



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**PETITION NO. 4 OF 2018**

**IN THE MATTER OF ARTICLES 1, 2, 20, 22(1), 23(3), 40, 43, 47, 48, 159(2), 162(2)(b) & 165(3) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT**

**AND**

**IN THE MATTER OF THE THREATENED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 40, 47, 50(1) OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**JOHN PETER MWANGI KAGIRA.....PETITIONER**

**VERSUS**

**THE NATIONAL LAND COMMISSION.....1<sup>ST</sup> RESPONDENT**

**ATHI WATER SERVICES BOARD.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**The background**

1. The Petitioner is the registered owner of all that parcel or piece of land known as LOC 16/KIGORO/1681(suit land).
2. The 1<sup>st</sup> Respondent is an independent Commission established under Article 67 (1) of the Constitution. The operational details of the 1<sup>st</sup> Respondent are set out under the National Land Commission Act No. 5 of 2012. The mandate of 1<sup>st</sup> Respondent, *inter-alia*, is to manage public land on behalf of the National and County Governments. By dint of Article 40(3) of the Constitution and Part VIII of the Land Act, No. 6 of 2012, the 1<sup>st</sup> Respondent has authority to carry out compulsory acquisition of private land required for public purposes and for a public institution.
3. The 2<sup>nd</sup> Respondent is a Water Services Board established under section 51 of the Water Act, 2002.
4. The Northern Collector Tunnel Phase 1 (also known as "the NCT-1") Project entails construction of a fully lined 11.8km, 3.2m diameter raw water transfer tunnel along the eastern fringes of the Aberdare Conservation Area. It is situated 60 kilometers north of Nairobi and desired to collect 40% floodwater from Maragua, Gikige and Irati rivers into the existing Ndakaini Dam. The water is to subsequently transferred via a pipeline to Kigoro treatment plant and thereafter to the storage tanks at Kabete, Gigiri and Kiambu to serve Nairobi city and its surrounding metropolitan towns. The project is aimed at increasing the water supply to Nairobi County by 140 million liters per day to serve an additional 1.2 million residents.
5. To achieve its objectives, the 2<sup>nd</sup> Respondent has been mandated to construct pipelines to convey the water to its destination as explained above. This has necessitated the acquisition of private land by the 1<sup>st</sup> Respondent for purposes of laying the pipeline along its way.

**Conservatory orders**

6. On the 18/9/18 the parties recorded a consent in the following terms;

“by consent the interim conservatory orders granted by the Court on the 16/8/18 be and are hereby confirmed pending the hearing and determination of the petition”.

This order effectively settled the Notice of Motion filed on the 9/8/18.

**The case for the Petitioner.**

7. The Petitioner avers that he was served with two gazette notices by the 1<sup>st</sup> Respondent on the 3/11/17 and 9/3/18, both seeking to acquire 0.409 ha and 0.1275 ha portions of the suit land on behalf of the 2nd Respondent for purposes of construction of a water pipeline. From the two notices, he asserts that it was not clear what size/measurement of the portion of the land the 1<sup>st</sup> Respondent intended to acquire.

8. That on 9/4/18 the employees of the 1<sup>st</sup> Respondent visited his land and attempted to coerce him to sign a blank consent for an undisclosed award, which he declined. Further, he accused the 1<sup>st</sup> Respondent of failing to give him notice so as to enable him to attend the inquiry and make his representations in respect to the claim for compensation for his land. That no prompt and just compensation has been paid to him for the acquisition of his land. That the 1<sup>st</sup> Respondent ignored his valuation in arriving at the award for compensation.

9. The Petitioner has enumerated the alleged breaches and violation of his Constitutional rights by the Respondents. As to his rights under Article 40 of the Constitution, he alleges that the intended acquisition without just and prompt compensation undermines his right to own property, which is under threat by the Respondents. He terms the said acquisition as an unlawful, unprocedural and illegal scheme by the Respondents geared towards depriving him of his property. That no inquiry was conducted and if one was done, it was a sham as no notice was issued to him and neither was he heard on his claim for compensation.

10. That in the absence of just and prompt compensation, the intended acquisition is unconstitutional and unprocedural.

11. In respect to Article 47 of the Constitution, the Petitioner claims that his right to fair administrative action is breached in failing to serve him with the inquiry notice and to provide him with the opportunity to be heard before making the decision to award compensation. The award proposed by the 1<sup>st</sup> Respondent is neither fair nor adequate. He contends that the 1<sup>st</sup> Respondent ignored his valuation and did not consider it in making its award.

12. Consequently, the Petitioner sought the following orders: -

a. A declaration that the intended acquisition of the Petitioner’s land by the 1<sup>st</sup> Respondent without adhering to strict and mandatory provisions of the Constitution, the Land Act No 6 of 2012 and the Land Acquisition Act (repealed) violates the Petitioner’s Constitutional right to ownership of property as guaranteed under Art 40(3)(a) & (b) of the Constitution.

b. A declaration that failure by the 1<sup>st</sup> Respondent to comply with the mandatory provisions of the Land Act and the Land Acquisition Act (repealed) violates the Petitioner’s Constitutional right to administrative action that is lawful, reasonable and procedurally fair as guaranteed under Art 47 (1) of the Constitution.

c. Spent.

d. This Court to grant a fair just and prompt compensation in the sum of Kshs 24 million to the Petitioner being the just compensation as a result of the intended compulsory acquisition by the 1<sup>st</sup> Respondent.

e. The Court to grant an order of certiorari calling before the Court for quashing the 1<sup>st</sup> Respondent’s notices dated the 30/7/18 and 9/3/18 with regard to a portion of the Petitioner’s land on account that it is defective and unlawful.

f. The Court to issue an order of prohibition restraining and or prohibiting the Respondents and or their agents or servants from forceful entry, taking possession, evicting the Petitioner or interfering in any way and or supervising any works on title LOC16/KIGORO/1681.

g. An order for mandamus compelling the Respondents to discharge their obligations as set out by Article 40(3)(b) of the Constitution and in the Land Act No 6 of 2012 to pay the Petitioner a just and prompt compensation.

h. Any other order that may be necessary to meet the ends of justice.

i. The Court to order the costs of the petition be borne by the Respondents.

13. In his Supporting Affidavit, the Petitioner deponed that he derives his livelihood from the suit land where he has planted crops, trees, practice horticulture and bee keeping as a source of income. He contends that he is not opposed to the acquisition of his land, as long as, he receives a fair, just, and prompt compensation for it.

14. Referring to the notice of taking possession under section 120(1) of the Land Act dated the 30/7/18, the Petitioner expressed his apprehension that on expiry of the 14 days the 1<sup>st</sup> Respondent may take possession of the land thus actualizing the violation of his rights

under the Constitution. He urged the Court to grant the orders prayed.

### **The case of the 1<sup>st</sup> Respondent.**

15. The evidence of the 1<sup>st</sup> Respondent is contained in the replying affidavit deposed by Brian Okol, its Deputy Director, Legal Affairs and Enforcement. In it, he stated that its mandate is to acquire the land required for public purposes on behalf of the 2<sup>nd</sup> Respondent, in this case for purposes of construction a water pipeline wayleave from Thika Dam (Ndakaini) to Kigoro treatment plant. In pursuance to the provisions of the Land Act, the 2<sup>nd</sup> Respondent gave the necessary notices vide the Kenya Gazette of its intention to compulsorily acquire land for the creation of a right of way (water pipeline wayleave) to interested persons. That inspections, enquiries and valuations of the affected parcels as well as issuance of awards to the project affected persons (PAPs) was carried out. The exercise of sensitization and issuance of awards took place on various dates and venues along the pipeline route. He attached an attendance sheet that showed that one of the attendees of these meetings was the Petitioner as evidenced by his signature on the attendance lists. In those meetings the Petitioner is variously listed as Nos. 10(9/4/18-sensitization, disclosure and award), 15 – (undated sensitization and issuance of gazette notices of inquiry) and 5 (1/7/18 - notice of taking possession). That during the inspection of the land, a data collection sheet captured such particulars as the size of the land, developments thereon which guides the valuer in arriving at a valuation of the property.

16. He explained that the 1<sup>st</sup> Respondent took into account the principles of valuation as set out in the Assessment of Just Compensation Rules, 2017 Legal Notice No.283 the Land Act (No.6 of 2012). That in determining the value of the land the 1<sup>st</sup> Respondent used the current market value of the land as at the date of the publication of the notice of intention to acquire the land as per the Government standards.

17. In respect to crop valuation it applied rates as contained in the Forest Act of 2005 (Legal Notice No 21 of 26/2/16). It also supplemented the crop valuation with the Crop and Technology Crop Compensation Rates for Kiambu County issued by the Ministry of Agriculture and Livestock Fisheries and Irrigation of the said County. This was used to determine the crop market values, which are usually available to the public.

18. That in conclusion of the valuation exercise, an award is prepared and given to the PAPS who may accept or reject the same. That the Petitioner refused to collect his award and proceeded to file the suit and his award is deposited with the 1<sup>st</sup> Respondent. He urged the Court to dismiss the petition for being an abuse of the process of the Court.

### **The case for the 2<sup>nd</sup> Respondent.**

19. The 2<sup>nd</sup> Respondent's response to the petition is contained in the replying affidavit sworn by Ms. Emily Kyalo, its Legal Officer. That vide gazette notice No 10870 of 3/11/17 the 1<sup>st</sup> Respondent notified the PAPs of its intention to acquire land for the construction of the water pipeline. The Petitioner was notified through the said notice that 0.409 ha of his land would be acquired. The acreage was later amended vide gazette notice No 2188 of 9/3/18 and reduced to 0.1275 ha. Vide gazette Notice No 2189 of 9/3/18 the PAPs were notified of a meeting at Ndakaini Social Hall on 9/4/18 for purposes of making inquiries.

20. Further, she stated that the Petitioner has admitted service of the gazette notice informing him of the intended acquisition. That the Petitioner attended several inquiry meetings along with other PAPs and cannot be heard to claim that he was not served.

21. The Petitioner's land was valued at Kshs 1,840,206/- which amount was increased by 15% to Kshs 2,116,237/-. That the Petitioner refused to sign the award of compensation. On the 31/7/18 upon the completion of the compensation exercise, the 1<sup>st</sup> Respondent issued a 14-day notice of taking possession under section 120 of the Land Act. That the Petitioner was informed that his award would be deposited in the special compensation account in line with the provisions of section 115(2) of the Land Act.

22. The 2<sup>nd</sup> Respondent contends that it followed the law in the process of acquisition and assessing the compensation. It avers that all the necessary notices were issued to the Petitioner and contrary to his evidence, he attended all the meetings including the inquiry and is only bent on frustrating the process.

23. Further that the project is time bound and any delay will occasion penalties in completion of the work which additional costs shall be passed to the taxpayer. That the project serves the public and public good should outweigh the private interests of the Petitioner. Further that the funds have been committed for the compensation of the Petitioner who has refused to cooperate.

### **Supplementary Affidavit of the Petitioner**

24. The Petitioner filed a further Supplementary Affidavit in response to the replying affidavit of the 2<sup>nd</sup> Respondent. He deposed that he received no notice of inquiry into the issue of compensation and only learnt from other PAPS on the morning of the 9/4/18, the day of the inquiry. As a result, he did not have adequate time to prepare a valuation of his property to allow him present written a claim of compensation to the 1<sup>st</sup> Respondent as required by law. In total, he contends that no proper notice of inquiry was issued to him and that in itself is a denial of natural justice and fairness in the entire process.

25. That after the inquiry he commissioned a Valuer to value the land and submitted the valuation report to the 1<sup>st</sup> Respondent with expectation that the same would be considered in arriving at a just and fair compensation but the 1<sup>st</sup> Respondent declined to respond, was non-committal and rejected any room for engagement. He went on to argue that the process and principles employed by the 1<sup>st</sup> Respondent are flawed, grossly punitive and does not meet the legal and constitutional threshold of just and fair compensation.

26. Whilst arguing that the point of deference is the sufficiency of the compensation, he contends that his own valuation of Kshs 24 million

was arrived at through a comprehensive valuation conducted by a licensed valuer and professional horticulture and forest experts and represents a fair and just compensation for the worth of his land and developments.

#### **The written submissions.**

27. As to whether the process of compulsory acquisition was procedurally conducted in accordance with the Constitution and the law, the Petitioner submitted that an inquiry notice was published in the gazette notice on the 9/3/18 but he was not served and got to know about it from other PAPs. He submitted that the absence of notice disentitled him the opportunity to prepare a valuation for his written claim for compensation before the inquiry date. That this violated his right to ownership of land as enshrined Article 40 of the Constitution. In the end, the Petitioner neither participated in the inquiry nor gave any representations during the inquiry since he had not been served with the notice in accordance with section 112(1)(b) of the Land Act.

28. The Petitioner argued that public participation is one of the tenets in the national values and principles under Art 10 of the Constitution, which binds all state officers and public officers in their execution of public duty and implementation of public policy. That public participation must be done both qualitatively and quantitatively unlike in the instant case when neither were done. The absence of public participation, he argues, violated the right to fair administrative action as enacted under Article 47 of the Constitution. By reason of the preceding sentence, the Petitioner asserted that he was denied the right to be heard as well as the reason for the award.

29. Relying on the case of **Patrick Musimba Vs National Land Commission & 4 others (2016) EKLR** where the Court held that inquiry as to compensation is a mandatory process for the simple reason that compensation is the essence of compulsory acquisition, the Petitioner submitted that failure to serve him with the inquiry notice rendered the process unprocedural, illegal, null and void.

30. Further, he submitted that he is not opposed to the compulsory acquisition of the land as long as he is paid a fair and just compensation for the land, which is the market value of the land as provided under Article 40. The Petitioner argues that a flawed procedure leads to an illegal, invalid and non-binding decision thus the award of Kshs 2,116,273.04 is a product of a flawed process and therefore null and void. The Petitioner relied on the case of **Gami Properties Limited Vs National Land Commission (2017) EKLR** where the Court declined to look into the merits or otherwise of the award because the process was flawed. The Court further held that the right to be heard and the right to protection against arbitrary action are Constitutional rights and any violations go to the root of the validity of any decision premised on the invalidity.

31. That the 1<sup>st</sup> Respondent did not follow the due process of the law in acquiring the Petitioner's land thereby violating his right to property under Article 40 of the Constitution and the right to fair administrative action as provided under Article 47 of the Constitution.

32. As to whether the amount of compensation was just as envisaged under the Constitution, the Petitioner submitted that just and fair compensation is based on the actual value or market value of the property in question, which is done through a valuation. He argued that the award of compensation given by the 1<sup>st</sup> Respondent is inadequate, below market value and failed to take into account the provisions of the Constitution and the Land Act (Assessment of just Compensation) Rules 2017, taking into consideration the value of the property and the developments thereon. Further, that the 1<sup>st</sup> Respondent also failed to take into consideration the written claim by the Petitioner. The Petitioner urged the Court to set aside the award of Kshs 2,116,273.04 and grant an award of Kshs 24 Million in its place.

33. The Petitioner relied on the case law of **Sceneries Limited Vs National Land Commission (2017) EKLR; Kanini Farm Limited Vs Commissioner of Lands (1986) KLR**. I have read and considered the cases and will refer to them as I go along.

34. As to whether the 1<sup>st</sup> Respondent conducted the compulsory acquisition process in accordance with the law, the 1<sup>st</sup> Respondent submitted that it gave notice of its intention to acquire land for the water pipeline project in accordance with the Constitution and the Land Act, an admission made by the Petitioner when it acknowledged having been aware of the said notice.

35. Further, the 1<sup>st</sup> Respondent reiterated the process it took as set out in its Replying Affidavit and submitted that it followed the procedure as set out in the Land Act and took into account the principles of valuation as enacted in the Land Act (Assessment of just Compensation) Rules, 2017. It cited the case of **Stanley Munga Githunguri Vs National Land Commission ELCA No 70 of 2015** where the Court upheld the principles of valuation as set out in the Land Act Rules.

36. In respect to the valuation of the Petitioner, the 1<sup>st</sup> Respondent faulted the valuation on account that the data collection sheets are wrought with glaring discrepancies. It urged the Court to adopt the valuation of the 1<sup>st</sup> Respondent whose data collection sheets are correct as they were conducted in the presence of the local administration and remained uncontested in the inquiry. That in any event the Petitioner failed to raise any objections to the valuation report at the inquiry in spite of his presence.

37. The 1<sup>st</sup> Respondent exuded its confidence that the values it presented are in line with the standards applicable by the Government agencies for compulsory acquisition. It concluded that it acted within the law in the acquisition of the land.

38. Further, the 1<sup>st</sup> Respondent contended that the State is vested with the right to eminent domain, which is the inherent power to take privately owned land for public purposes subject to reasonable compensation. In this case, it sought to persuade the Court that it has acted within the law in its exercise of its right to eminent domain.

39. The 1<sup>st</sup> Respondent relied on the case of **Patrick Musimba Vs National Land Commission & 4 others (2016) EKLR** that settled the process and the steps to be followed in compulsory acquisition.

40. The 2<sup>nd</sup> Respondent submitted that the Petition is anchored on acquisition of way leaves and not land and sought to distinguish the case

of **Patrick Musimba supra** on the basis that the said case dealt with acquisition of land.

41. As to whether the Petitioner was served with the notice of intended acquisition of the wayleave, the 2<sup>nd</sup> Respondent referred to the gazette notices dated the 3/11/18 and 9/3/18 for which the Petitioner has acknowledged having been served with both notices. The Petitioner therefore cannot be heard to submit in his submissions that he was never served. It submitted further that the Petitioner attended the sensitization meeting where he appears on the list of attendees as No 10. That the Petitioner also received the notice of taking possession dated the 31/7/18.

42. As to whether there was public participation before the commencement of the compensation process, the 2<sup>nd</sup> Respondent submitted that the Petitioner attended the meeting held on 9/4/18 and 31/7/18 under No 15 and 10 respectively. That the two meetings were amongst many that were undertaken by the 2<sup>nd</sup> Respondent to sensitize the PAPs and interested persons of the process of acquisition of land for the water pipeline as provided by the Land Act.

43. As to whether public interest outweighs the Petitioner's private rights, the 2<sup>nd</sup> Respondent sought to persuade the Court that the project is aimed at providing water to millions of Kenyans in the City of Nairobi and its environs and any delay will occasion the tax payer additional costs. That the private interest of the Petitioner should yield to the overarching public interest and in any event, the 1<sup>st</sup> Respondent has committed the funds for compensation.

44. The 2<sup>nd</sup> Respondent further fouled the valuation report of the Petitioner on account that the credentials of the valuer are not disclosed and the valuation report cannot be accepted without, inter-alia, interrogating his qualifications.

### **Highlighting.**

45. The parties with the concurrence of the Court highlighted their submissions through their able learned Counsels on record. Mr. Owino represented the Petitioner while Ms. Njuguna and Ms. Mwinzi advocated for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents respectively.

### **Analysis and determination.**

46. I will set the background of the petition as hereunder; The Petitioner is the registered owner of the suit land as shown in the copy of title issued on 16/9/97. He claims that he was served with two gazette notices No.s 10870 and 2188 which confused him as to the actual size of the land being acquired. He also claims that he was not served with the inquiry notice and as a result he asserts, he was unable to present a claim for compensation due to time constraints to commission a valuation. That the 1<sup>st</sup> Respondent did not tender any valuation and so was unable to make any meaningful representations at the inquiry. He was offered an award dated 9/4/18 in the sum of Kshs 2,116,273.04 as compensation which amount he rejected. He commissioned his own valuation which returned a value of Kshs 24 million. He forwarded it to the 1<sup>st</sup> Respondent on 30/7/18 but was neither responded to nor considered. The 1<sup>st</sup> Respondent served him with a notice of taking possession under section 120 of the Land Act. This triggered the filing of the Petition. Interim conservatory orders were recorded by consent of the parties on 18/9/18 restraining the Respondents from entering the Petitioner's land pending the hearing and determination of the Petition. The Petitioner's case is therefore premised on the process of acquisition as well as the inadequate compensation offered by the 1<sup>st</sup> Respondent.

47. It is on record that the 1<sup>st</sup> Respondent issued a notice in the Kenya Gazette VOL CXIX-165 dated the 3/11/17 No 10870 under the Land Act titled; construction of water pipeline from Thika Dam to Kigoro treatment works to Gigiri tanks. Intention to create a right of way (water pipeline wayleave). The notice is issued in pursuance of section 143, 144 and 162 (2) of the Land Act. In it, the 1st Respondent gave notice that the Government intends to acquire a wayleave corridor on parcels of land indicated for the construction of water pipeline wayleave from Thika Dam to Gigiri tanks on behalf of the Athi Water Services Board. In this notice, the land of the Petitioner is disclosed as measuring 0.409 ha. Alongside the notice, interested parties were notified that Plans of the affected land may be inspected during office hours at the offices of the National Land Commission, Arthi House, 3<sup>rd</sup> Floor, Room 305, 1<sup>st</sup> Ngong Avenue.

48. On the 9/3/18 vide Gazette Notice No 2188 the 1<sup>st</sup> Respondent published a notice of intention to create a right of way(water pipeline wayleave) pursuant to section 112, and 162(2) of the Land Act. In this notice the acreage of the Petitioner's land was amended to read 0.1275 ha. This notice amended the gazette notices No.s 9589 of 2016 and 10870 of 2017 in respect to the acreage of the affected lands. The name of the Petitioner and the land reference number of the land are disclosed in the notice. Equally, the name of the Petitioner appears on the attendance list of those present in the meeting.

49. Having corrected the acreage of the proposed acquired lands, the 1<sup>st</sup> Respondent issued another Gazette Notice No 2189 dated the 9/3/18 headed "inquiry" which stated as follows;

“in pursuance of section 112 and 162(2) of Land Act, 2012 and Gazette Notices No.s 9589 of 2016 and 10870 of 2017, the National Land Commission gives notice that the Government intends to undertake inquiries for the following parcels of land on behalf of Arthi Water Services Board for the construction of raw and treated water pipeline from Thika Dam to Kigoro treatment works to Gigiri tanks in Muranga and Kiambu counties for public purpose.”

The said notice gave the venue of the meeting to be Ndakaini Social Hall on Monday 9/4/18 at 9.30 am. The said gazette notice listed the parcel numbers that would be affected by the notice, one of which belonged to the Petitioner which is listed as No. 9.

50. On the record before the Court there is a list of 206 attendees of project affected persons (PAPS) sensitization and issuance of Gazette Notices of inquiry. The list is not dated. The name of the Petitioner, Land reference number, acknowledgement, ID No. and signature appear on No. 10 of the said list. The Petitioner acknowledged receipt of the inquiry notice. Alongside that list is another list for those who accepted the awards.

51. There are data collection sheets dated the 20/2/18 in respect to the land, beehives, barbed fence, numbers of various trees and crops. The document is undated on the part of the owner but contains a signature attributed to the Assistant Chief Kanunga Sub location and a Mr Dennis Kariuki described as a valuer.

52. On the 9/4/18, the date of the inquiry, the name of the Petitioner appears on entry No 15 on the list of PAPS who attended the inquiry held at Ndakaini dam on 9/4/18. In addition to the other particulars as stated in para 52, his cell phone number is also included.

53. I have seen an award dated 9/4/18 given pursuant to section 113(1) and 162 of the Land Act, 2012 the 1<sup>st</sup> Respondent having concluded the inquiry relating to the acquisition of the land in the sum of Kshs 2,116,237/-. The indemnity at the back of the said award is unsigned. The Petitioner deponed that he declined to sign the award.

54. On the 31/7/18, the 1<sup>st</sup> Respondent authored a notice of taking possession addressed to the Petitioner notifying him that the 1<sup>st</sup> Respondent shall take possession after the expiry of 14 days' notice. He was also notified that the award dated the 9/4/18 having been rejected was deposited into a special compensation account in line with the provisions of section 115(2) of the Land Act.

55. On the 31/7/18, the Petitioner is recorded in attendance (No. 5) in the meeting held at Ndakaini Dam office. The meeting is stated to be for taking possession and registration of the water pipeline wayleave.

56. The 1<sup>st</sup> Respondent's case is that it has followed the law in the process of acquisition and returned a fair and just valuation which took into account the principles of valuation as set out in the just compensation Rules.

57. The 2<sup>nd</sup> Respondent reiterates the position of the 1<sup>st</sup> Respondent and adds that the Petitioner was duly served with the notice of intention to acquire land as well as the notice of inquiry. The Petitioner attended the various meetings conducted by the 1<sup>st</sup> Respondent and signed the attendance registers therefore cannot claim that he was not served. He received an award and a notice of taking possession dated 31/7/18. The 2<sup>nd</sup> Respondent contends that there was no procedural flaw in the process and the award is fair and just and urged the Court to uphold the values. That since the project is a public good, public interest should supersede the private rights of the Petitioner.

58. Having reviewed and considered the Petition, the affidavit evidence, the annexures, the submissions (both oral and written), case law where supplied, all the materials placed before the Court, the issues framed separately by the learned counsels, the Court is of the considered view that the following issues will determine/dispose the Petition:-

- a. Whether the acquisition of the wayleave is in compliance with the law?
- b. Whether the compensation was adequate?
- c. Whether the Petitioner is entitled to the orders sought?
- d. Who meets the cost of the Petition?

#### **Whether the acquisition of the wayleave is in compliance with the law**

59. This issue has two limbs; the 1<sup>st</sup> one is whether the Petitioner was served with the inquiry notice and the second is whether the 1<sup>st</sup> Respondent followed the law as set out in the Land Act in acquiring the wayleave.

60. The State enjoys the power of eminent domain, which is exercisable under Article 40 (3) of the Constitution which provides as follows:-

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

- a. results from an inquisition of land or a conversion of an interest in land or title to land in accordance with Chapter five; or
- b. is for 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 of 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.”

61. Article 40 of the Constitution guarantees every person the right to property. It protects a person from arbitrary deprivation of his property by the State or any person. This right can only be limited as provided by Law.

62. The National Land Commission is empowered under section 143,144 and 146 of the Land Act to create a public right of way also known as a wayleave for the benefit of the National Government or the County Government, a Local Authority or any corporate body to facilitate the functions of such bodies. It can do so on its own motion or on application by any State Department, County Government or public authority or corporate body. In this case, the 1<sup>st</sup> Respondent is acquiring the right of way on behalf of the 2<sup>nd</sup> Respondent, the state agency authorised in law to supply and manage water resources.

63. A public right of way is a right that is attached and runs with the servient (burdened) land on which it has been created and shall be binding on all land owners irrespective of the manner of occupation whether under a land or derivative right, under customary law, successor in title or even a trespasser. Section 28 (c) of the Land Registration Act recognizes a right of way as an overriding interest in land, a right that subsists and affects land without it being noted on the register. Equally rights of compulsory acquisition are classified as overriding interests so much so that once it is done in accordance with the law, it subsists on the land.

64. What is the purpose of a way leave? It mandates an authorised person to enter into the servient land for purposes of executing such works such as building and maintaining installations and structures on the servient land and to pass and repass along the wayleave in connection with the purposes of the institution or bodies concerned.

65. In this case the 1<sup>st</sup> Respondent published a notice of intention to acquire a right of way (water pipeline wayleave under section 143, 144 and 162(2) of the Land Act for the purposes of conveying raw water from the Ndakaini Dam to the consumers in Nairobi and its metropolis as captured in Para 4 of this judgement. The pipeline burdens a number of parcels of land enroute to the end consumers running through a number of Counties all the way to the County of Nairobi.

66. The purposes of the right of way is therefore clearly defined by the acquirer.

67. In the case of **Machareus Obaga Anunda v Kenya Electricity Transmission Co. Ltd [2015] eKLR**. Justice Okong'o set down the procedure for acquisition of a wayleave as follows:

'Section 144 (4) of the Land Act provides that an Applicant for a wayleave shall serve a notice of its application for the creation of a wayleave to all persons occupying the land over which the wayleave is sought, the County Government within whose jurisdiction the land is situated and any other interested person. After service of the said notice, the commission is supposed to publish the application along the route of the proposed wayleave. Section 146 of the Act requires the commission to consider all representations and objections received pursuant to the said notices and recommend to the Cabinet Secretary whether to carry out a public inquiry into the representations and objections or refer the application for the wayleave to the county government or to initiate and facilitate negotiations with the persons who have made representations on the application with the Applicant with a view of reaching a consensus on the application. The Cabinet Secretary is supposed to determine whether or not to create a wayleave after considering as the case may be, the recommendation of the commission, or the advice of the County Government or the outcome of any negotiations that may have been reached between the Applicant for the right of way and those who had made representations or objections. If the Cabinet Secretary decides to create a right of way, it shall make an order to that effect which order shall among others be published in the Kenya Gazette. Once the order is made, any person who had made representation or objection to the application for the creation of a right of way may appeal against the decision of the Cabinet Secretary to the Court on a point of law.'

68. Section 146(6) provides as follows;

“The order of the Cabinet Secretary to create a public right of way shall—

- a) delineate the route of that public right of way;
- b) be published in the *Gazette*;
- c) be notified to a county government having jurisdiction along the route of the public right of way;
- d) be publicized in any manner which is calculated to bring it to the attention of people occupying and using land along the route of the public right of way; and
- e) come into force thirty days after it has been published in the *Gazette*”.

69. In particular, section 146 (7) provides that any person who makes any representation or objection to an application to create a public right of way, within six weeks after the order has been made, may appeal to the Court on a point of law against an order made by the Cabinet Secretary under this section. Apart from such an appeal, an order of the Cabinet Secretary shall not be questioned by way of judicial review or otherwise in any Court.

70. The Land Act contains an elaborate procedure to be followed when one wants to create a wayleave over private land. In the instant case the 1<sup>st</sup> Respondent issued a notice of intention to acquire a right of way (water pipeline wayleave), notice of inquiry, award of compensation and notice of taking over. All these procedures are set out under Part VIII of the Land Act which makes provisions for the compulsory acquisition of interest in land and runs from Sections 107-133. Although the 1<sup>st</sup> Respondent issued the notices to acquire under section 143 and 144 of the Land Act, it took a different route on inquiry. The inquiry is stated to be issued under section 112 and 162(2) of the Land Act. It would appear that the 1<sup>st</sup> Respondent proceeded under the wrong provisions of the law. The correct provisions are as set out in Para 64-67 of this judgement and runs from sections 143 – 149 of the Land Act, 2012.

71. The matters relating to notification and identification of the land subject of the wayleave are not substantially disputed. The dispute is in relation to service of the notice of the date of inquiry. The Petitioner asserts that he was not served. This appears contradictory. I say contradictory because the relevant notice is Kenya Gazette Notice No 2189 of 9/3/18 which gives notice of the inquiry to be held at Ndakaini Dam Social Hall office on Monday 9/4/18 at 9.30 a.m. The said notice clearly stated that the National Land Commission gives notice that the Government intends to undertake inquiries for the following parcels of land on behalf of Arthi Water Services Board for the construction of raw and treated water pipeline from Thika Dam to Kigoro treatment works to Gigiri tanks in Muranga and Kiambu counties for public

purpose.

72. The said notice, as given, required the affected parties, the Petitioner included, to deliver to the National Land Commission on or before the day of inquiry a written claim to compensation, copy of the Identification Card (ID), Personal Identification Number (PIN), Land ownership documents and bank accounts details. The commission offices are in Arthi House, 3rd floor, Room 305, 1st Ngong Avenue.

73. In addition there is on record a list annexed to the affidavit of Emily Kyalo for the 2<sup>nd</sup> Respondent in annexures at page 22, of the persons who were issued with copies of gazette notices on inquiry and entry No 10 comprising the name, Particulars of the land, Identify Card and signature the Petitioner.

74. Further in Paras 7 of the Petition and 4 of the Petitioners affidavit in support of the petition, the Petitioner has expressly admitted having been served with the gazette notice. Having made such admission, the Petitioner curiously refers to the gazette notice as having given him notice of intention to acquire his land for the wayleave. It is common ground that the inquiry in respect of the lands that were subject to the wayleave as gazetted in Gazette Notice No 2189 of 9/3/18 was scheduled and conducted on 9/4/18.

75. From the analysis above the Court finds that the Petitioner was properly served with the notice of inquiry. It was therefore incumbent upon the Petitioner to present his claim to the 1<sup>st</sup> Respondent on or before 9<sup>th</sup> April 2018. He did not do so. He only has himself to blame for not making his representatives.

76. The answer as to whether the Petitioner was served with the notice of inquiry is answered in the positive. The Petitioner's case fails in that respect.

77. The Petitioners case may have come to an end on the findings in Para 76 above were it not for the actions of the 1<sup>st</sup> Respondent vis a vis the requirements of the Constitution, Land Act and the Fair Administrative Actions Act in so far as the acquisition of rights of way (wayleave) are concerned. This leads me to discuss the second sub- limb of the issue as to whether the 1<sup>st</sup> Respondent adhered to the law as set in the Land Act in acquiring the wayleave.

78. Going by the provisions of section 144(4), the 1<sup>st</sup> Respondent ought to have served a notice on;

- a) All persons occupying land over which the proposed wayleave is to be created, including persons occupying land in accordance with customary pastoral rights;
- b) The County government in whose area of jurisdiction land over which the proposed wayleave is to be created is located;
- c) All persons in actual occupation of land in an urban and per-urban area over which the proposed wayleave is to be created; and
- d) Any other interested person.

79. In addition to the matters set out in the preceding paragraph the 1<sup>st</sup> Respondent ought to have published the application along the route of the proposed way leave and on the date of the inquiry seek to receive from the persons served information that it may have prescribed or required under the Land Act. Upon receipt of such information, the 1<sup>st</sup> Respondent is required to follow the elaborate procedure on acquisition of wayleaves set out in the statute sections 146 – 148 of the Land Act.

80. It appears that the 1<sup>st</sup> Respondent after publishing Kenya Gazette No 2189 (inquiry) of 9/3/18 made a substantial departure from compliance with the law as set out in sections 144-148 of the Land Act. I say so because it is on record that the 1<sup>st</sup> Respondent on the date of inquiry purported to give a determination on the value of the Petitioner's land, give an award and offer payment. This procedure is prescribed for the purposes of compulsary acquisition to land in sections 107 -133 of the Land Act.

81. I find no evidence that the elaborate procedures relating to the issuance of notice to *interalia* County Government of Murang'a, publication of the application along the route of the proposed wayleave, receipt of information, representations or objections, recommendation to the Cabinet Secretary, decision of the Cabinet Secretary on the recommendations, order of the cabinet secretary to create a public right of way, and publication of the said order in the Kenya Gazette *interalia*, were undertaken.

82. In such circumstances the Court finds that the land subject to the wayleave petitioned has not been acquired by the 1<sup>st</sup> or 2<sup>nd</sup> Respondents more particularly in the manner expressed by the law.

83. The Court finds that the 1<sup>st</sup> Respondent failed to comply with the requisite sections of the Land Act in respect to the acquisition of the wayleave.

#### **Whether the compensation was adequate.**

84. The law placed an obligation upon the 1st Respondent and the Cabinet Secretary to consider the said representations and make a decision thereon which decision had to be communicated to the Petitioner. In this case, the Petitioner submitted his representation of claim vide a letter dated the 31/7/18 and there is no evidence that the same was responded to or considered by the 1st Respondent. There is also no evidence before me that the Cabinet Secretary made an order creating a wayleave (right of way) in favour of the 2nd Respondent.

85. This Court is of the view that even if the wayleave had been lawfully created which is not the case here, the 1st Respondent could not

enter the suit land without first making prompt payment of just compensation to the Petitioner as set out under Article 40 of the Constitution.

86. The 2nd Respondent has urged this Court to hold that public interest outweighs private interest. The Constitution guarantees the right to property to any person, the Petitioner included. These rights are only subject to limitation as provided by law which is unless the interest in land is acquired for public interest and public purpose through compulsory compensation which must be accompanied with just full and prompt compensation as provided under Art 40. I am unable to derogate on the rights of the Petitioner in the manner suggested by the 2<sup>nd</sup> Respondent. The actions of the Respondents in the manner in which it purported to acquire the right of way falls short of the legal and constitutional threshold. To quote the words of the Learned Justices of the Court of Appeal in **Christopher Ndarathi Murungaru...Vs... Kenya Anti-Corruption Commission & Hon. Attorney General (2006) eKLR** where the Court stated that;

“... the Constitution of the Republic of Kenya is a reflection of the Supreme public interest and its provisions must be upheld by the Courts, sometimes even to the annoyance of the Public.”

87. Further, the said Court stated that: -

“... Kenya has opted for the rule of law and the rule of law implies due process. The Court must stick to that path even if the public may in any particular case want a contrary thing and even if those who are mighty and powerful might ignore the Court’s decisions... The Courts must continue to give justice to all and sundry irrespective of their status or previous status...”

88. It is clear that the 1<sup>st</sup> Respondent failed to follow the law in the acquisition of the wayleave. The act of the Respondents including and not limited to the notice of taking possession therefore were illegal and unconstitutional.

89. I have found that the award made by the 1<sup>st</sup> Respondent to the Petitioner was not pursuant to or compliant with the law. It is therefore not necessary to consider the adequacy, sufficiency or lack of it in this case.

**Whether the Petitioner is entitled to all or any of the orders sought.**

84. Paragraph 12 of this judgement sets out in extensor the orders sought by the Petitioner. The Constitutional provisions relevant to this petition are set out in the Petitioner’s case in the introductory paras of this judgement.

85. In respect to costs of the suit, both parties approached the Court by petition and in their defence invoking the wrong provisions of the law, none has justification to lay a claim on costs on the other.

90. Taking into account the findings in issue Nos 1 and 2 above, balancing one thing with another, and doing the best I can to serve the ends of justice in this case the Court makes the following orders;-

- a. A declaration that the intended acquisition of the Petitioner’s land by the 1<sup>st</sup> Respondent without adhering to strict and mandatory provisions of the Constitution, the Land Act No 6 of 2012 violates the Petitioner’s Constitutional right to ownership of property as guaranteed under Art 40(3)(a) & (b) of the Constitution.
- b. A declaration that failure by the 1<sup>st</sup> Respondent to comply with the mandatory provisions of the Land Act violates the Petitioner’s Constitutional right to administrative action that is lawful, reasonable and procedurally fair as guaranteed under Art 47 (1) of the Constitution.
- c. An order of mandamus be and is hereby issued compelling the Respondents to comply with the provisions of the Constitution, Land Act and Fair Administrative Actions Act as the case may be in respect of each one of them.
- d. The Petitioner’s prayers in c, d, e, (inadvertently named as a), f (b), g(c) are declined.
- e. Each Party to meet their own costs.

**Orders accordingly.**

**DATED, SIGNED AND DELIVERED AT MURANGA THIS 24TH DAY OF JUNE 2019.**

**J G KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Ms Aligula HB for Owino for the Petitioner

1<sup>st</sup> Respondents Absent but served.

Ms Kinuthia HB for Mulekyo for the 2<sup>nd</sup> Respondents

Kuiyaki and Njeri, Court Assistants