



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC PETITION CASE NO. 4 OF 2016**

**IN THE MATTER OF ARTICLE 22(1), 23(1), (3) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 40(3), 4 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF PART VIII OF THE LAND ACT, 2012**

**AND**

**IN THE MATTER OF COMPULSORY ACQUISITION OF LAND REFERENCE NO. SIPILI/NDONYOLOIP/BLOCK 2/5261**

**BETWEEN**

**EDWARD KIGIRA GACHUIRI.....PETITIONER**

**-VERSUS-**

**THE BOARD OF GOVERNORS, GITHIMA PRIMARY SCHOOL.....1ST RESPONDENT**

**THE HON. ATTORNEY GENERAL**

**(Sued on behalf of the MINISTRY OF EDUCATION.....2ND RESPONDENT**

**JUDGMENT**

1. The petitioner herein, **Edward Kigira Gachuri**, who has described himself as a member of Nakuru Mutukanio Company Limited (hereinafter referred to as the company), brought this suit seeking the reliefs listed hereunder against the respondents.
2. The petitioner's case is that the 1st respondent, the BOG Githima Primary School, compulsorily acquired his plots which border the school to wit plots Nos. 1117F and 1118F with a promise to compensate him which promise never materialized.
3. The petitioner laments that his attempts to secure compensation for the alleged compulsory acquisition of his plots have been in vain.
4. Maintaining that the acquisition of his plots by the respondents was unlawful and against his constitutional rights, the petitioner urges the court to enter judgment in his favour and against the respondents for:

**(a) A declaration that he was the rightful owner of plot No.1117F and 1118F after the plots were allocated to him by the company.**

**(b) A declaration that the occupation of the parcels of land referred to in (i) above by the respondents was unlawful because the respondents did not comply with the law in taking over the parcels from him.**

(c) A declaration that the acquisition of the parcels referred to in (i) above by the respondents is a violation of his right to property under Article 40(1) of the Constitution of Kenya 2010 (COK, 2010);

(d) A declaration that he is entitled to compensation by the respondents on account of Article 40(4) of the COK, 2010 as follows:-

(i) By land of same value elsewhere within the locality/same block;

(ii) By a fair price of the 6 acres including the loss of use for the said period which in figures constitutes;

(a) The market value of the land at Kshs 100,000/- per acre

(b) Loss of user since 1976 to date at Kshs.3 600,000/= per annum.

(iii) General damages to include loss of earnings and benefits;

(iv) Interest on (i), (ii) and (iii) at court rates.

(v) Costs and interest.

(vi) Such other orders as this honourable court may deem fit to grant.

5. The petition is supported by the affidavit (supporting) of the petitioner sworn on 23rd August, 2016 on which the averments on the face of the petition are reiterated.

6. In support of the averments in the petition, the petitioner has annexed the following documents to the affidavit:-

A copy of green card showing that the parcel of land Known as Sipili/Ndonyoloip Block 2/5261 was registered in the name of the company before it was transferred to the 2nd respondent, marked **EKG 1**;

(i) Ballot papers allegedly issued to him in respect of plot Nos.1117F and 1118F by the company, marked **EKG 2 (a) and (b)**;

(ii) A letter written to him by the Chairman Githima Block D dated 31.10.1979 informing him that Githima Committee met, discussed all matters concerning his parcels of land and decided he should avail himself to be given the land, marked **EKG-3**;

(iii) Letter from Education Officer Ol' Ngarua Division dated 19th October, 1994 to the Chief Sipili Location informing the chief that his office had received the petitioner's complaint that his plots to wit, plots No.1117F, 1118F, 1119F had been taken over by Githima Primary School with a promise that he was going to be given alternative plots elsewhere. (The letter, which is marked **EKG-4**, was inviting the Headmaster and the Chairman Githima Primary School to attend a discussion on the complaint by the petitioner to be held on 24th November, 1994).

(iv) Notice to the Attorney General dated 4th October, 2013;

(vi) Letter from the office of the Attorney General to the Cabinet Secretary Ministry of Education dated 10th October, 2013 forwarding the petitioner's notice of intention to sue to the Ministry of Education and requiring the Ministry to furnish the Attorney General with instructions to enable his office defend the claim.

(viii) Letter from the office of the Attorney General to the petitioner's advocate dated 26th November, 2013 requesting for more information and supporting documentation to the petitioner's claim.

7. The petition is undefended as the respondents, despite having been served with the petition never filed any response.

8. Pursuant to directions issued on 15th November, 2017 the petition was disposed of by way of written submissions.

#### **Petitioner's submissions**

9. In the submissions filed on behalf of the petitioner, an overview of the petitioner's case as pleaded is given and submitted that the evidence adduced in this suit shows that the company herein, where the petitioner was a member, is the one which owned the parent parcel of land before it was transferred to the 1st respondent.

10. It is contended that the plots which formed part of the parent parcel of land were transferred to the school after they were compulsorily acquired from the petitioner.

11. To demonstrate that the plots in question were allocated to the petitioner, it is pointed out that the petitioner annexed ballot cards bearing the stamp of the company to his supporting affidavit.

12. The letter from the Chairman Githima Block D and from the Education Officer which intimate that there was a dispute concerning the petitioner's claim to the plots herein are said to be proof that the petitioner's plots herein were compulsorily acquired by the 1st respondent.

13. Because the petition is undefended, the pleaded facts are said to be undisputed and uncontroverted and the court urged to allow the petition as prayed.

14. According to the petitioner, his right to property was protected under the repealed Constitution, **Section 75** thereof and under the Land Acquisition Act now repealed.

15. Maintaining that he was arbitrarily deprived of the suit property without compensation, the petitioner flanks out the law and procedures to be followed before land can be compulsorily acquired and maintains that the law was not complied with in acquiring his land.

16. The petitioner urges the court, in considering her claim, to be persuaded by the decisions in the cases of Republic v. Commissioner of lands & another *ex parte* Coastal Aquaculture Limited (2000) e KLR, Rutongot Farm Limited v. Attorney General & 3 others (2014) e KLR and Re estate of William Kimgeny Arap Letin (deceased) (2016) e KLR where the courts found in favour of the petitioners in those suits.

### **Analysis and determination**

17. From the pleadings filed in this matter and the submission made in respect thereof, I find the sole issue for determination to be whether the petitioner has made a case for being granted the orders sought or any of them.

18. With regard to that question, I begin by pointing out that the evidence adduced in this matter shows that the land which was transferred to the 1st respondent belonged to the company, Nakuru Mutukanio Farmers Limited.

19. Whereas the petitioner claims that plots No.1117F and 1118F were allocated to him by the company and compulsorily acquired by the 1st respondent, the evidence relied on is incapable of showing that the 1st respondent obtained its title from the company; secondly, no evidence has been adduced capable of showing that the land transferred to the 1st respondent composed of land belonging to the petitioner; thirdly, no evidence has been adduced capable of proving that the plots allegedly issued to the petitioner by the company were issued to him. This is so because, apart from indicating that the ballots relied on came from the company, there was nothing in those ballots capable of indicating that they were issued to the petitioner or showing that the petitioner was eventually issued with which parcels of land and where.

20. Despite the petitioner's case being undefended, the petitioner had a duty to link the ballots relied on by him to himself and to demonstrate that pursuant to those ballots, he was allocated land which the 1st respondent unlawfully took possession of. I am afraid, the evidence adduced in this case is incapable of proving that fact. The only fact the evidence proves is that there was a dispute between the 1st respondent and the petitioner over those parcels of land which dispute is not proof of the allegation that the 1st respondent compulsorily acquired his plots of land.

21. There being no evidence what the resolution in respect of that dispute was, I reiterate that the evidence cannot prove that the plots in question belonged to the petitioner and that they were unlawfully acquired by the 1st respondent.

22. By dint of the provisions of **Section 107** of the Evidence Act, Cap 80 Laws of Kenya, the duty of proving that the plots referred to herein above ended up being registered as part of the land held by the 1st respondent in circumstances that amounted to compulsory acquisition of the plots by the respondents, lay with the petitioner.

23. In view of what I have stated herein above, I find and hold that the petitioner has not made up a case for being granted the orders sought. Consequently, I find the petition to be lacking in merit and dismiss it with no orders as to costs as it was undefended.

**Dated, Signed and Delivered in open court at Nyeri this 10th day of May, 2018.**

**L N WAITHAKA**

**JUDGE**

Coram:

Mr. Kinuthia h/b for Mr. Gori for the petition

N/A for the 1st & 2nd respondents

Court assistant - Esther