



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MILIMANI

PETITION NO. 15 OF 2018

IN THE MATTER OF ARTICLES 22, 18, 50(1), 258 AND 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ALLEGED VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS IN ARTICLES 24, 40, 42 AND 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ALLEGED VIOLATION OF THE WILDLIFE CONSERVATION & MANAGEMENT ACT 2013, THE FAIR ADMINISTRATIVE ACTION ACT 2015 AND THE STATUTORY INSTRUMENTS ACT 2013

AND

IN THE MATTER OF THE CONSTITUTIONAL & STATUTORY VALIDITY OF THE UNDATED GAZETTE NOTICE NUMBER 12526 STATING THE PARCELS OF LAND THE GOVERNMENT INTENDS TO ACQUIRE FOR THE CONSTRUCTION OF THE NAIROBI-NAIVASHA SECTION (PHASE 2A) OF STANDARD GAUGE RAILWAY

BETWEEN

OKIYA OMTATAH OKOITI.....APPLICANT

VERSUS

NATIONAL LAND COMMISSION.....RESPONDENT

JUDGMENT

1. The Petitioner is a public spirited individual who mainly brings public interest litigation and is a member of Kenyans for Justice and Development Trust. The Respondent is a Constitutional Commission established under the National Land Commission Act 2012, pursuant to Article 67 (1) of the Constitution. The functions of the Respondent are to manage public land on behalf of the National and County Government and for acquisition of land on behalf of National Institutions and County Governments among others.

2. The National Environmental Management Authority (NEMA) granted an Environmental Impact Assessment (EIA) Licence in respect of the construction of phase 2A of the Standard Gauge Railway (SGR); Nairobi Naivasha Section. The Petitioner and the Kenya Coalition for Wildlife Conservation and Management filed an appeal to the National Environment Tribunal (NET) against NEMA'S grant of EIA licence for construction of the SGR part of which was to pass through Nairobi National Park. As per Section 129 (4) of the Environmental Management and Coordination Act (EMCA), NET issued a stop order on 5th April, 2017. While the stop order was in force the Respondent on 22nd December, 2017 published an undated Gazette Notice No. 12526 of its intention to acquire 41.3090 hectares of LR No. 10758 belonging to Nairobi National Park. This is what prompted the Petitioner to file this petition in which he seeks the Court's orders removing into this Court the said Gazette Notice for purposes of being quashed and for payment of costs of the petition including any other remedy which the Court may deem fit to grant.

3. The Petitioner contends that the Gazette Notice was issued in contemptuous violation of two valid stop orders issued by NET in Tribunal Appeal No. 200 of 2017 ***Okiya Omtatah Okoita & Another-Vs-National Environment Management Authority & Others***; that the Respondent acted contrary to Article 71 (1) of the Constitution; that the Respondent contravened the provisions of Section 44 of the Wildlife Conservation and Management Act 2013 (WCMA) Act and that the Gazette Notice did not comply with the provisions of the Statutory Instruments Act.

4. The Petitioner's Petition was opposed by the Respondent on grounds that the construction of the SGR through Nairobi National Park is a subject of active consideration before NET in Tribunal case No.200 of 2017 ***Okiya Omtatah Okiiti – Vs- NEMA & Others***; that the appropriate Court to ventilate the Petitioner's grievances should be before NET; that the power of the state to exercise the powers of eminent domain is only subject to Article 40 of the Constitution and provisions of the Land Act; that the Petitioner has not demonstrated that the impugned Gazette Notice does not meet the Constitutional requirements of Article 40 of the Constitution and that NET did not stop the Respondent from acquiring land required for public purpose.

5. Parties were directed to file Written Submissions in respect of this petition. The petitioner filed his submissions on 18th December, 2018. The Respondent did not file any submissions. I have considered the petition and the submissions filed by the Petitioner. I did not see any response to the petition by the Respondent but I took it that the Respondent is relying on the grounds of opposition which were filed on 21st November, 2018 in opposition to the application by the Petitioner for conservatory orders which application was later abandoned in favour of hearing of the main petition.

6. The issues which emerge for determination are as follows:-

- (i) Whether Gazette Notice No. 12526 is void for having been issued without ratification by Parliament.**
- (ii) Whether Gazette Notice No. 12526 is void for not complying with the provisions of the Statutory Instruments Act of 2013.**
- (iii) Whether Gazette Notice No. 12526 is void for having been issued contrary to Section 44 of the WCMA Act.**
- (iv) Whether Gazette Notice No. 12526 is void for having been issued contrary to two stop orders given in Tribunal Appeal No. 200 of 2017.**
- (v) Whether Gazette Notice No. 12526 is void for having been issued without public participation on the face of LR No. 10758 belonging to Nairobi National Park.**
- (vi) Whether the Petitioner's legitimate expectations were violated.**
- (vii) Which order should be made on costs.**

7. Before I start addressing the issues listed in paragraph 6 hereinabove, I have to address the issue raised by the Respondent that the Petitioner should have ventilated his issues in NET Appeal No. 200 of 2017 ***Okiya Omtatah Okiiti & Another – Vs- National Environment Management Authority & Others***. It is true that the Petitioner was pursuing an appeal before the NET before he filed this petition. This however does not prevent the Petitioner from filing the present petition because Article 70 (1) of the Constitution gives him powers to do so. Article 70 (1) of the Constitution provides as follows:-

“If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.”

8. It is therefore clear that the Petitioner is within his rights to bring this petition as he still pursues other remedies available to him as he is doing in the appeal before the NET. I now turn to address the issues set out hereinabove.

Whether Gazette Notice No. 12526 is void for having been issued without ratification by Parliament

9. The Petitioner submits that the Gazette Notice No. 12426 is void because it was not subjected to Parliament for ratification. The Petitioner therefore contends that this was in contravention of Article 71 (1) of the Constitution which provides as follows:-

“(1) A transaction is subject to ratification by Parliament if it—

(a) involves the grant of a right or concession by or on behalf of any person, including the national government, to another person for the exploitation of any natural resource of Kenya; and Constitution of Kenya, 2010.

(b) is entered into on or after the effective date.

(2) Parliament shall enact legislation providing for the classes of transactions subject to ratification under clause (1).”

10. Pursuant to Article 71 (2) of the Constitution Parliament enacted the National Resources (Classes of Transactions Subject to Ratification) Act 2016 which came into force on 4th October, 2016. The schedule to this Act provides a list of transactions subject to ratification by Parliament. One of the transactions listed under the schedule is excision or change of boundaries of gazetted National Park or Wildlife Protection Area. In the instant case, Gazette Notice No. 12526 sought to excise 41.3090 of the Nairobi9 National Park land for construction of the SGR. This excision was done pursuant to Section 110 of the Land Act.

11. The process of acquisition of the land for construction of the SGR through Nairobi National Park started before the commencement of the National Resources (Classes of Transactions Subject to Ratification) Act. Section 16 of the Act provides as follows:-

“ A transaction that is subject to ratification by Parliament, which was lawfully entered into on or after the effective date but before the commencement date, shall continue in effect and be deemed valid and lawful notwithstanding the absence of ratification by Parliament.”

It is therefore clear that as the land had been lawfully acquired before the commencement date of the Act, the transaction is deemed to be valid notwithstanding the absence of ratification by Parliament. The Petitioner cannot therefore argue that Parliament did not ratify the transaction.

Whether Gazette Notice No. 12526 is void for not complying with the provisions of the Statutory Instruments Act of 2013.

12. Section 2 of the Statutory Instruments Act 2013 defines a “Statutory Instrument” as follows:-

“ any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued.”

The Petitioner contends that the provisions of the Statutory Instruments Act 2013 were never followed and that the Gazette Notice which is impugned therefore lapsed for failure to be submitted to the clerk of Parliament within 7 days of its publication as provided under Section 11 (1) of the Act. The Gazette Notice which is being impugned is not a Statutory Instrument contemplated under the Act and therefore there was no need for it to be tabled in either Parliament or the Senate.

Whether Gazette Notice No. 12526 is void for having been issued contrary to Section 44 of the WCMA Act.

13. The Petitioner contends that the construction of the SGR through Nairobi National Park should not go on because Section 44 (4) provides that no development should be carried out in a National Park without a Management Plan. He argues that the last Management Plan in respect of Nairobi National Park is that of 2005 – 2010 which is no longer in force. Ecosystem Management Plans are management tools which are supposed to be prepared in accordance with the Fifth Schedule of the Act. They are specifically meant to be a guide for the Management of National Parks or Game Reserves or Marine Protected Parks. The Management Plan has nothing to do with acquisition of land for public purpose as in the present case. It cannot therefore be argued that as there was no Ecosystem Management Plan for Nairobi National Park, acquisition of land for the SGR was therefore illegal and void.

Whether Gazette Notice No. 12526 is void for having been issued contrary to two stop orders given in Tribunal Appeal No. 200 of 2017.

14. There is no contention that there were two stop orders issued by NET as result of NET Appeal No. 200 of 2017 *Okiya Omtatah Okoiti & Another – Vs- NEMA & Others*. There is one which was issued on 5th April, 2017 and another issued on 6th June, 2017. The Petitioner was not clear on what grounds he filed an appeal to the NET. Under Section 129 (4) of the EMCA Act, once an appeal has been filed, the status quo of any matter or activity which is the subject of appeal, shall be maintained until the appeal is determined. The Petitioner did not inform the Court what that status was before he filed the appeal. It is clear that what was before the NET is the question of grant of EIA licence for construction of the SGR. The Petitioner herein is challenging the Gazette Notice which communicated intention to acquire land for construction of the SGR. Acquisition of land for the SGR was not the issue before the NET. The Gazette Notice Published on 22nd November, 2017 cannot therefore be said to have been issued in contravention of the two stop orders.

Whether Gazette Notice No. 12526 is void for having been issued without public participation on the fate of LR No. 10758 belonging to Nairobi National Park.

15. Public participation is now a Constitutional requirement. Any activity which is likely to affect the members of public has to be subjected to public participation. Under Article 69 (1), (D), the state is under obligation to encourage Public participation in the Management Protection and Conservation of the Environment. In the instant case, the Petitioner contends that there was no public participation. It is important to note that this petition was filed after the Petitioner had obtained a stop order following his appeal to the NET. The Petitioner’s appeal as can be seen from the stop orders annexed to the petition is that NEMA issued an EIA licence hurriedly without following the laid down procedures.

16. The Petitioner did not however elaborate on how the public was not involved. Before an EIA licence is issued, there must be an Environmental Impact Assessment Report given and before this Report is prepared, there must be public participation which includes all parties who will be affected by the project. In the instant case, other than the Petitioner stating that there was no public participation, there is no evidence at all tendered from the matter pending before the NET to show the kind of public participation which was allegedly carried out if any.

17. The impugned Gazette Notice was issued pursuant to the provisions of the Land Act which deals with compulsory acquisition of land for public purpose. The Act gives elaborate steps which the Respondent was expected to take before the land is finally acquired. There is no evidence from the Petitioner that any of those steps were not followed.

18. In the case of *Anarita Karimi Njeru – Vs- Republic [1979]eKLR* the Court stated as follows:-

“ We would however again stress that if a person is seeking redress from the High Court on a matter which involves reference to the Constitution, it is important (if only to ensure justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

19. The Petitioner has cited Article 40 and several other Constitutional Provisions of the Constitution as having been violated but he has not stated in which manner the said provisions were violated. For instance Article 40 relates to right to protection of property. The Petitioner has not shown how the publication of a Gazette Notice of intention to acquire land has violated his or other persons rights. Publication of notice of intention to acquire is among the first steps towards fulfilment of the Respondent's Constitutional mandate. I therefore do not see how the Petitioner can claim that his Constitutional rights have been violated by the mere publication of the Gazette Notice without showing that the steps preceding the publication were violated.

Whether the Petitioner's legitimate expectations were violated.

20. Black's Law Dictionary, 10th Edition defines legitimate expectation as expectation arising from the reasonable belief that a private person or public body will adhere to a well – established practice or will keep a promise. In the instant case, I have demonstrated hereinabove that there is no evidence that the Respondent did anything wrong in publishing the impugned Gazette Notice. There is therefore no basis upon which this Court can make a finding that the Petitioner's legitimate expectations have been violated or will not be met.

21. From the analysis hereinabove, it is clear that the petition herein lacks merit. The same is hereby dismissed but because the Petitioner brought this petition as a public interest litigation, I will order that each party bear their own costs.

Dated, Signed and delivered at Nairobi on this 28th day of August, 2019.

E.O.OBAGA

JUDGE

In the presence of M/s Masinde for Mr Wahome for Respondent

Court Clerk : Phyllis

E.O.OBAGA

JUDGE