



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CONSTITUTIONAL PETITION NO. 10 OF 2014

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF ARTICLE 10,
27, 28, 30, 31, 32, 35, 40, 47, 60 AND 62 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: THE BILL OF RIGHTS UNDER CHAPTER
FOUR OF THE CONSTITUTION OF KENYA, 2010, THE UNIVERSAL
DECLARATION ON HUMAN RIGHTS (1984) AND THE**

AFRICAN CHARTER ON HMAN RIGHTS

AND

**IN THE MATTER OF: THE ENFORCEMENT OF FUNDAMENTAL
RIGHTS AND FREEDOMS OF INDIVIDUAL (SUPERVISORY JURISDICTION)
PRACTICE AND PROCEDURE RULES 2006 AND PART 5 RULE 19 OF THE
SIXTH SCHEDULE OF THE CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF PART VIII OF THE LAND ACT

AND

**IN THE MATTEER OF: THE DISREGARD FOR NATIONAL VALUES AND PRINCIPLES,
QUALITY AND FREEDOM FROM DISCRIMINATION, RELIGION,
FAIR ADMINISTRATIVE ACTION, SECURITY AND PRIVACY OF PERSONS,
ARBITRARY DEPREVIATION AND DISPOSSESSION OF PROPERTY, AND FAILURE
TO ADHERE TO CONSTITUTIONAL PRINCIPLES OF LAND POLICY IN KENYA**

BETWEEN

1. OMAR ABDALLA JELANI

2. KASSIM SHAHALI ALI

3. SHUMI BAMKUU

4. KHAIRU OMAR

5. SWALEH MOHAMED ATIK

6. MOHAMED RAJAB (Suing of their own behalf and on behalf of

all other affected members in the area(PAPs).....PETITIONERS

VERSUS

THE HON. THE ATTORNEY GENERAL.....1ST RESPONDENT

MINISTRY OF LANDS, HOUSING AND URBAN DEVELOPMENT...2ND RESPONDENT

KENYA PORTS AUTHORITY.....3RD RESPONDENT

LAPSET CORRIDOR DEV. AUTHORITY.....4TH DEFENDANT

NATIONAL LAND COMMISSION.....5TH RESPONDENT

RULING

1. By a Notice of Motion dated 19th December 2017 but filed herein on 4th May 2018, the Petitioners herein pray for orders framed as follows: -

1.

2. That this Honourable Court be pleased to issue an order to have this matter marked as compromised (and) fully settled and the file be closed subject to payment of costs.

3. That this Honourable Court be pleased to determine whether party and party costs are payable and by whom they are so payable.

4. That the party and party costs of this suit be assessed by this Honourable Court at Kshs 132,511,044.00/-

5. That the party and party costs so assessed and/or agreed or taxed by the taxing master be paid by the 5th Respondent herein(the) National Land Commission and or any other party that this Honourable court may deem fit.

6. That the costs of this application be in the cause.

2. The application which is supported by an Affidavit sworn by Christine Kituyi, Advocate for the Petitioners is premised on the grounds: -

i) That on 25th November 2014, M/s George Wakahiu & Njenga Advocates filed this Petition in respect of 146 Claimants seeking various prerogative orders against the Respondents;

ii) That an order of prohibition was thereafter issued against the 2nd Respondent for 14 days barring them from surveying, demarcating, issuing titles or in any other manner interfering with the Petitioners' occupation of their respective parcels of land pending the hearing of the Petition.

iii) That the said Petitioners Advocates further obtained a consent order to enjoin to this suit all affected persons who occupy/own land at Kililana, Mashudwani and Hindi Magogoni Settlement Scheme;

iv) That the 5th Respondent then proceeded to verify the list of affected persons and upon receipt of money from the 3rd Respondent, proceeded to secretly compensate the Petitioners without factoring in the aspect of legal costs payable;

v) That despite the compensation paid to the Petitioners, the issue of party and party costs was never addressed and it is now the Petitioners' prayer that a determination be made thereon.

3. The application is opposed by the Honourable the Attorney General (the 1st Respondent), the Kenya Ports Authority (the 3rd Respondent) as well as the National Land Commission (the 5th Respondent).

4. In Grounds of Opposition filed by Ms Ruth C. Lutta Senior State Counsel dated 25th July 2018, the Honourable the Attorney General is

opposed to the application on the grounds: -

- 1. That the application is incompetent, misconceived and fatally defective.**
- 2. That the application is bad in law, incompetent and procedurally improper.**
- 3. That the costs claimed by the Applicant are exaggerated and unfounded and contrary to law considering the matter was filed as a Petition which was seeking declaratory and prerogative orders.**
- 4. That(the) orders sought for cannot be granted as such would be unconstitutional for being in violation of the procedure provided for under the law.**
- 5. That this Honourable Court cannot be expected to issue orders in vain, without a proper legal basis.**
- 6. That this Honourable Court lacks jurisdiction to deal with the issues raised in the Motion and the Respondent shall at the earliest instance seek determination on the issue of jurisdiction.**
- 7. That the Plaintiff's application is therefore incurably defective and ought to be dismissed with costs.**

5. In a Replying Affidavit sworn on its behalf by the Head of Litigation and Disputes John Turasha, the 3rd Respondent avers that the Lamu Project which caused the filing of this Petition is being implemented under the mandate and responsibility of the LAPSET Corridor Development Authority (the 4th Respondent) and the role of the 3rd Respondent was only a minor one of releasing funds as directed by the Government and it cannot be held responsible in any way for alleged delays in the compensation process and the costs due to the Applicants.

6. The 3rd Respondent further asserts that the sum of Kshs 132,511,044.97/- demanded by the Petitioners is exorbitant and contrary to the law considering that this was a Constitutional Petition settled by consent. It is further their case that they are unable to challenge the sum demanded in the context of the current application as it is not clear what rationale, law, facts and/or disbursements have been considered in arriving at the figures.

7. Similarly, in a Replying Affidavit sworn on its behalf by its Acting Director Legal Affairs Brian Ikol, the 5th Respondent avers that the Petition herein is still alive and not settled and therefore the Petitioners' prayer for costs is premature and an abuse of the Court process.

8. The 5th Respondent further avers that the Applicants have not provided a basis for the sum of Kshs 132,511,044.96/- claimed as party and party costs and urge that the application be dismissed as in any event, the 5th Respondent is not liable for any costs incurred by the Petitioners it having not been the acquiring entity.

9. I have considered the application before me and the respective responses thereto. I have equally perused and considered the detailed written submissions as filed by the Learned Counsels for the parties.

10. This Petition was lodged on 25th November 2014 by some six Petitioners seeking various declaratory and prohibitory orders against the five Government agencies named herein as the Respondents. The Petitioners also sought an order directed at the Ministry of Transport and Infrastructure (which was not enjoined specifically as a party herein) as well as the Chairman of the Kenya Ports Authority (the 3rd Respondent) to honour the list of the 146 beneficiaries, and to compensate them for their land at the rate of Kshs 1,500,000/- per acre.

11. Thereafter all the Respondents filed their respective responses to the Petition together with an interlocutory application filed therewith also dated 25th November 2014. When that interlocutory application was placed before the Honourable Justice Angote on 26th November 2014, the Learned Judge granted orders of injunction and prohibition restraining the Respondents from engaging in certain activities including interfering with the Petitioners occupation of their respective parcels of land pending the hearing of the Petition inter partes.

12. Subsequently the parties appeared to have entered into negotiations and by a Consent Order dated and filed in Court on 8th December 2014, the parties agreed as follows: -

- 1) That the on-going verification on project affected persons be completed within 14 days as from 8th December 2014;**
- 2) That parties herein endeavour to engage and keep duly updated the project affected persons about the ongoing verification process of the project affected persons. After the verification process, the list of affected persons should be shared amongst all the affected parties;**
- 3) That interim orders issued in Clause 2 and 3 of the Order dated 27th November 2014 be vacated until further orders on 12th January 2015;**
- 4) That the parties herein concur that this is a representative suit and the Advocate of the Petitioners undertakes to enjoin to this suit all projected affected persons who occupy/own land at Kililana, Mashudwani and Hindi Magogoni Settlement Scheme within 14 days as from 1st December 2014; and**
- 5) That this matter be mentioned on 12th January 2015 so that the Honourable Court either confirms compliance with this**

consent and therefore issues further orders or the Court reinstates Court orders issued in the Court Order dated 27th November 2014 if the parties herein would have breached undertakings which adversely affect the interests of the Petitioners as described in Clause (1), (2) and (4) hereinabove.

13. Thereafter by a consent again recorded in Court on 11th February 2015, the parties agreed that the 3rd Defendant be granted time to release funds for compensation of the Petitioners to the National Land Commission (the 5th Respondent).

14. It is now the case of Counsel for the Petitioners that the 5th Respondent proceeded to verify a list of the beneficiaries without the involvement of the Advocates and that subsequently, the Petitioners were secretly paid compensation for their land.

15. It is the Applicant's case that in view of the payments made by the 5th Respondent to the Petitioners, this suit has been substantially satisfied, settled and/or compromised and all that remains pending is the issue of costs.

16. I have perused and considered the substance of the Petition herein and the prayers made therein. It is apparent to me that the bedrock of the Petitioners claim was compensation of their land which was being acquired by the Government through various agencies for the establishment of the LAPSET Project. It was the Petitioners case before this Court that the Government should be prohibited from taking their land for the Project unless and until they were properly identified and compensated.

17. The Application before me is brought inter alia under the provisions of Order 25 Rule 5 of the Civil Procedure Rules as well as Sections 1A, 1B, 3A and 27 of the Civil Procedure Act. The said Order 25 Rule 5 provides as follows: -

5(1) Where it is proved to the satisfaction of the Court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise or where the Defendant satisfies the Plaintiff in respect of the whole or any part of the subject matter of the suit, the Court shall on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter Judgment in accordance therewith.

(2) The Court, on the application of any party, may make any further orders necessary for the implementation and execution of the terms of the decree.

18. I note from the 3rd Respondent's Replying Affidavit that they admit having released the sum of Kshs 1,319,586,674.55/- to the 5th Respondent for compensation of the Petitioners. While the 5th Respondent protests in its Replying Affidavit that this suit remains alive and that it has not been compromised the record reveals that the 5th Respondent compensated the parties and supplied the other parties with a list of those that were compensated. That list is attached to the application herein as annexure CK2 to the Supporting Affidavit.

19. In view of the foregoing and more so the admission by the Petitioners Advocates that the Petitioners were compensated, I am satisfied that this suit has been substantially settled and/or compromised.

20. That settlement as it were was arrived at after the Respondents were dragged to Court and they filed various responses objecting to the Petitioners' demands for payment. As a result, the Petitioners now urge this Court to determine that they are entitled to be paid costs which they urge this Court to assess at Kshs 132,511,044.96/-.

21. Section 27 of the Civil Procedure Act provides as follows in regard to the issue of costs: -

27(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid; and the fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of those powers;

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the Court or Judge shall for good reason otherwise direct."

22. Considering the meaning of the word "the extent" as envisaged under Section 27 of the Civil Procedure Act, ***in Cecellia Kamuru Ngayu -vs- Barclays Bank of Kenya & Another (2016) eKLR***, Mativo J, citing the wittings of Justice (Retired) Richard Kuloba in Judicial Hints on Civil Procedure (2nd Edition, 2011 page 99) states as follows:-

"The words "the extent" mean the result of all the proceedings to the litigation. The event is the result of the entire litigation. It is clear however, that the word "event" is to be regarded as a collective noun and is to be read distinctively so that in fact it may mean the "events" of separate issues in an action. Thus the expression "the cost shall follow the event" means that the party who on the whole succeeds in the action gets the general costs of the action, but that, where the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it. An issue in this sense need not go to the whole cause of action, but includes any issue which has a direct and definite event in defeating the claim to Judgment in the whole or in part."

23. In the matter before me, I am persuaded that the Petitioners rightfully came to Court to protect what they perceived to be the Respondents intention to take away their parcels of land for the implementation of the LAPSET Project without compensation. The Respondents saw the sense in their demands and hence the compromise that was reached herein.

24. Considering the entire chain of events from the time of filing this suit up until the time the Petitioners were compensated for their parcels of land, and taking into account the numerous Court attendances, I find no reason to deny the Petitioners the costs of that litigation. I did not however think it falls within my province to assess the costs payable in the manner proposed by the Petitioners Advocates herein.

25. Accordingly, and in the result, I hereby make the following orders: -

a) That this matter is hereby marked as compromised and fully settled subject to payment of costs.

b) That the Respondents do pay to the Petitioners the cost of this case as may be agreed or taxed by the Taxing Master of this Court.

c) The costs of this application shall be in the cause.

26. Order accordingly.

Dated, signed and delivered at Malindi this 8th day of October, 2019.

J.O. OLOLA

JUDGE