



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC PETITION CASE NO. 3 OF 2017

IN THE MATTER OF ARTICLE 22(1), 21(3),

23(3)(a) (e) 40(1) (3) and (4) OF

THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTION 111 OF

THE LAND ACT NO. 6 OF 2012

AND

IN THE MATTER OF SECTION 13(2)(b), 13(7)((c)(d)(h)(i) OF THE ENVIRONMENT AND

LAND COURT ACT NO. 19 OF 2011

AND

IN THE MATTER OF SECTION 15 OF THE NATIONAL LAND COMMISSION ACT NO.5 OF 2012

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS)

PRACTICE AND PROCEDURE RULES 2013

BETWEEN

CHARLES MAINA MURACHU.....1ST PETITIONER

JOSEPH WAMBUGU THINJI.....2ND PETITIONER

AND

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE MINISTRY OF HEALTH.....2ND RESPONDENT

JUDGMENT

1. The petitioners herein who have described themselves as the administrators and legal representatives of the estates of Mary Wangechi Karoing'o and Thinji Kihuni respectively filed this petition seeking judgment against the respondents for a declaration that the respondents have violated their right to land and their families' right to land under **Article 40(3)** of the Constitution of Kenya, 2010 by

failing to give them full, just and prompt compensation in respect of their parcels of land which were compulsorily acquired by government sometime in 1979 or there about; an order compelling the respondents to compensate their families justly, fairly and promptly taking into account prevailing market rates for equivalent parcels of land to those compulsorily acquired by the government; any other remedy or relief as the court may deem fit to grant.

2. The petitioner's claim is premised on the ground that sometime in 1979, the Government acquired their parcels of land namely **Othaya/Kiahagu 165, 166 and 167** (hereinafter referred to as the suit properties) for constructing Othaya Cottage Hospital but failed to compensate them as by law required. The petitioners also contend that the applicable legal procedures were not complied with in the acquisition of their land. As a consequence, they suffered and have continued suffering loss and prejudice-their families and them were rendered destitute, homeless, hopeless as they were left without any source of livelihood.

3. The petition is supported by an affidavit of the petitioners where the grounds and the averments on the face of the petition are reiterated.

4. In reply and opposition to the petition, the respondents have deposed that the applicable laws and procedures were complied with in acquiring the suit properties; that the owners of the suit properties were compensated and that no complaint was raised by the owners concerning the compensation paid or the process that led to acquisition of the suit properties.

5. Terming the complaints that were later lodged by the petitioners concerning the acquisition of the suit properties an afterthought and the petition herein an abuse of the court process, the respondents point out that through the letter marked **CTM 11** annexed to the petitioners' supporting affidavit, the petitioners have acknowledged having received compensation in respect of the suit property though they complain that it was inadequate.

6. Pursuant to directions issued on 20th February 2018, the petition was disposed off by way of written submissions.

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

8. With regard to that question, I begin by pointing out that through the letter mentioned in paragraph 2 above which forms part of the petitioners own evidence, the petitioners acknowledge that compensation was paid in respect of the impugned acquisition. The only issue arising from that letter and the other documents relied on in support of the petitioners' claim, is that the petitioners were not satisfied with the award. In that regard, see the document referred to above, being a letter from the petitioners & 5 other persons to the then Minister for Lands, Amos Kimunya, dated 20th April, 2004 where the petitioners addressed the minister as follows:-

"Dear Minister,

RE: DISPUTE LAND COMPENSATION CLAIM, OTHAYA SUB-DISTRICT HOSPITAL (OTHAYA TOWN) SIX CLAIMANTS VS. REPUBLIC OF KENYA

1. We do humbly appeal the disputed matter in reference so that the same may be settled amicably in the essence of land law as per government land acquisition Cap 295 Act;

2. That the matter arising to be considered is as to how the Republic of Kenya ought to compensate the claimants for their land which was acquired by the state for the extension of the said Hospital in reference herein in 1979 (Othaya town) Nyeri district.

3.

4. That we have pursued this painful and hearty matter in vain to various government offices in the former regime and that the disputed issue has not been settled and hence

do arise our plea/appeal to your good offices seeking your assistance for the same to be settled as per Land Acquisition Act as contained in law of the land;

5. That the Beneficiaries (land owners) were paid at Kshs.9151/= per acre; contrary to Kshs. 120,000/= per acre land value by then which could not even purchase a small land plot elsewhere and that we were forced to lead and live in squatter life which was contrary to our life wish since we did surrender our family land to the state in good faith without adequate compensation and as such it was land grumbling by the state from the claimants which is against the rule of law;

6. Do refer the annexed documents val 497 dated 27/4/1979 for verification of facts and the truth on the disputed matter. (Mary Wangechi Karoingo-Plot No. Othaya Kiahagu 165) land measuring 3.8 acres for Kshs.34,755/= and development at 9,495/= totalling to only Kshs. 44,275 paid in cash form. And we do query as to how and why a land plot of one acre could not fetch more

than 10,000/= for we were paid too less than the said amount.

7.NOTE: as per clause No. 6 all beneficiaries were paid land compensation value at the rate in reference of less than Kshs.

10,000/= per land acre.

8. That it's a pity that the former government did ignore and neglected to pay the beneficiaries the right award on the disputed land plots although the claimant have petitioned the same without no valid assistance forthcoming from the state and that the claimants do lodge this final claim for a redress on the same for justice delayed is justice denied on the part of the claimants contrary to the rule of the rule....”.

9. It is clear from the contents of the foregoing letter, that contrary to the petitioners' contention that they were not compensated, they were indeed compensated only that they were not satisfied with the compensation.

10. Going by the averments contained in the petitioners' pleading (petition) in paragraphs 7 and 20 thereof, it appears that from 1979 when the suit properties were compulsorily acquired to about 2004, more than 20 years after the alleged illegal acquisition, the petitioners had not raised any issue concerning the alleged breaches of law in the acquisition of the suit properties by respondents.

11. As pointed out in the submissions filed on behalf of the respondents, the law provides for a procedure which any person aggrieved with the acquisition process or the award could use to challenge the process or the award. In this regard see **Section 29** of the Land Acquisition Act, Cap 295 Laws of Kenya (now repealed) which provided as follows:-

“29(1) The right of access to the High Court conferred by section 75(2) of the Constitution on an interested person shall be by way of appeal (exercisable as of right at the instant of a person interested from the decision of a tribunal.

(7)A person interested who is dissatisfied with the award of the commissioner may apply to the tribunal in the prescribed manner for-

a. the determination of his her interest or right in or over the land;

b. the amount of compensation awarded to him under section 10; or

c. to amount of compensation awarded to him under section 5, 9, 23, 25 or 26.”

12. By dint of the provisions of **Section 35** of the Act, no proceedings could be brought in court questioning an award by the Commissioner. The right procedure was to apply to the tribunal in the prescribed manner.

13. The petitioners who have neither demonstrated that they used the procedure provided in law for asserting their rights to the suit property and/or challenging the award awarded to them nor given any satisfactory reasons for failure to use that procedure cannot be heard to say that their rights were violated on account of the alleged inadequate compensation.

14. Concerning the merits of the petition, no evidence was adduced capable of demonstrating that the amount paid to the petitioners was not in accordance with the value of the land at the time the land was acquired. It is not enough for the petitioners to claim that the amount awarded was grossly low. It behooved them to prove that fact by production of say a valuation report done at the time the acquisition was done to guide the court in making a determination on that issue. No such valuation report or any document capable of guiding the court on the value of the suit property at the material time was availed.

15. Being the ones who premised their case on the assertion that the respondents did not comply with the applicable law and procedures while carrying out the impugned acquisition of the suit properties and who would fail if that fact was not proven, it equally behooved the petitioners to prove that there was no compliance with the law in carrying out the impugned acquisition. From the documents annexed to the petition and their admission that they were paid albeit an amount they consider inadequate, I am satisfied that the law and the applicable procedures were complied with in effecting the acquisition of the suit properties.

16. The upshot of the foregoing is that the petitioners have not made up a case for being granted the orders sought or any of them. Consequently, I find the petition to be devoid of any merit and dismiss it but with no orders as to cost.

Dated, Signed and Delivered at Nyeri this 31st day of July, 2018.

L N WAITHAKA

JUDGE

Coram:

Mr. Kiboi for petitioners

Mr. Njoroge for the respondents

Court assistant - Esther