



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. MISC. APPLN. NO. 29 OF 2004**

**REPUBLIC.....APPLICANT**

**VERSUS**

**ATTORNEY GENERAL OF THE REPUBLIC OF KENYA**

**THE COMMISSIONER OF POLICE**

**PERMEANT SECRETARY MINISTRY**

**OF WATER & NATURAL RESOURCES ].....RESPONDENTS**

**LAND REGISTRAR MACHAKOS DISTRICT**

**THE CHIEF MUTHETHENI LOCATION**

**AND**

**MUTHETHENI MIU WATERS PROJECT ].....INTERESTED PARTIES**

**MUSYOKI KILOMBA (Chairman)**

**BERNARD MUTUKU NDUNDA (Secretary)**

**CHRISTINA KAVINDU MUTINDA (Treasurer)**

**AND**

**EX PARTE APPLICANTS**

**TERESIA NDUNGE**

**MUTISYA MUINDE**

**KITONGA SILA**

**NDUKU SILA**

**NGII MBUVI**

**MUTIE KIILU**

**MUSILI KIILU**

**WILLIAM MUNYAO MWALWA**

**ESTHER KALONDU ISIKA**

KITHUKA MUSAU

KITAVI NZENGELA

**JUDGMENT**

1. In the Notice of Motion dated 10<sup>th</sup> March, 2004, the Ex-parte Applicants are seeking for the following reliefs:

*a. That an order of prohibition directed at the Respondents do issue prohibiting the Respondents, their agents and/or licensees prohibiting them from entering the suit premises, drawing water from the suit premises for sale or other purposes and/or in any other way from interfering with the suit premises.*

*b. That an order of prohibition directed at the Respondents do issue prohibiting them and/or the Interested Parties from interfering with the Applicants' rights, control and peaceful enjoyment of the suit premises.*

*c. That an order of mandamus directed at the 1<sup>st</sup> and 3<sup>rd</sup> Respondents do issue to compel them to assess the damages caused on the Applicants from the time of the unlawful occupation to date and to compensate the Applicants within a specified period and in default the court to assess the same.*

*d. That an order of mandamus directed at the Respondents do issue compelling them to remove all the offending structures, substances and/or developments on the suit premises and to surrender the suit premises to the Applicants in as good condition as they found it in 1980.*

*e. That an order of mandamus directed at the 5<sup>th</sup> Respondent do issue to account for all receipts of the money earned from the sale of water from the suit premises from 1980 to date and to surrender the same to the Applicants.*

*f. That the leave granted to file these proceedings do act as stay to stop all the Respondents' activities at the suit premises until the final determination of these proceedings.*

*g. That the Respondents to pay costs of this Application.*

2. The Application is supported by the Affidavit of the 6<sup>th</sup> Applicant who has deponed that all the Applicants are the registered owners of parcels of land known as Muthetheni/Kyethivo/144, 147, 148, 232, 233, 255, 254, 311, 325, 402, 448, 554, 589, 634, 609, 633 and 310 (*the suit properties*).

3. It is the deposition of the 6<sup>th</sup> Applicant that in 1980, the Ministry of Water and the Chief of Muthetheni Location, Machakos District, identified the Applicants' village as an ideal place to construct a water dam to supply water to the residents; that an area of 25 acres was needed and that before compulsorily acquiring the suit premises, the Applicants had profitably used the same for agriculture.

4. According to the Applicants, after the acquisition of the suit land, the water point they were using was fenced off; that no single pipe has been connected to supply them with water; that the 5<sup>th</sup> Respondent licenced the 6<sup>th</sup> Respondent to run the water dam on their land making money for themselves and that for over twenty (20) years, their land has been out of their bound without compensation. The 6<sup>th</sup> Applicant deponed that the Respondents had the Applicants arrested and charged in Criminal Case No. 152 of 2006.

5. The Respondents filed Grounds of Opposition in which they averred that the Respondents have never acquired the suit land compulsorily, and that the facts contained in the Supporting Affidavit does not raise sufficient grounds to warrant granting of the prayers sought.

6. In his submissions, the Applicants' advocate submitted that the actual acquisition of the suit land by the Respondents was done in 1980 although there was no gazettee notice; that this suit was compromised by a consent order recorded on 21<sup>st</sup> November, 2006 and that the Respondents agreed to compensate the Applicants for the acquired land after valuation of the acquired land and loss of user of the suit land.

7. The Applicants' counsel submitted that Part II of the Land Acquisition Act provides for the procedure of compulsory acquisition; that a notice must be published in the Kenya Gazette and served upon all persons who have interests in the land and that where payment is not paid promptly, the Commissioner was required to pay interests accrued as may be applicable but not less than 6% per annum from the time of taking possession.

8. According to counsel, the value of the award of compensation can only be determined from a valuation and inquiry after the respective parties have been notified by a gazette notice; that the Ex parte Applicants have since filed valuation reports dated 10<sup>th</sup> July, 2017 for their respective parcels of land and that they are entitled to compensation in accordance with the filed valuation reports.

9. The Applicants' counsel submitted that the Applicants deserve a just compensation for loss of user of the suit properties for thirty eight (38) years; that the Land Acquisition Act provides for payment of interest at a rate not less than 6% per annum of the award and that in the previous decisions of the court, the interest rate of 12% per annum was applied. The Respondents and the Interested Parties did not file submissions.

10. It is not in dispute that the Applicants are the registered owners of the suit land. It is also not in dispute that the suit land was acquired by the Ministry of Water in 1980 for purpose of generating and supplying water to the residents of the area. Indeed, on 21<sup>st</sup> November, 2006,

the Applicants' and the Respondents' advocates entered into a consent in the following terms:

**“By consent the suit be compromised in the following terms:**

**1. The government through the Ministry of Water hereby undertakes to facilitate and ensure that reasonable compensation is made to the Applicants in respect of all the pieces or parcels of land now being used by Muthetheni/Miu Water Project in relation to two aspects.**

**a. Value of land occupied by the project.**

**b. Loss of user of the relevant pieces of land.**

**2. The government to send valuers to site to survey and value each Applicants' occupied piece of land within thirty (30) days.**

**3. The government to file in this court the aforementioned valuation reports within fifteen (15) days from the end of the thirty (30) days aforementioned.**

**4. Applicants be at liberty to file in court their independent private valuation within the similar thirty (30) days.**

**5. It is agreed between the government and the Applicants that the Government through the Machakos District Water offices shall take over the water project upon recoding a final Agreement on compensation.**

**6. Costs to be considered later.**

**7. Mention on 8<sup>th</sup> February, 2007.”**

11. It would appear that since the year 2006 when the above consent was recorded, neither the government nor the Applicants complied with the consent order. It was not until 14<sup>th</sup> July, 2017 when the Applicants filed the Valuation Reports for parcels of land number Muthetheni/Kyethivo/554, 144 and 325 dated 10<sup>th</sup> July, 2017.

12. According to the Valuation Report in respect of parcel of land known as Muthetheni/Kyethivo/554, the land belongs to Ndunge Muli; that the acreage of the land is 20.76 acres and that the portion of land that was taken up by the water dam was 5.84 acres. The Report further provided as follows:

**“In my opinion, to the valuation so assessed should be added loss of use for the years (1981-to date) which may be referred to as mesne profit. This is in recognition of the fact that the subject area has been under water for the last thirty six (36) years without the owner using it.”**

13. After comparing the suit land to the neighbouring parcels of land, the private Valuer put the valuation of the land measuring 5.83 acres at KShs. 1,455,000. The loss of user of the land was assessed by the Valuer at KShs. 1,050,000 for the thirty six (36) years that the land was not utilized for agricultural purpose. The total payable sum for parcel of land known as Muthetheni/Kyethivo/554 was assessed by the Valuer at KShs. 2,505,000.

14. Using the same perimeters, the value of a portion of parcel of land known as Muthetheni/Kyethivo/325 measuring 5.14 acres was put at KShs. 1,285,500 being the market value of the land and KShs. 925,000 being the *mesne profits*. The total amount to be paid to the registered proprietor of the land was KShs. 2,210,000.

15. The Valuation Report in respect to a portion of land known as Muthetheni/Kyethivo/144 measuring 5.41 acres shows the market value of the said portion of land to be KShs. 1,352,000 and the loss of user for thirty six (36) years to be KShs. 974,000. The total payable amount was placed at KShs. 2,326,000.

16. The evidence before the court shows the payable amount for the portions of land that were acquired for the construction of the water dam for parcels of land known as Muthetheni/Kyethivo/554, 325 and 144 to be KShs. 2,505,000, 2,210,000 and 2,326,000 respectively.

17. Considering that the Valuation Report gave the value of the three parcels of land as at 10<sup>th</sup> July, 2017, the Applicants are entitled to interest of not less than 6% per annum (*See Section 16(1) of the Land Acquisition Act - repealed*). I shall award the Applicants an interest rate of 12% per annum from the date of the Valuation of the three parcels of land until payment in full.

18. For the reasons I have given above, I allow the Notice of Motion dated 10<sup>th</sup> March, 2004 as follows:

**a. The Permanent Secretary, Ministry of Water and Natural Resources, or the current equivalent to the said office, to pay to the Ex parte Applicants, a total sum of KShs. 7, 041,000 plus interest made up as follows:**

**i. KShs. 2,505,000 for a portion of parcel of land known as Muthetheni/Kyethivo/544.**

**ii. KShs. 2,210,000 for a portion of parcel of land known as Muthetheni/Kyethivo/325.**

*iii. Kshs. 2,326,000 for a portion of parcel of land known as Muthetheni/Kyethivo/144.*

*iv. Interest on the above amounts at the rate of 12% per annum from 10<sup>th</sup> July, 2017 until payment in full.*

*b. The 3<sup>rd</sup> Respondent to pay the costs of the suit.*

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 24<sup>TH</sup> DAY OF MAY, 2019.**

**O.A. ANGOTE**

**JUDGE**