per acre as at 9th August 2016 with and adjacent property known as Ngong/ Ngong/ 32954 being valued at Kshs.50,000,000 per acre as at 23rd July 2014.

The 1st and 4th Respondents opposed the application through their Ground of Opposition filed on 5th March, 2019. The grounds raised were in opposition to the notice of motion dated 19th February 2019. Therein, reference was placed on Article 40(3) (i) of the Constitution, which requires prompt payment in full and just compensation should be made to the person whose land is compulsorily acquired. It further referred to section 115(c) of the Land Act that stipulates that where there is a dispute as to the rights of the persons entitled to receive compensation as to the share in which the compensation is to be paid, the amount of compensation payable shall be deposited in a special compensation account held by the 1st Respondent and not the account held by the Deputy Registrar of this court.

They insisted the conditions for grant of conservatory orders had not been met and cannot issue in the current circumstances. They stated that orders of mandatory injunction cannot be issued in a Petition more so in an interlocutory stage and that there will be no prejudice suffered by the Petitioner if the orders sought are not granted since the subject matter of this Petition is a liquidated amount of money which is recoverable after payment.

Preliminary objection by the 3rd respondent

The 3rd Respondent's raised a preliminary objection dated 24th April, 2019 and filed on 25th April 2019. The preliminary objection was on a point of law specifically, the issue of jurisdiction and res sub judice. The 3rd Respondent claimed the court lacked jurisdiction to determine the Cross Petitioner's application by dint of the Constitution of Kenya 2010, the Environment and Land Court Act and Land Act as to the nature of the claim on compulsory acquisition. The substratum of the cost petition orders being sought is res subjudice as it is before another court of competent jurisdiction.

The 3rd Respondent filed their grounds of opposition on 25th April 2019. The grounds raised were in opposition to the Notice of Motion application dated 4th March 2019. It was pointed out that by dint of article 162(2) (B) of the Constitution, the Environment and Land Court had the same status as the High Court to hear and determine disputes relating to the environment and the use including occupation of as well as title to land. It contended that the Court does not have jurisdiction to adjudicate/ review the orders issued by the High court by dint of article 165(5) of the Constitution as read with the aforementioned article. It insisted that the Court was limited to the determination of fair value of the compensation available to the Cross Petitioner and in no way extends to supervision or review of the money ordered to be deposited. It reiterated that the application dated 4th March 2019 is thus incompetent, incurably defective and is an abuse of this honourable court process hence it should be struck out with costs.

SUBMISSIONS

Petitioner/Applicant's submissions

Mr. Julius N. Muraya learned counsel for the Petitioner/ Applicants presented his written submissions dated 5th April 2019 and filed on the same day. He raised three issues for determination;

i)Whether the entire sum of kshs. 927,885,080.00 should remain in the custody of court pending determination of the petition (prayer

ii) Whether the court should release kshs. 690,697,077.76 to 2nd respondent (prayer 2 of notice of motion of 4.3.2019)

iii) Whether a mandatory conservatory order in the nature of an injunction should issue against Kenya Railways (interested party) from boarding the land pending fair compensation or other orders of the court (prayers 3 and 4 of NM of 4.3.2019)

iv) Cost of both NMs

On the first and second issue, he submitted that the Applicant's had made out a prima facie case for retention of the funds in the sum of Kshs. 927,885,080.00 in the court's account. He further submitted that the Petitioner raised a weighty issue, that the award of Kshs. 927,885,080.00 is illegal and comprises an offence of bribery under section 5 and 6 of the Bribery Act 47 of 2016.

He contended that the award for compensation was driven by corrupt motives and is predicated on crime. He directed the court to the transcripts and conversations recorded on 10th and 16th April 2018 respectively, attached to the affidavit of Anne Murigih whereby the recordings were submitted to the Petitioner by the 2nd Respondent. He argued that a reading of the transcribed conversations disclosed a plain case of criminal racketeering, influence peddling and bribery schemes in the award of compensation for compulsorily acquired land.

The 4th and 5th Respondents being professionals who by virtue of their official positions, were the guardians of the process and entrusted with establishing fair and just compensation, acted in complete disregard to the law and professionalism and came up with arbitrary figures which could not be explained. He further submitted that the very purpose for the orders made on 4th February 2019 in Kajiado HCCC No. 43 of 2018 was to preserve the substratum of the intended suit. Further, if an order is made to release the Kshs. 690,697,077.76 on the ground that the same is undisputed, the court could instantly lose its adjudicatory authority over the said sum of kshs, 690,697,077.76 in regard to the entitlement or otherwise of a 15.3% of the said sum as consultancy fee pursuant to the impugned agreement and it would be enforcing an illegal contract.

On the subject of public interest, Counsel submitted that the retention of the entire sum of Kshs. 927,885,080.00 is more aligned to public interest than an order releasing any amount, leave alone the sum of Kshs. 690,697,077.76 claimed by the 2nd Respondent.

On the issue of whether the Applicant would suffer prejudice if conservatory orders are not granted, he reiterated that the factor of prejudice ranked much lower than public interest. He relied on the case of **GATIRAU PETER MUNYA VS DICKSON MWENDA KITHINJI AND 2 OTHERS eKLR** to buttress his arguments. It was his submission that no prejudice would be occasioned to the 2nd Respondent as it has been compensated for early entry into their land by the contractor, Ms China communication Construction Company Limited E.A. Further, that no part of the 2nd Respondent's institution as well as buildings had been demolished and it was still in occupation of the same and still holding the title deed to the suit land.

On the third issue as to whether a mandatory conservatory order in the nature of an injunction should issue against Kenya Railways (interested party) from boarding the land pending fair compensation or other orders of the court. The Petitioner's Counsel submitted that the application dated 4th March 2019 is based on material non-disclosure on the part of the 2nd Respondent as the said lease was not part of the issues before court for interpretation. Further, in determining the issue of lease, the court had to enjoin the contractor but it cannot be enjoined in the current proceedings in view of the arbitration clause.

1st Respondent's Submissions

S. Mbutia learned counsel for the 1st Respondent advanced his arguments vide the written submissions dated 23rd April 2019 and filed on the 25th April 2019. He only raised the issue as to whether the conservatory order sought both in the Cross Petition and the Petition could issue. He submitted that the orders sought could not issue and none of the Petitioners had fulfilled the conditions for grant of conservatory orders.

He argued that there was no merit in the Petition as the Petitioner did not have a constitutional or statutory mandate to undertake compulsory acquisition or any process thereto. He insisted the mandate is given to the 1st Respondent pursuant to section 113 and 114 of the Land Act. He challenged the Petitioner's valuation of the suit land at Kshs. 690,697,077 and submitted that it is a gross undervaluation of the property, illegal, arbitrary as well as baseless. He insisted that the only avenue the Petitioners could challenge the award is to lodge an appeal with the Environment and Land Court as stipulated in section 13 of the Environment and Land Court Act but it should not rewrite or substitute the decision of the 1st Respondent. He submitted that under section 249(2) of the Constitution, the 1st Respondent is not subject to the control or direction of the Petitioner, hence the court should not assist the it to usurp the lawful mandate of the 1st Respondent by recognizing the arbitrary valuation of Kshs. 690,697,077, which is not anchored in law.

He highlighted various shortcomings in the Petitioners' Valuation report and explained that the value of the suit land was arrived at with undue regard to the comparables and in effect the valuation of Ksh. 690,697,077 did not reflect the actual value of the land. He relied on the case of **KANINI FARMS VS. COMMISSIONER OF LANDS** where the court affirmed the position that "**the market value of land cannot be ascertained without considering and demonstrating comparables that the valuer used to arrive at the value returned.**"

He further submitted that the Petitioner's valuation report omitted certain parameters which include statutory additions to wit: professional fees [legal fees, architectural fees, permit fees and other statutory fees] and alternative accommodation that entails what the affected person will incur in construction as a result of relocation.

On the allegation by the Petitioner that the amount of Kshs. 927,885,080 was influenced by bribery and agreements of kickbacks, he submitted that the allegations were unfounded and baseless, and the evidence tendered was secondary which in his view amounts to hearsay and had no probative value. Further, the evidence is inadmissible owing to the fact that it was not accompanied by the maker of the recording.

On the issue of the contract between the 2nd and 3rd Respondents, he submitted that it is a stranger to the contractual agreement hence incapable of influencing the performance of its statutory mandate in terms of compulsory acquisition. He concluded that no prejudice would be occasioned if the entire compensation sum is paid to rightful owners since it is a liquidated amount and capable of recovery in the event the Petition succeeded. Further, that the 2nd Respondent stood to suffer prejudice since their land had been acquired and no compensation received to enable them relocate. He was categorical that compulsory acquisition was irreversible as the construction of the standard gauge railway could not be stopped and the only redress to the owner is payment of full compensation of Kshs. 927,885,080 as ascertained by them. Further, that Public interest shifted in favour of the standard gauge railway being finalized and the 1st Respondent's compliance in compensation of land in a just and prompt manner.

The 2nd Respondent Submissions

Mr, Echessa learned counsel for the 2nd Respondent submitted that the court should release the sum of Kshs. 690,697,077.76 as they were suffering prejudice and considering that the Petitioner had conceded to the same. He argued that the Petition could thereafter proceed for trial to determine whether it was entitled to Kshs. 1,088,672,385.00 or Kshs. 927,885,080.00 as awarded by the 1st Respondent or Kshs. 690,697,077.76 as assessed by the Petitioner. He contended that the 2nd Respondent has continued to suffer prejudice due to the delayed payment of compensation which had been occasioned by it being forced to borrow money to finance payment of salaries and meeting other current expenditures. He submitted that the Court was called upon to conduct an assessment to ascertain whether the Petition and Cross petition are arguable and whether prejudice shall be suffered if conservatory orders do not issue. He relied on the case of **Centre for Rights Education and Awareness and 7 others vs. Attorney general 2011 eklr** to buttress his arguments.

He further argued that the aspects of corruption in the assessment of compensation as raised in the Petition is arguable but it did not necessarily mean it had a chance of success. On the issue of prejudice, he further submitted that no prejudice shall be occasioned on the Petitioner if the application is not granted but conversely it will be occasioned the 2nd respondent. He referred to article 40(3) (b)(i) of the Constitution, the Land Act and Rule 3 of the Land Act (Assessment of Just Compensation) Rules, 2017 which directed that compensation should be paid to 2nd Respondent. The Counsel reiterated several times that rather than the court withholding the entire compensation award of Kshs. 927,885,080.00, the court should release the conceded sum of Kshs. 690,697,077.76. Further, that the court did not have jurisdiction under the law to make orders that obstruct prompt payment of full compensation for compulsory acquisition of private property and any such order would be unconstitutional.

ANALYSIS AND DETERMINATION

Upon consideration of the materials presented in respect of the application dated 19th February 2019; 9th March 2019; Notice of Preliminary Objection dated the 24th April, 2019 as well as submissions from the Counsels, the following are the issues for determination:

- **Whether the Court has jurisdiction to hear and determine this Petition.**
- **Whether conservatory orders should issue to release the sum of Kshs. 690,697,077.76 pending the outcome of the Petition**
- **Whether conservatory orders should issue to retain the entire award of Ksh. 927, 885.080.00 in court pending the outcome of the Petition.**
- **Whether a mandatory conservatory order in the nature of an injunction should issue against the Interested Party from boarding the suit land pending payment fair compensation or other orders of the court.**

It is not in dispute that the 2nd Respondent/ Cross Petitioner is the proprietor of the suit land that has been compulsorily acquired by the 1st Respondent on behalf of the government for purposes of building the SGR. It is further not in dispute that the 2nd Respondent/ Cross Petitioner is yet to be paid any form of compensation and the Award has been deposited with the Deputy Registrar for the High Court, Kajiado. It is further not disputed that MS China Communication Construction Company Limited E. A which is the Contractor for Kenya Railways Corporation (Interested Party) is already on the suit land. It is also not disputed that the matter between the Cross Petitioner and the 1st Respondent in the Cross Petition is pending before the High Court. The fulcrum of this Petition is the amount of compensation to be paid to the 2nd Respondent/ Cross Petitioner.

As to whether the Court has jurisdiction to hear and determine the Petition.

It was the contention of the 3rd Respondent that this court is not seized of jurisdiction to hear and determine this Petition since the matter was already being handled in the High Court. I note the fulcrum of the Petition herein concerns an Award in respect of the suit land, which was compulsorily acquired by the 1st Respondent. I note in the High Court, the main dispute revolves around a consultancy agreement between the 2nd and 3rd Respondents, in respect of compensation over the suit land.

Section 13 of the Environment and Land Court Act, which confers jurisdiction to the Environment and Land Court, is couched in mandatory terms and stipulates that the Court is allowed to deal with all disputes relating to land and environment including compulsory acquisition of land.

In case of **Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Company Limited (1969) EA 696**, the Court held that ‘**A preliminary objection should be on a pure point of law.**’

Further, in the case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR**, the Court stated that jurisdiction is everything and where a Court does not have it, it should down its tools.

Since the fulcrum of the Petition revolves around an Award in respect of Compulsory Acquisition of land, and in reference to the legal provisions cited above as well the two judicial decision, I find that this court has jurisdiction to hear and determine the Petition. However, on the question of the contract between the Cross Petitioner and the 1st Respondent in the Cross Petition, since the matter is pending in the High Court, I opine that I do not have the jurisdiction to deal with the same and will down my tools on the same.

On the two issues as to whether conservatory orders should issue to release the sum of Kshs. 690,697,077.76 pending the outcome of the Petition; and whether conservatory orders should issue to retain the entire award 927, 885.080.00 in court pending the outcome of the Petition, I wish to tackle them jointly.

The Petitioner/applicant prays for a mandatory injunction that the sum of Kshs. 927,885,080.00 be retained by the Deputy Registrar pending the hearing and determination of the Petition. While the 2nd Respondent seeks an order of court to release the uncontested amount of Kshs. 690,697,077.76 pending the hearing and determination of the Petition. The Petition insists the Award was inflated and that the extra amount therein was to be used to corruptly pay certain public servants facilitated the compensation, which fact is disputed by all the Respondents. The 2nd Respondent contends that the contractor for Kenya Railways Corporation is already on site and they have not been compensated.

The basis of the funds being held with the Deputy Registrar, High Court emanated from a Ruling by Justice Nyakundi dated the 14th February, 2019 in a related matter HCCC No. 43 of 2018 where he had ordered the sum of Kshs. 927,885,080.00 to be deposited in court. This ruling was made after the Petitioner had come on record in the said High Court matter where the 3rd Respondent had sued the 2nd Respondent over a consultancy agreement in respect of the Award which funds were held by the 1st Respondent.

The principles to be satisfied in granting of a conservatory order was expressed by Justice Onguto J. (as he then was) in the case of **Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others [2015] eKLR** .

“In summary, the principles are that the Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the Court should decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of a specific right or freedom in the Bill of Rights, and whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion whether to grant or deny a conservatory order.”

The Court of Appeal further settled the principles for the grant of mandatory injunction in the case of **Kenya breweries limited and another vs Washington okeyo (2002) EA 109** it held as follows:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff.”

The Court of Appeal quoted with approval an English decision in the case of **Locabail International Finance Ltd vs Agroexport and others (1986) 1 ALLER 901** where it was stated:-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence or special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted ...”

While in the case of **Mrao Limited vs First American Bank of Kenya limited and 2 others 2003 eKLR** the Court provided a guide as to what constitutes a prima facie case in civil cases and stated that: *“In civil cases, a prima facie is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”*

The Petitioner’s claim is that the compensatory award granted by the 1st Respondent to the 2nd Respondent is an inflated value and not the actual value of the suit land. It contends that they are carrying out their mandate of investigating corruption allegations as stipulated in section 11(d) of the Ethics and Anti -corruption Act. It annexed documentary evidence to bolster their case in the form of transcripts and recordings of conversations between the 1st Respondent and representatives of the 2nd Respondent and other officials. In the said recordings the 2nd Respondent may have been coerced and threatened into signing the consultancy agreement or lose the compensation money.

The 1st and 2nd Respondent refuted the applicant’s allegations on corruption. The 1st Respondent challenged the evidence adduced and stated

that the documentary evidence is weak and the Petitioner did not produce the Certificate of the maker to prove the same. The 2nd Respondent also refuted the Petitioner's assertions and stated that the award given is just, full and fair and they are incurring losses by having the money retained in court and not given to them.

Mandatory injunction should only be granted in clear cases where the matter ought to be decided at once. I am of the view that this case is not clear one but requires further analysis of the aforementioned allegations and counter allegations of bribery and corruption. I opine that this matter cannot be decided at once at this interlocutory stage, but after a full trial. Further, granting a mandatory injunction at this stage will not give the court assurance that it did the right thing during the main trial.

The 2nd Respondent/ applicant herein sought conservatory orders directing the Deputy Registrar of the High court at Kajiado to release and pay to the cross petitioner immediately the sum of Ksh. 690,697,077.76 held out of the sum of Ksh. 927,885,080.00 deposited in court by the 1st Respondent on account of compulsory acquisition of the suit land pending the determination of the Petition. They further sought conservatory orders restraining Kenya Railways Corporation (Interested Party) in occupying the suit land until fair and full compensation has been paid to them.

Insofar as the Cross Petitioner Applicant has rightly demonstrated that there is an infringement of their right to property as stated in Article 40 of the constitution as they are yet to be compensated for the same, I note the Petitioner has made allegations of bribery and corruption as to how the Award was arrived at. Further, the Cross Petitioner did not deny the Petitioner's averments that it is the one that furnished it with the phone records in respect of the discussion over compensation in respect of the suit land. Insofar as the 1st Respondent is the legally mandated institution to determine the amount of Award to be paid, the Petitioner on its part is also mandated to ensure that there is no violation of code of ethics by public bodies while undertaking their duties. Even though the 1st Respondent supports the release of all the funds to the 2nd Respondent, but since there are allegations of corruption which violate Chapter 6 of the Constitution, this cannot be wished away. Further, I note Kenya Railways admits that where there allegations of corruption, the same ought to be investigate. Justice Nyakundi in his Ruling in the HCCC No. 43 of 2018 stated that'..... ***I am satisfied that it's in the interest of justice to do so to stay the release of the amount pending the hearing and determination of the dispute. In order to assure the 1st defendant that the applicant is only motivated by a desire to achieve justice and not calculated to deny him the fruits of his award, the entire award be and is hereby ordered to be deposited at a joint earning interest account of the interested party and both counsels for the plaintiff and the defendant to the suit or in the alternative have the entire amount deposited with the Registrar of the High court within 7 days from today's date to monitor compliance with the above order is hereby scheduled on the 20th February 2019.***"

Further, in the case of **Patrick Musimba vs National land commission and 4 others (2016) eKLR** summarizes the process of compulsory acquisition and integrity is key indicator to compensation.

I note the funds have already been deposited with the Deputy Registrar pending the outcome of the dispute and is hence available for release at any time the Petition is determined. I note Justice Nyakundi in his ruling made an order to deposit the funds pending determination of the dispute. Further, the said orders were made when all the parties herein were present.

Since the High Court and the Environment and Land Court are courts of concurrent jurisdiction, it is trite law that I cannot review orders emanated therefrom. In the circumstances, and relying on cases cited above, I decline to grant an order for the release of the sum of 690,697,077.76 held out of the sum of 927,885,080.00 deposited in court at this interlocutory stage and direct that the Petition be set down for hearing on a priority basis within the next two weeks from the date hereof.

As to whether a mandatory conservatory order in the nature of an injunction should issue against the Interested Party from boarding the suit land pending payment of fair compensation or other orders of the court. I note the 2nd Respondent as well as the Interested Party admitted that a contractor to Kenya Railways which is MS China Communication Construction Company Limited E.A took an early occupation of the land prior to the compensation. Since the 1st Respondent has already determined and paid the amount of Compensation in Court and this being a national project of public interest, I will decline to grant the orders as sought.

I direct that the Costs of the two applications dated 19th February 2019 and 9th March 2019 including the Notice of Preliminary Objection dated the 24th April, 2019 which have been determined by this ruling, be in the cause.

Dated and Delivered in Kajiado this 30th day of May, 2019

CHRISTINE OCHIENG

JUDGE