



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANGA

ELC NO 416 OF 2017

PAUL NJUGUNA NGANGA.....PLAINTIFF

VS

KENYA NATIONAL HIGHWAYS AUTHORITY.....1ST DEFENDANT

THE ATTORNEY GENERAL.....2ND DEFENDANT

NATIONAL LAND COMMISSION.....3RD DEFENDANT

JUDGMENT

Introduction

1. By an amended plaint filed on 2/3/18, the Plaintiff sought the following prayers;
 - a. A declaration that the boundaries of the Plaintiffs' parcels of land LOC 4/GAKARARA/599 and 2511 (suit lands) as appertains the date of the suit are actual true boundaries as delineated by law.
 - b. A declaration that there was no compulsory acquisition of the suit parcels of land LOC4/GAKARARA/578 and by extension LOC4/GAKARARA/2511 for failure of strict compliance with the Land Acquisition Act.
 - c. A declaration that the 3rd Defendant has reneged on its constitutional and statutory duties to protect all land owners more particularly the Plaintiff herein in his capacity as a private land owner against historical injustices as it is mandated by law to do so.
 - d. An order for the removal of illegal restriction lodged against land parcel LOC4/GAKARARA/599
 - e. A permanent injunction restraining the 1st Defendant by itself and/or by its employees servants and/or agents from carrying out and delineation erecting any marks and/or beacons alienation of any portions whatsoever and/or in any manner at all from cutting down any fence demolishing any developments on the Plaintiffs parcels of land known as LOC4/GAKARARA/599 and 2511 and/or in any other manner whatsoever interfering with the Plaintiff's occupation and quiet enjoyment of the said lands.
 - f. Costs and interest of the suit.
2. The Plaintiff avers that he is the registered owner of the suit lands having acquired them in 1988 and 2016 respectively. That on the 10/7/2017 the Defendant through its employees' servants and agents invaded the suit lands claiming that a portion of the suit land measuring 3 meters is on a road reserve. That they threatened to remove the Plaintiff's perimeter fence and gate to pave way for the routine maintenance of the road from Gacharage to Thika without any notice. That he risks having his family's home impaired if the road reserve boundary moves into his suit lands. He asserts that the portion of 3 meters being claimed is part of his land and has denied encroaching on to the road reserve.
3. Under Para 9 and 13 c of the Plaint, the Plaintiff has itemized the particulars of illegality on the part of the Defendants and their servants agents and employees. Further he alleges breach of constitutional and statutory duty on the part of the 3rd Defendant.
4. The 1st Defendant denied the Plaintiffs claim and asserted that the Plaintiff's perimeter wall encroached on the public road reserve by 3m wide and 6 meters along the road. Further it asserted that a 40 m road reserve was acquired by the Government of Kenya in 1976 along the Gacharage-Githumu-Kangare Road (B23) formerly C70 for public purposes prior to the Plaintiff acquiring the suit lands. It admitted that through the contractor the said road reserve was being cleared to foster the safety of motorists and therefore their actions were within the law. It contended that the public road reserve does not affect the Plaintiffs house except for the fence.

5. Maintaining that there was no need for notice to be served on the Plaintiff since that the road reserve had already been acquired by the Government of Kenya in 1976, it termed the Plaintiffs claim on the road reserve illegal and one that cannot be protected by the Constitution.

6. The 2nd Defendant denied the allegations of illegality as pleaded by the Plaintiff. It contended that the functions and liabilities of the office of the Commissioner of Lands were taken over by National Land Commission hence the particulars of illegality set out against the said office cannot stand against a non-existing office. Further it denied the illegalities levelled against the Land Registrar, Muranga and averred that the registration of the restriction was lawful and in pursuance to the gazette Notice No. 1220 of 1976.

7. The 3rd Defendant resisted the Plaintiffs claim and averred that the suit lands were among parcels compulsorily acquired for the construction and expansion of the Thika- Gacharage road in 1976 under the Gazette notice No 1220 of 15/4/1976. That the said acquisition was carried out pursuant to the Land Acquisition Act of 1968 and all legal processes complied with including the full compensation to former registered owners of the suit lands. They contend that at the conclusion of the compulsory acquisition, no appeal was filed by the previous owners.

8. Substantive pleadings

- a) The Plaintiff filed his amended plaint on 2/3/2018. Kenya National Highways Authority become the 1st Defendant, Attorney General 2nd Defendant and National Land Commission the 3rd Defendant. He alongside his amended plaint filed a list of documents.
- b) The 1st Defendant filed its amended defence on 3/4/ 2018 accompanied by a list of documents.
- c) The Attorney General appearance and filed defence both on 5/4/2018. It is noteworthy that the Attorney General's defence was wrongly titled "the 3rd Defendant's statement of defence.
- d) The 3rd Defendant the National Land Commission filed its defence and list of documents on 12/7/2018.
- e) The Plaintiff filed a reply to defence of the 1st Defendant on 24/4/2018.
- f) The Plaintiff filed reply to defence of the 2nd Defendant (Attorney General) on 24/4/2018.
- g) The Plaintiff also filed a reply to defence of the 3rd Defendant.
- h) The Plaintiff filed a further list of documents dated 24/4/2018 and filed on even date.
- i) The Plaintiff filed a further list of documents dated 24/5/2018 and filed on even date.
- j) The Plaintiff filed a further list of documents dated 11/2/2019 and filed on 13/2/2019.
- k) Parties put in their consolidated bundles as filed on record respectively.

The evidence of the parties

9. The Plaintiff, PW1- testified that he is the registered owner of the suit lands. He acquired parcel LOC4/GAKARARA/599 from Mwangi Nduati in 1988 and built a family home and other developments and his residence since 1993 to date. The developments on parcel LOC4/GAKARARA/ 599 are a permanent 4 bed roomed bungalow, chicken structure (double storeyed) and a cattle shed.

10. In 2016 he acquired parcel No. LOC4/GAKARARA/2511. This parcel was a resultant subdivision of Parcel 1913 which in turn arose from excision from parcel LOC4/GAKARARA/578.

11. That both parcels are adjacent to Kandara -Githumu road. That the road was surveyed and built long before he acquired the suit lands. That for the 29 years he has had quiet and peaceful occupation and had no notice of encroachment of the road reserve. The previous owner too had no notice of a claim that the suit land was on a road reserve. That he did due diligence at the time of buying the suit lands and there were no endorsements on the title.

12. He stated that in the month of July 2017, the employees or agents of the 1st Defendant's contractor invaded his land and placed a mark that his land had encroached 3 meters into the road reserve and threatened to remove the fence together with the gate to pave way for road reserve maintenance work they were undertaking. That he pleaded with them to give him time and they gave him 2 days within which time they would return to remove the fence and the gate. That thereafter he filed suit and sought and obtained injunctive orders from the Court.

13. The witness stated that thereafter he commissioned a private surveyor to confirm the measurements on the ground who informed him that the road reserve measured 36 meters and not 40 meters as claimed by the 1st Defendant.

14. Further that after the Defendants pleaded the defence of compulsory acquisition he sought to investigate the title and discovered that a restriction had been registered against his title, 599 in 1994. He informed the Court that he was not aware of any compulsory acquisition of the suit land nor compensation made. That the restriction was lodged in 1994 when he had become registered as the owner in 1988.

15. The witness produced documents marked as PEX No. 1-14 disclosed in the amended list of documents filed on the 2/3/18 and 24/4/18.
16. Further the witness stated that he sought the opinion of an Engineer on the financial impact of the extension of the road reserve into his land and was advised that he would be forced to build a reinforced concrete retention wall to protect his house from any vehicular and other objects and or storm water from the road. This would impair the natural lighting of the house, increase lighting costs, impair the use of the backyard which will be lost and render the back entrance unusable. In total he was advised the value utility and enjoyment of the house would be diminished.
17. On Cross-examination by Ms Ndirangu the learned counsel for the 1st Defendant the witness explained that he bought parcel 599 from one Nduati Kariuki through an agreement of sale which he did not produce in Court. Mr Nduati died in 2015. He informed the Court that he did not find it necessary to enjoin the vendors in the suit. That he acquired LOC4/GAKARARA/2511 from Kangethe Kimani, (the son of the original owner Kangethe Kimani who died some years back) through an agreement of sale, not produced in Court. That Mr Kimani is alive though not a witness in the case. That his house is on parcel LOC4/GAKARARA/599 while the parcel LOC4/GAKARARA/2511 has nappier grass , macadamia, and avocado trees. That LOC4/GAKARARA/2511 has no fence and hence it is not affected by the alleged encroachment.
18. That he was not aware about the intention to acquire the suit land through gazette notice dated the 15/4/76 nor was he aware that the previous land owners were compensated for the lands. He informed the Court that he did not enquire from Mr Kimani about the compulsory acquisition. He informed the Court that parcel LOC4/GAKARARA/599 measures 0.24 ha on the title while the area in the green card is 0.6 ha. He further explained that he sued the Attorney General on behalf of the Land Registrar Muranga. He argued that the restriction on his land remains illegal notwithstanding the presence of the gazette notice of intention to acquire the land.
19. In reexamination he stated that no acquisition of the land nor payments were made by the 3rd Defendant on behalf of the 1st Defendant. He went ahead to state that there was no evidence of payment, registration of vesting orders in the green card nor amendments to the survey plans in respect to the alleged acquired lands. He contended that the road reserve is about 14 meters which is the space from the tarmac to his perimeter fence.
20. PW2- Raphael Gitonga testified and states that he is a holder of a diploma in land surveying with 14 years' experience and works with Mapland Agencies. He produced the report dated 13/10/17 which is on general boundaries of parcel LOC4/GAKARARA/599. According to Registry Index Map (RIM) sheet No 14, the road measures 36 meters wide. He also confirmed that the Plaintiffs developments are sitting on the parcel LOC4/GAKARARA/599.
21. In cross-examination he stated that he only took the measurements on the road in respect to parcel LOC4/GAKARARA/599 and not 578. He confirmed that the total acreage on the title and on the ground in respect to parcel 599 is 0.24 ha. He stated that he used the latest amended RIM as at 2012. In conclusion he summed his evidence that the according to the said RIM there is no encroachment of the Plaintiff's land to the road reserve. He stated that he used the scale on the RIM to calculate the size of the land. The witness informed the Court that though he reconfirmed the size of the land he measured it on the basis of general boundaries and had he been made aware of the dispute in Court he could have referred the matter to the District Surveyor to confirm the measurements.
22. In further cross-examination by the learned counsel for the 3rd Defendant the witness stated that he is a licensed surveyor though he did not produce his license in Court and he undertook to produce if given leave by the Court.
23. At the close of the PW2 testimony the parties consented to allow the witness through the Plaintiff's counsel to file in Court his practice licence in respect to the years 2017 and 2019
24. With that that the Plaintiff closed his case.
25. The 1st Defendant called one witness Eng Muita Ngatia who led evidence that he is the Deputy Director of the 1st Defendant in charge of Road asset management. He explained to the Court that the Plaintiff has encroached on the road reserve of Thika – Gacharage Road and constructed a building as well as carrying out farming activities.
26. The witness informed the Court that the road was compulsorily acquired in 1976 although it was built in 2013 and commissioned in 2016.
27. He stated that the road is referred to as C70 although it was reclassified as B23 in 2017 making it a national trunk road. He stated that the road corridor is 40 meters wide and the centreline of the existing carriage way is the centre of the existing road corridor. He explained that the law requires that any developments should be 20 meters from the centerline of the existing road corridor.
28. In the year 2017 the 1st Defendant entered into a maintenance contract with Interwood General Contractors Limited for the maintenance of the said road and it is in the process of clearing that the Plaintiff together with other several other land owners along the road had put up developments encroaching on the said road reserve. That the Plaintiff's perimeter wall had encroached on the said road reserve by 3 meters wide and 6 meters long. He stated that on making the discovery a surveyor namely Alice Marimi on checking the records available at the Lands Registry Muranga noted that the section of the road encroached had been compulsorily acquired in 1976 from the then land owners who were compensated at the time.
29. He stated that the road reserve is now vested in the 1st Defendant for public use. That road reserves are necessary for the redevelopment of the road as well as safety of the road users and the public. It was his case that the Plaintiff has encroached on to road reserve/public land.
30. In cross-examination by the Plaintiff's counsel, the witness stated that he did not visit the suit land. He also clarified that he did not

produce the gazette notice in respect to the reclassification of the road in 2017.

31. The witness maintained that he believed that the land was acquired based on the gazette notice issued in 1976 coupled with various correspondences from the offices of the then Commissioner of Lands. The witness stated that from the documents produced by the 1st Defendant there is no evidence of payment of compensation and that some of the documents referred to him were not signed. For example, he referred to a letter dated the 12/10/76 addressed to the Chief Engineer Roads from the Ministry of Lands and Settlement calling for cheques payable to the owners of the lands. He commended that the said letter is not signed and it does not prove that compensation was made.

32. In further cross-examination he stated that if the Plaintiffs land touches Kandara -Githumu road then that road was in existence and is different from the road built in 2013 commonly referred to as "Nyoka -Nyoka" road. That the Kandara -Githumu road had been tarmacked before. That the measurements of the road referred to the old road and not the new road named Nyoka Nyoka built in 2013. That he did not have a survey plan to show the delineations of the acquired portion by the government in 1976 nor a beacon certificate. That no notice was given to land owners before the road maintenance work commenced. Further that the contractors' workers who cleared the road were not surveyors and therefore used the road to inform the distance from the road to the life fence/hedge.

33. He conceded that the encroachment is per the measurements of their internal surveyor and further that the Government of Kenya Surveyor was not involved in the ascertainment of the road reserve.

34. Whilst being reexamined by Ms Ndirangu for the 1st Defendant the witness stated that he does not visit all the roads being constructed by the 1st Defendant and in particular he did not visit the road in issue before coming to Court to testify. That he was unsure if the road was curved or straight at the point of the intersection with the Plaintiff's land. That in 1976 it was the Ministry of Roads and Works that paid the compensation.

35. He further stated that the 1st Defendant did not engage a Government of Kenya Surveyor to ascertain the measurements of the road reserve because it was assumed that the survey of the acquired land was done in 1976 and hence there was no need to do so. Further that there is no legal requirement that the land owners be given notice when maintaining the roads. He sought to clarify that the documents in respect to the compulsory acquisition and compensation were in the custody of the Ministry of Roads and Public Works and not the 1st Defendant. He clarified that beacons are affixed on the edge of the road reserve.

36. DW2 – Alice Gacheri Marimi testified and informed the Court that she is employed by the 1st Defendant as a Surveyor assigned to the central region of Kenya since 2009. Part of her job description entails ensuring that the road reserves are preserved and maintained free from encroachment as well as liaising with the lands registries to ensure that the land acquired by the 1st Defendant is preserved.

37. That the 1st Defendant commissioned Interwood contractors to maintain the road reserve and supplied them with the required corridor width. They were to clear the vegetation between the corridor width. However, they were obstructed by the encroachment in form of a perimeter wall, gate and nappier grass on the road reserve.

38. She informed the Court that she used the plan and longitudinal section drawing for Thika-Gacharage-Githumu-Kangare Road (C70/414/E509), land acquisition plan (Thika -Gacharage Road C70) which indicates a road reserve of 40 meters, The Kenya Gazette Notices No 1220 dated the 5/4/1976 and the list of the parcel owners to be compensated from the Ministry of Lands, Athi House.

39. That at the end of the exercise she confirmed that the Plaintiff had encroached on the road reserve by 3 meters wide and 6 meters long and she offered him time to construct another fence just like other land owners along the road but he declined and rushed to Court and filed the suit.

40. The witness produced the documents referred to in para 38 in support of her testimony.

41. In cross-examination by the Plaintiffs' Counsel on record, the witness stated that though the land was acquired in 1976 she did not produce a vesting order in that respect. She stated that she did not produce the minutes of the land acquisition committee. Pressed further to explain whether any compensation was made the witness responded that she relied on the letter dated the 12/10/76 authored by the Ministry of Lands and settlement and calling for cheques from the ministry of Roads and Works to enable the author to make payment to the land owners. She conceded that she has never seen any cheques to the land owners, the Plaintiff included. She also admitted that the said document is unsigned. She confirmed to the Court that she does not have any documents to support payment of compensation.

42. She testified that the expansion of the road reserve was done in 1976 by acquiring more land from the land's owners along the road.

43. She informed the Court that she went to the suit land to ascertain the road reserve and took measurements from the centerline (yellow line) of the road to the end of the road reserve on both sides which confirmed that the Plaintiffs land had encroached 3 meters wide by 6 meters. That the yellow line is fixed by the Ministry of Roads. That it is their responsibility to fix the road beacons and not the land beacons, the latter being the role of the land surveyor.

44. That though she did not engage the Government of Kenya Surveyor to ascertain the size of the Plaintiff's land she noted that the survey is general boundaries and she was not aware if the beacons were fixed in 1976. She explained that general boundaries are marked by features such as fences while fixed boundaries have concreted beacons.

45. The witness further explained that the road was shifted at the point adjacent to the Plaintiffs' land which interfered with the position of the road and the parcels of the land. She produced the gazette notice No 1220 which allowed the shifting of the road inside the Plaintiff's land.

46. The witness informed the Court that she was not involved with the acquisition of the land in 1976 and therefore her evidence is based on the documents she was able to retrieve from both the Ministry of Lands and settlement and the Ministry of Roads and Public Works.

47. The 2nd and 3rd Defendants did not adduce any evidence in the case. Both associated themselves with the defense of the 1st Defendant.

Written submissions of the parties

48. The Plaintiff submitted and gave a summary of the pleadings and the evidence of the parties in the case.

49. The Plaintiff took a swipe at the 2nd and the 3rd Defendants for failing to adduce evidence in the case to prove compulsory acquisition of the Plaintiff's lands. That the alleged acquisition was done by the then Commissioner of Lands, an office that is sued through the Attorney General. That the inference that should be drawn from the conduct of the AG is that either the evidence does not exist or if tendered was adverse to the 2nd Defendant. In conclusion the Plaintiff summed the 2nd and 3rd Defendants submissions mere allegations and to that extent the claim of the Plaintiff against the 2nd and 3rd Defendants is uncontroverted.

50. The Plaintiff relied on case of Kenya **Akiba Micro Financing Limited Vs Ezekiel Chebii & 14 Others (2012) EKLR** where the Court held that ;

“Section 112 pf the Evidence Act Chapter 80 laws of Kenya provides;-

In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him. “..... where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the Court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party”.

51. The Plaintiff submitted that it's the Defendants who raised the defence of compulsory acquisition of the suit lands against his claim and therefore this entitles him to interrogate and challenge the defence. He faulted the Defendant's argument that the Plaintiff was not a party to the compulsory acquisition and that he cannot challenge the acquisition as flawed. He said by reason that the Plaintiffs cause of action arose in 2017 when the 1st Defendant's agents invaded his land, that is when he was obliged to come to Court. Further that the defense of compulsory acquisition was raised by the Defendants the Plaintiff was right to challenge the defence.

52. The Plaintiff submitted that the original owners of the suit lands are long dead. Mwangi Nduati, the owner of parcel LOC 4/GAKARARA/599 died in 2015. He bought parcel LOC 4/GAKARARA/578 from Charles Kimani Kangethe the son of Kangethe Kimani who died a while ago. That parcel No LOC 4/GAKARARA/578 has gone through successive subdivisions that yielded parcel LOC 4/GAKARARA/ 2511. He submitted that it was therefore not tenable for him to call dead persons to adduce evidence in the matter.

53. The Plaintiff submitted that in so far as the restriction was placed on his title without following due process, and without notice it remained illegal.

54. It was the submission of the Plaintiff that the Attorney General was well suited in the suit having been sued on behalf of the Commissioner of Lands, the acquiring authority under the Land Acquisition Act (repealed).

55. Were the suit lands compulsory acquired? The Plaintiff argued that his case is that of encroachment onto his land comprised in the two suit lands and that the case of the defense is that a portion of the suit lands were compulsory acquired by the 1st Defendant which therefore gives it the right to take over that portion of his land. That it was the obligation of the 1st Defendant to prove that the land was compulsory acquired.

56. Further the Plaintiff submitted that the process of compulsory acquisition was not complied with save for the issuance of the gazette Notice No 1220 dated the 5/4/1976.

57. The Plaintiff relied on the case of **Shalein Masood Mughal Vs AG & 5 others Petition No 186 of 2013,in which** the judge citing the decision of **Eunice Grace Njambi Kambi Kamau & Anor Vs AG & others (give the citation)** held that;

“in my view and having regard to the provisions of the Land Acquisitions Act (now repealed) the Government has an obligation to execute the process of land acquisition to finality to effectuate title acquisition. The commissioner of Lands and the Land Registrars have duties and obligations which they are required to execute to ensure land is properly documented and protected.”

58. The Plaintiff submitted that he is the holder of the suit lands which he acquired free from all encumbrances as there were no endorsements on the titles to signify compulsory acquisition on any part of the titles. To that extent he submits that he has a legitimate expectation to the protection of his constitutional rights to own property.

59. The Plaintiff further submitted that the restriction lodged on the suit land parcel No LOC4/GAKARARA/599 is illegal as it was anchored on a gazette notice whose import was a notice of intention to acquire land which cannot form a basis for acquisition of land. The Plaintiff argued that no vesting order was registered against the suit lands and restriction is not one of the entries permitted by law to evidence the acquisition of land. That in any event the law in respect to the registration of restrictions was not complied with including the fact on the face of the register which shows that the restriction was not signed.

60. Finally, the Plaintiff submitted that the right to own property is a fundamental right enshrined in the Constitution. The Constitution has

decreed that such right can only be limited as provided for in the Constitution and through strict compliance to the supreme and statutory law. He opined that public interest has not been elevated to derogate a right enshrined in the bill of rights like the right to own property.

61. Was there compulsory acquisition of the land in 1976? The 1st Defendant submitted that the lands were acquired in 1976 from the previous owners and due compensation paid in full. It submitted that the due process of the law as set out in the Land Acquisition Act (now repealed) was duly followed. Quoting the case of **Republic V commissioner of Lands & Anor Exparte Coastal Aquaculture Limited (2000) ECLR;**

“the test of the legality of the acquisition is whether the land is required for a public body for a public benefit and such purpose is so necessary that it justifies hardship to the owner. Those details must be contained in the notice itself for the prima facie validity of the acquisition must be judged on the content of the notice. The test must be satisfied at the outset and not with the aid of subsequent evidence”.

62. The 1st Defendant submitted that the evidence by PW2 should be expunged from the record for failure of the said witness to produce in Court the practicing license for 2017 and 2019. It argued that under section 36 and 37 of the Surveyors Act Cap 299, Laws of Kenya, the said witness fell under the category of unqualified persons who are forbidden from surveying and anyone who falsely pretends to be a licensed surveyor shall be guilty of an offence and is liable to punishment. The 1st Defendant submitted that the evidence of the surveyor should be excluded from the evidence produced in Court.

63. As to whether there was compulsory acquisition of the land in 1976, the 1st Defendant stated that the suit lands were compulsory acquired and the land owners at the time duly compensated. That the gazette notice No 1220 dated 5/4/1976 shows the land was acquired amongst others for the construction of the Thika – Gacharage Road in Muranga District. Parcel LOC 4/GAKARARA/578 belonged to Kangethe Kimani and Parcel No LOC 4/GAKARARA/599 belonged to Nduati Kariuki . It contended that the said land owners were among the beneficiaries of the cheques forwarded by the Commissioner of Lands to the beneficiaries The 1st Defendant defended its position in presenting an unsigned letter dated the 19/10/1976 by saying that there must have been a signed copy which communicated the awards arrived at by the Commissioner of Lands in respect to acquired lands. That the Commissioner of Lands vide letter dated 9/11/1976 informed the Land Registrar Muranga that the acquired lands were then vested in the Government absolutely. It argued that the vesting notice could only have been issued after the compensation was paid.

64. The 1st Defendant stated that since the acquisition occurred in 1976, it is possible that some documents may have been lost along the way in the shuffling of departments and ministries. Further that the 1st Defendant was not in existence then and relied on the information available in the Lands Registry and the Survey department. That notwithstanding, it submitted that the lands were acquired by the Government of Kenya.

65. The 1st Defendant argued that the Plaintiff was not a party to the compulsory acquisition and despite being aware, he failed to call the original owners or their families of the suit lands so that they may confirm if indeed compulsory acquisition took place.

66. Further the 1st Defendant submitted that the road reserves are for the good of the general public. It sought to persuade the Court that the interest of the public should outway the private rights of the Plaintiff in this case. That the road reserve having existed before the Plaintiff acquired the suit lands was an overriding interest unaffected by the rights of any subsequent purchaser whether the purchaser had notice or not. That the Plaintiff should give way for the road reserve as it serves public interest.

67. The 2nd Defendant by and large associated itself with the submissions of the 1st Defendant and urged the Court to dismiss the Plaintiffs case.

68. The 3rd Defendant did not file any submissions.

The determination of the Court

69. The issues for determination are;

- a. Whether the suit lands were compulsorily acquired.
- b. Whether the restriction should be removed.
- c. Whether the 3rd Defendant failed to protect the Plaintiff against historical injustices.
- d. Whether a permanent injunction should be granted.
- e. Costs of the suit.

70. The background of this case is that Parcel LOC 4/GAKARARA/599 became registered in the name of Nduati Kariuki on the 2/1/64. Upon his demise the land was succeeded by Mwangi Nduati on the 13/8/1976 and the certificate of title issued on 20/8/1976. On 5/7/88 it was transferred to the Plaintiff; consideration being stated as Kshs 20,000/-. On the 7/4/1994 a restriction was registered in favour of the Government of Kenya (0.019ha) pursuant to GN 1220 of 15/4/1976. The entry is not however signed by the Land Registrar to denote completeness of register.

71. On the 2/1/1964 parcel LOC 4/GAKARARA/578 became registered in the name of Kangethe Kimani and upon his demise it was succeeded by Joyce Mwhaki Kangethe (0.24 ha) and Susan Njeri Kangethe (0.24 ha). The title was closed on 3/7/90 upon subdivision which yielded LOC 4/GAKARARA/1912 and 1913. Parcel 1913 was further subdivided into LOC 4/GAKARARA/2511 and 2512 on the 8/4/2008 whereupon parcel LOC 4/GAKARARA/2512 became registered in the name of Susan Njeri Kangethe . It was transferred to Charles Kimani Kangethe by way of gift on the 30/6/2008. The Plaintiff acquired the suit land on the 24/10/16 and a title issued accordingly.

72. It is the case of the Plaintiff that he is the registered owner of the suit lands and the 1st Defendant has threatened to encroach his lands and pull down his perimeter fence and remove his gate on the grounds that the same are erected on the road reserve.

73. The 1st and 3rd Defendants' case is that the Plaintiff has encroached on road reserve that was compulsorily acquired in 1976 by the Government of Kenya from for the construction of Thika Gacharage Road in Muranga. That parcels No LOC 4/GAKARARA/578 and 599 were acquired from Kangethe Kimani and Nduati Kariuki respectively and were duly compensated. In short that he does not infact own the portion of 3 meters by 6 meters (road reserve) of land but is a trespasser.

74. The 2nd Defendant asserted in its defence that the role of compulsory acquisition was by the Commissioner of Lands then which function has now been taken over by the 3rd Defendant hence the alleged illegality cannot stand against a non existent office. Further it denied any wrong doing on the apart of the Land Registrar in respect to the registration of the restriction as it was based on the intention to acquire land as per the Kenya Gazette No 1220 of 1976.

75. It is not in dispute that the Plaintiff is the current registered owner of parcel No.s LOC 4/GAKARARA/599 and 2511. It is also not in dispute that the Plaintiff is in possession and occupation of the suit lands. The two suit lands border each other and are abutted to the main Thika- Gacharage road.

76. 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 except as provided by law.

77. 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 acquisition 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.”

78. To answer the question as to whether the suit lands were compulsory acquired, I shall examine the law in force then.

79. Section 75 of the retired Constitution provided safeguards like the current Constitution in respect to the exercise of the power of the eminent domain by the state;

“No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied - (a) the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit; and (b) the necessity therefor is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and (c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation. (2) Every person having an interest or right in or over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the High Court for - (a) the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled; and (b) the purpose of obtaining prompt payment of that compensation: Provided that if Parliament so provides in relation to a matter referred to in paragraph (a) the right of access shall be by way of appeal (exercisable as of right at the instance of the person having the right or interest in the property) from a tribunal or authority, other than the High Court, having jurisdiction under any law to determine that matter.”

80. The Land Acquisition Act cap 295 (now repealed) set out very elaborate steps to be complied in compulsory acquisition of land. These provisions are now domiciled in sections 101-133 of the Land Act, No 6 of 2012.

81. Where the Minister was satisfied that the acquisition of land was necessary, he would inform the Commissioner of Lands who would publish in the Kenya Gazette a notice of intention to acquire giving notice to the public and interested persons of the impending acquisition. The land subject of acquisition would be marked and surveyed and the plan placed in a disclosed place for the public and any interested person to inspect. Between the period of 30 days to 12 months after the publication of the notice of intention to acquire, a public inquiry notice is issued to all persons with interest in the subject land stating the date, time and place of the public inquiry. At the conclusion of the inquiry the commissioner would then prepare an award for each person established to have had an interest in the parcels being acquired. The compensation shall then be paid according to the awards. Thereafter the commissioner would serve on the interested persons a notice of

taking possession within 60 days of the award. Nothing prevents the commissioner from taking possession earlier than the 60 days if there is an urgency to do so.

82. Section 19 (3) of the Land Acquisition Act provided that Upon taking possession of land under subsection (1) or subsection (2), the Commissioner shall also serve upon— (a) the registered proprietor of the land; and (b) the Registrar, a notice that possession of the land has been taken and that the land has vested in the Government. (4) Upon taking of possession, the land shall vest in the Government absolutely free from encumbrances.

83. Section 20 of the said Act provides as follows;

“(1) Where the documents evidencing title to the land acquired have not been previously delivered to him, the Commissioner shall in writing require the person having possession of the documents of title to deliver them to the Registrar, and thereupon that person shall forthwith deliver the documents to the Registrar. (2) On receipt of the documents of title, the Registrar shall— (a) where the whole of the land comprised in the documents has been acquired, cancel the documents; (b) where only part of the land comprised in the documents has been acquired, record upon the documents that so much of the land has been acquired under this Act and thereafter return the documents to the person by whom they were delivered and upon such receipts, or if the documents are not forthcoming, cause an entry to be made in the register recording the acquisition of the land under this Act.

84. In the case at hand, the Defendants have placed some documents before the Court which I shall now analyze through the prism of the law. The gazette notice No 1220 dated 15/4/1976 signed by J R Njenga the then commissioner of lands, was an intention to acquire among other lands the parcels Nos LOC 4/GAKARARA/578 and 599 then registered in the names of Kangethe Kimani and Nduati Kariuki. The disclosed acquired sizes are 0.013 ha and 0.019 ha respectively.

85. The 1st Defendant adduced evidence that compensation was duly paid and produced a letter dated 10/1/1976 purported to be from the Commissioner of lands addressed to the district Commissioner Muranga forwarding 306 cheques for payment to the individual owners. The list of the said owners is not attached to enable the Court determine whether indeed the original owners were paid. The letter is not signed and is not on any letter head.

86. A second letter adduced in evidence was dated 12/10/76. It is an unsigned letter from the Ministry of Lands addressed to the Chief Engineer Roads calling for the cheques payable as per the awards to the individual owners. Among the beneficiaries on the list was Kangethe Kimani and Nduati Kariuki who were to receive Kshs 260/- and 378/- respectively for their portions.

87. Save for the two letters there is no evidence that the two original land owners were paid any compensation. This would have been evidenced by cheques in their names and or acknowledgements of receipt of compensation. The 1st Defendant has faulted the Plaintiff for failing to enjoin the original owners or their families in the suit to ascertain the payment. In my respectful view, the burden of proof shifted to the Defendants once they raised the defense of compulsory acquisition to poof that indeed the portions of the lands were acquired. In any event the Plaintiff led unchallenged evidence that the two are deceased. This can also be gleaned from the entries in the titles pursuant to succession of their estates.

88. The 1st Defendant adduced a letter dated the 9/11/1976. Despite directing the 1st Defendant to supply the Court with a clear copy, the copy on record is still illegible. From what can be gleaned from the letter, it is addressed to the Land Registrar Muranga informing him that the COL had taken possession of the lands described in the notice as contained in the Kenya Gazette No 1220 effective the date of signing the notices on 4/10/1976 (copies enclosed). That the said lands are now vested in the Government of Kenya. It directed the Land Registrar to amend the titles of the plots involved accordingly.

89. Notwithstanding the contents of the above letter, there was no evidence that the Land Registrar complied with the provisions of section 20 of the Land Acquisition Act so much so that the Green cards for the two parcels do not contain any entries in respect to the vesting of the land to the Government of Kenya. The purpose of the vesting order is to serve as notice to all and sundry that the land acquired by way of compulsory acquisition is now owned absolutely by the Government or the acquiring body. That the process of compulsory acquisition is complete and the land is fully divested into the acquirer free of all encumbrances. Anyone dealing with such land then would have notice of the said acquisition.

90. The 1st Defendant argued in Court that the land was acquired and vested in the Government of Kenya and that the Plaintiff was encroaching onto its land. It based this argument on interalia entry No 6 (restriction) on title parcel No 599 dated the 7/4/1994 to persuade the Court that indeed the interest of the Government of Kenya was registered on the said title. The Plaintiff has maintained the position that no compulsory acquisition took place at all.

91. In the case of **Eunice Grace Njambi Kambi & Anor Vs Ag & Others** where the Court confronted by similar facts stated as follows;

“ in my view and having regard to the provisions of the Land Acquisition Act (now repealed) the Government has an obligation to execute the process of land acquisition to finality to effectuate title acquisition. The Commissioner of Lands and the Land Registrars have duties and obligations which they are required to execute to ensure land is properly documented and protected.”

92. The entry aforesaid is not countersigned. The 2nd Defendant who represented the Land Registrar failed to offer any explanation why the entry was not signed. The 2nd Defendant also failed to explain why the restriction and not the vesting order was registered on the title 18 years after the alleged compulsory acquisition was concluded. The certified copy of the restriction document was not presented to Court for the Court to determine for itself whether indeed the land registrar signed the primary document. Based on the documents presented before the Court, the Court finds that this is not a valid entry capable of vesting any right or interest in law.

93. Even if it had been validly signed, the restriction was not in compliance with the provisions of section 20 of the Land Acquisition Act which required the land registrar to record the acquisition of the land effectually vesting the interest in the acquirer. The Act did not prescribe a restriction on the land. I shall come to this latter.

94. Going by the findings in the preceding paras it is clear that the interest of the Government was not registered at all. The Defendants have relied on a questionable entry of lodgment of a restriction placed on the green card after the Plaintiff had acquired the land. The Plaintiff explained that he had no notice of the compulsory acquisition of the land. He averred that he purchased the suit land parcel 599 in 1988 and the issue of compulsory acquisition came to his knowledge on being served with the 1st Defendants statement of defense where it raised a defense of compulsory acquisition forcing the Plaintiff to amend his plaint.

95. The 1st and 3rd Defendants have argued that the Plaintiff has no right to challenge compulsory acquisition because he was neither privy to nor a party to the compulsory acquisition and that a stranger to a contract cannot derive benefit or advantage from the said contract. It is clear from the green card that the Plaintiff acquired LOC 4/GAKARARA/ 2511 in 2016 and parcel LOC 4/GAKARARA/599 in 1988. The Court has found that there was no entry signifying acquisition of the portions of land by the Government on the title. The titles were free from all encumbrances as the Plaintiff has argued in his case and as seen from the green cards. Therefore there was no notice of acquisition at the time of purchasing the land as at 1988. The Plaintiff therefore was a bonafide purchaser for value without notice. He cannot be held responsible for a process that he was not a party nor had no notice of.

96. If the land was still in the hands of the original owners then the Defendants would have had (subject of proof of payment of compensation) a claim of constructive trust and/or unjust enrichment. That is not the case for the Plaintiff who is a third party without notice. The 1st Defendant is not protected because the interest they are advancing of compulsory acquisition is a registrable interest which was not registered. The issue of an overriding interest arising over the portion of the suit lands in the absence of proof of compulsory acquisition does not arise.

97. Section 136 of the Registered Land Act states that;

“for the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, after directing such inquiries to be made and notices to be served and hearing such persons as he thinks fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge. (2) A restriction may be expressed to endure - (a) for a particular period; or (b) until the occurrence of a particular event; or (c) until the making of a further order, and may prohibit or restrict all dealings or only such dealings as do not comply with specified conditions, and the restriction shall be registered in the appropriate register. (3) The Registrar shall make a restriction in any case where it appears to him that the power of the proprietor to deal with the land, lease or charge is restricted. (4) The Registrar shall make a restriction expressed to endure until the making of a further order when the Registrar is informed by the National Museums of Kenya that a declaration of heritage by the Minister under the National Museums and Heritage Act has been applied for, or is about to be gazetted or has been gazetted affecting the property in question and upon gazettment the restriction shall take effect as a charge over the land. 137. (1) The Registrar shall give notice in writing of a restriction to the proprietor affected thereby. (2) So long as any restriction remains registered, no instrument which is inconsistent with it shall be registered except by order of the Court or of the Registrar. 138. (1) The Registrar may at any time, upon application by any person interested or of his own motion, and after giving the parties affected thereby an opportunity of being heard, order the removal or variation of a restriction. (2) Upon the application of any proprietor affected by a restriction, and upon notice thereof to the Registrar, the Court may order a restriction to be removed or varied, or make such other order as it thinks fit, and may make an order as to costs.

98. From the foregoing paras the Court has held that the restriction was not valid given that it was not signed by the Land Registrar. Further even if it was validly registered, the said restriction would still not meet the process of the law. The restriction was allegedly lodged in 1994 when the Plaintiff was already the registered owner of the land. There is no evidence that the Plaintiff was notified of the reasons for restricting the land in accordance section 136 aforesaid.

99. I find no justifiable reason for the continued presence of the restriction. It should be removed.

100. Section 2 of the Historical Land Injustices Rules 2016 define historical injustice as a grievance which occurred between 15th June 1895 when Kenya became a protectorate under the British East African Protectorate and 27th August, 2010 when the Constitution of Kenya was promulgated and which have not been sufficiently resolved. The Plaintiff has argued that the 3rd Defendant has not protected it from historical injustices. This prayer was not argued and it is not clear what the Plaintiff meant by historical injustices.

101. Finally, the 1st Defendant has argued that the road reserves are for the good of the general public. It submitted to the Court that the interest of the public should outway the private rights of the Plaintiff in this case. The Constitution guarantees the right to property to any person, the Plaintiff included. These rights are only subject to limitations as provided by law which is that 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 for under Art 40. I am unable to derogate on the rights of the Plaintiff in the manner suggested by the 1st Defendant. The actions of the Defendants in the manner in which it purported to acquire the road reserve 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.”

102. 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...”

103. The 1st Defendant has failed to proof that the land was compulsory acquired nor that it has any other lawful interest in the suit lands. According to the green cards the registered owner of the lands is the Plaintiff. The Plaintiff has proved that he is the registered owner of the suit lands and is entitled to protection of the law as provided for under sections 24, 25 and 26 of the Land Registration Act.

104. The Plaintiff has won the case and I see no reason not to grant a permanent injunction against the 1st Defendant as prayed.

105. In the upshot the Court allows the Plaintiffs claim in terms of prayers a, b d and e.

106. Prayer c is declined.

107. The costs of the suit shall be payable by the Defendants jointly and severally in favour of the Plaintiff.

108. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANGA THIS 24TH DAY OF OCTOBER 2019

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Kirubi for the Plaintiff

Mugo HB for Ms Ndirangu for the 1st Defendant

Attorney General for the 2nd Defendant Absent

3rd Defendant – Absent

Kuiyaki and Njeri, Court Assistants