



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC PETITION N0.15 OF 2017

IN THE MATTER OF ENFORCEMENTS OF RIGHTS AND FUNDAMENTAL FREEDOMS

UNDER CHAPTER FOUR ARTICLES 22 AND 23 (I) AND 3 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS OF THE INDIVIDUAL UNDER ARTICLES 40, 43 AND 47 OF THE CONSTITUTION

AND

IN THE MATTER OF THE INTENDED EXPANSION OF BUTAMU-CHURCH OF GOD ROAD IN LUANDA

ISAIAH OTIATO

JACKSON A. ATICH

LIVINGSTONE ETALE

MUSSA O. MBALANYA

DANIEL OTWOMA

JOEL OKONJI

FREDRICK TOKA PETITIONERS

VERSUS

COUNTY GOVERNMENT OF VIHIGA RESPONDENT

JUDGEMENT

The Petitioners approached this Honorable Court vide Petition dated 10th of August 2016 praying for orders that;

1. A Declaration that the intended expansion of Butamu-Church of God road in Luanda Ward is unconstitutional and is in breach of the petitioner’s economic and social rights.
2. An order declaring that the Respondent’s action in seeking to curtail, undermine and/or deprive the petitioners off their rights to their various properties within Luanda Ward without just cause and adequate compensation is unfair, unlawful and unconstitutional.
3. An order preserving the Petitioners parcels
4. In Alternative to prayer (3) The Respondents be ordered to adequately compensate the petitioners before compulsorily acquiring their parcels.
5. Cost of the petition.

6. Any other suitable and/or alternative relief this Honorable Court may deem fit and just to grant.

The Petitioners avers that on or about 23rd July 2016, servants and/or agents of the Respondent without any legal notice or warning entered upon various land parcels within Luanda Ward and marked them without informing the respective owners of the lands the reason for their action but later on at a funeral, the area Assistant Chief announced that the County Government marked the parcels for expansion of Butamu-Church of God road. The Respondent did not publish notice of intention to acquire and notice of inquiry on the County Gazette or Kenya Gazette or rather follow the correct procedure as it required by the law, all that the Respondent did was to issue verbal notices through the Assistant Chief who delivered the message in two funerals.

The Respondent did not appoint a date for an inquiry to hear issues of property claims and for compensation of persons with stake in various land parcels. The Respondent also did not apply public participation with relation to the intended compulsory acquisition. The Respondent ought to engage the public and most of all the Petitioners before acquiring their various parcels of land. One of the core values of public participation is based on the belief that those who are affected by a decision have a right to be involved in the decision-making process.

Attempts by the Petitioners to amicably resolve this matter has been frustrated by the Respondent who have wilfully refused and/or neglected to meet them for any further consultative meeting and further maintain that there will be no compensation for any land acquired compulsorily. The intended expansion is likely to affect various schools, dispensaries and churches for instance Mumboha Church of God and even The Salvation Army Luanda which will be of great and serious loss to the area residents.

Whenever there is need for compulsory acquisition of a citizen's property and/or land there must be just, full and prompt compensation for the affected persons to commensurate the loss that is to be incurred. The Respondent does not have any right over the various parcels of land within the ward without duly compensating the Petitioners for their losses. The intended actions of the Respondent on the Petitioners is an infringement of their constitutional rights to peaceful and use of their properties. The Petitioners have lived on the parcels of land for as long as they have lived as they are their ancestral lands and they are at risk of being rendered homeless if the Respondent is not barred from compulsory acquiring their parcels. The Petitioners contends that the arbitrary decision impedes the enjoyment of their rights and fundamental freedoms they are entitled to.

Article 2 of the Constitution of Kenya 2010 established the Supremacy of the Constitution and provides that the Constitution binds all the state organs at both levels of the Government. The Constitution is the supreme law of the country and the Respondent are in breach of the Constitution by not violating the rights of Petitioners e.g. the right to acquire and own property and also the Petitioners are arbitrarily denied the right to enjoy their property. In the case of Christopher Ndarathi Murungaru vs Kenya Anti-Corruption & Hon. Attorney General (2006), it was held that

“The constitution 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”

The Respondent should uphold the provisions of the Constitution.

Article 2 (4) of the Constitution of Kenya 2010 provides that any act or omission in contravention of the Constitution is invalid. The Respondent's actions are in contravention with this Constitution by not compensating the Petitioners and channeling the proper way of acquiring the land parcels. The Respondent's actions by entering the Petitioners land and marking their parcels of land clearly are in contravention with the Constitution by virtue of Article 40 which explain that no one should be should be arbitrarily deprived of property or In any way restricted from the enjoying their own property, most of all they trespassed the Petitioners land because they had no colour of right to enter the various parcels of land and marking those lands without permission.

Article 3 of the Constitution of Kenya 2010 obligates every person to respect, uphold and defend the Constitution. The Respondent clearly does not respect, uphold or even defend the constitution because if they did they would respect the rights accrued to the Petitioners by the Constitution by allowing the Petitioners to peacefully enjoy their properties which in this case is their land parcels.

Article 10 of the Constitution sets out the National Values and principles of Government that binds all state officers, state organs, public officers and all persons whenever they apply or interpret the Constitution, enact, apply or interpret any law, make or implement public policy decisions. Among the National values and principle of governance is the rule of law, participation of the people, human dignity, human right, social justice, non-discrimination, equality and protection of the marginalised. The Respondent specifically did not apply public participation in their Compulsory acquisition, they ought to accue them a fair hearing and engage them in the process but instead what they did was to trespass their various land parcels and they went as far as marking them without informing them. This clearly is in contravention with article 10 of the Constitution. The Respondent ought to engage the public and most of all the Petitioners before acquiring their various parcels of land. They state, one of the core values of public participation is based on the belief that those who are affected by a decision have a right to be involved in the decision-making process. Public participation has its benefits, for example, it increases trust between public officials and the community. The Respondent's action of not involving the public most of all the petitioners causes mistrust between the County Government and the Petitioners, in the case of Robert N. Gakuru & Others vs The Governor of Kiambu County & 3 Others, the learned Judge C. V. Odunga in his judgment stated that;

“In my view, public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purpose of fulfilment of the constitutional dictates.”

Article 40 of the Constitution of Kenya provides that every person has the right to acquire and own property and Article 40 (2) observes that no one should be arbitrarily deprived of property or in any way restricted from the enjoying their own property. The Petitioners have right to own their land and they should not be deprived or even restricted from enjoying their right. The Respondent restricted and deprived the

Petitioners from enjoying their land by acquiring their land parcels without following the due process which is illegal. In the case of Everlyn College of Design vs Director of Children's Department & AG Constitution Petition no. 228 of 2013, Constitution Petition No. 228 of 2013, the Learned Judge P.S. Majanja stated in his judgment that;

"I would once again emphasise that a finding of "unlawful acquisition" referred to in article 40(6) of the constitution must be through a legally established process and not by forcefully occupation of the property by the state institutions or by preventing a person from enjoying the incidents of ownership of property".

These lands are their ancestral land they are part of their inheritance hence they ought to be compensated.

Article 47 of the Constitution states that every person has a right to fair administrative action that is expeditious, effective, lawful, reasonable and procedurally fair. The Respondent ought to under Section 112 of the Land Act conduct a hearing and make full inquiry into and determine who are the persons Interested in the land. The Respondent didn't do that and they also did accrue the Petitioners a fair administrative action by making an inquiry and conducting a hearing for that purpose in the Judicial Review Miscellaneous Application no. 36 of 2016, Republic vs National Police Service Commission, the learned judge C. V Odunsa stated that;

"Procedural fairness is therefore now a constitutional requirement in administrative action and the requirement goes further than the traditional meaning of duty to afford one an opportunity of being heard. It is now dear that even in cases where there is no express requirement that a person be heard before a decision is made, the tribunal or authority entrusted with the mandate of making the decision must act fairly".

The Respondent action further violate the provisions of Article 42 and Section 8 of the Section 8 of the Environmental Management and Coordination Act 2015. The Respondents did not conduct a full Environment Impact Assessment before marking the various parcels of land for expansion. The constitution under article 42 provides that every person has a right to a clean and healthy environment. In the ELC case of Moffat Kamau & 9 Others vs Aelous Kenya Ltd Constitutional Petition No. 13 of 2015 at Nakuru, learned judge, Munyao Sila stated that;

"It has been my view which I still hold that, where the procedures for the protection of the environment are not followed, then an assumption may be drawn that the right to a clean and healthy environment is under threat. *Section 8 of the Environmental Management and Coordination Act 2015 observes that notwithstanding any approval, license, permit granted under any law in Kenya, before, financing, commencing, proceeding with, carrying out, executing or conducting a specified project, the project proponent must apply for and obtain an environmental impact assessment license*".

The intended compulsory acquisition of the land parcels to expand the Butamu-Church road could be harmful to the environment. Article 42 of the Constitution of Kenya 2010 states that every person has a right to a clean and healthy environment. Article 69 (f) of the Constitution of Kenya 2010 observe that the State has an obligation to protect the environment. This can be through environment impact Assessment. The Respondent neither conducted nor even produced any documents explaining if the compulsory acquisition is environmental friendly. The acquisition of the land parcels to expand the road could cause more damage than good to the environments and the residents.

The Respondents ought to conduct Environmental Impact Assessments and Environmental Audits to determine if it is lawful to expand the road which will not harm the residents. This proves that the Respondents intended actions are not lawful. Also there has not been any public participation or public awareness in the Environmental Impact Assessment which is yet to be carried out. The state has an obligation under Article 69 (d) of the Constitution of Kenya 2010 to encourage public participation in the management, protection and conservation of the environment. The Respondent ought to consider public participation before acquiring the various parcel of land.

The petitioners are absolutely and with every colour of right entitled to compensation. The various Land parcels are their ancestral home and their inheritance from their fore fathers as such part of their heritage as it is proved by the various title deeds that the Petitioners produced. It's only fair to appropriately and adequately compensate them for compulsory acquiring their land parcels.

Article 40 of the Constitution of Kenya provides that every person has the right to acquire and own property and Article 40 (2) observes that no one should be arbitrarily deprived of property or in any way restricted from the enjoying their own property. The actions of the Respondent contradict the Constitution as they violate the right of the Petitioners to acquire and own property. The law provides for compulsory acquisition therefore the Respondent ought to compensate the Petitioners for acquiring their land. The Petitioners should be adequately compensated. Section 8 in of the Land Act observes that if land is acquired compulsorily, a just compensation should be paid promptly in full to all persons whose interest in the land has been determined.

Section 8 of the Land Acquisition Act observes that," Where land is acquired compulsorily under this Part, full compensation shall be paid promptly to all persons interested in the land. The Petitioners are yet to be compensated for their land parcels.

Compulsory acquisition is provided by the law and also compensation for the compulsory acquisition is provided by the law, the Respondent ought to respect the law and follow the due process set out by the law under Section 115 of the Land Act. The Law provides the Petitioners may be compensated in form of monetary terms. Hon. Justice J.L Onguto in the case of Patrick Musimba vs. The National Land Commission and 5 others Petition No. 613 of 2014 stated in the judgment that,

"If land is so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined; see

section III of the Land Act. This is in line with the constitutional requirement under Article 40 (3) of the constitution that no person shall be deprived of his property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation”.

The process of Compulsory Acquisition is set out in the Land Acquisition Act Cap 295. The process is as follows;

Section 3 of the Act states that,

“Whenever the Minister is satisfied that the need is likely to arise for the acquisition of some particular land under section 6, the Commissioner may cause notice thereof to be published in the Gazette, and shall deliver a copy of the notice to every person who appears to him to be interested in the land.”

Section 4 of the Act provides that,

"The Commissioner may in writing authorize any person, together with servants and workmen, to enter upon any land specified in a notice published under section 3 and to survey the land and to do all things which may be reasonably necessary to ascertain whether the land is suitable for the purpose for which it may be required.

Section 4(2), An authorization under subsection (1) shall not empower a person to enter a building, or an enclosed court or garden attached to a dwelling house, unless— (a) he has first obtained the consent of the occupier; or (b) failing consent, he has served on the occupier not less than seven days' notice in writing of his intention so to enter”.

Section 5 of the Act provides that,

“As soon as practicable after entry has been made under section 4, the Commissioner shall make good or pay full compensation for any damage resulting from the entry”.

Section 6 of the Act provides that,

“Where the Minister is satisfied that any land is required for the purposes of a public body, and that— (a) the acquisition of the land 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 any property in such manner as to promote the public benefit: and (b) the necessity therefore is such as to afford reasonable justification for the causing of any hardship that may result to any person interested in the land, and so certifies in writing to the Commissioner, he may in writing direct the Commissioner to acquire the land compulsorily under this Part.”

Section 6 (2) states that

“On receiving a direction under subsection (1). The Commissioner shall cause a notice that the Government intends to acquire the land to be published in the Gazette, and shall serve a copy of the notice on every person who appears to him to be interested in the land”

The Land Acquisition act provides for the procedure for entry with the intent of compulsory acquiring the land. The Respondent trespassed thought the petitioner's land without permission hence illegally and went as far as marking their lands, they ought to compensate the Petitioners for the damages caused.

The process of Compulsory Acquisition is summarized by Hon. Justice J.L Onguto in the case of Patrick Musimba vs The National Land Commission and & others Petition No. 613 of 2014 as follows;

“Under Section 107 of the Land Act, the National Land Commission...is ordinarily promoted by the national or county government through the Cabinet Secretary or County Executive member respectively. The land must be acquired for a public purpose or in public interest as dictated by Article 40(3) of the Constitution, in our view, the threshold must be met: the reason for the acquisition must not be remote or fanciful. The National Land Commission needs to be satisfied in these respects and this it can do by undertaking the necessary diligent inquiries including interviewing the body intending to acquire the property.

Under Sections 107 and 110 of the Land Act the National Land Commission must then publish in the gazette a notice of the intention to acquire the land. The notice is also to be delivered to the Registrar as well as every person who appears to have an interest in the land. As part of the National Land Commission's due diligence strategy, the National Land Commission must also ensure that the land to be acquired is authenticated by the survey department for the rather obvious reason that the owner be identified, in the course of such inquiries, the National Land Commission is also to inspect the land and do all things as may be necessary to ascertain whether the land is suitable for the intended purpose”.

The foregoing process constitutes the preliminary or pre-inquiry stage of the acquisition. The burden at this stage is then cast upon the National Land Commission and as can be apparent from a methodical reading of Sections 107 through 110 of the Land Act, the land owners role is limited to that of a distant bystander with substantial interest.

Section 112 of the Land Act then involves the land owner directly for purposes of determining proprietary interest and compensation. The

section has an elaborate procedure with the National Land Commission enjoined to gazette an intended inquiry and the service of the notice of inquiry on every person attached. The inquiry hearing determines the persons interested and who are to be compensated. The National Land Commission exercises quasi-judicial powers at this stage.

On completion of the inquiry the National Land Commission makes a separate award of compensation for every person determined to be interested in the land and then offers compensation. The compensation may take either of the two forms prescribed, it could be a monetary award, it could also be land in lieu of the monetary award, if land of equivalent value, is available. Once the award is accepted, it must be promptly paid by the National Land Commission. Where it is not accepted then the payment is to be made into a special compensation account held by the National Land Commission.

The process is completed by the possession of the land in question being taken by the National Land Commission once payment is made even though the possession may actually be taken before all the procedures are followed through and no compensation has been made. The property is then deemed to have vested in the National or County Government as the case may be with both the proprietor and the land registrar being duly notified.

If land is so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined. This is in line with the Constitutional requirement under Article 40(3) of the Constitution that no person shall be deprived of his property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation.

The Constitution dictates that acquisition be in accordance with the provisions of the Constitution itself and any Act of Parliament. The Constitution itself provides for just compensation being made promptly.

In the case of *Rutongot Farm Limited vs Attorney General & 3 others* (2014) Eklr Petition No.1 of 2011 in the foregoing case. It was submitted by the Learned Judge Obaga, J that,

“unlawful acquisition of the petitioner's land by the Government was in breach of the petitioner's right to property and that the property of an individual cannot be undertaken unless in accordance with the constitutionally provided means”.

They submit that the Respondent clearly has not projected the proper procedure with their intention to acquire the land parcel. There were agents who trespassed into the Petitioners' land parcel without consent which is also illegal. The Respondent's actions are clear as day prove that they did not follow the due process in fact their action further are in contravention with the law by trespassing through the land parcels without permission which in fact is an offence.

This court has carefully considered the petition and the submissions herein. The respondent was served but failed to attend court or file any submissions in opposition. As was stated by Mutungi, J in the case of *Virendra Ramji Gudka & 3 Others –v- Attorney General* [2014] eKLR.

“Rights of compulsory acquisition are conferred by specific provisions of the law being Article 40 of the Constitution and Sections 107 to 133 of the Land Act, No. 6 of 2012 which replaced the provisions previously contained in the Land Acquisition Act”.

The meaning and intent of the Article 40 (3) of the Constitution. Article 40, reads in part as follows:

40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a 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.

The Land Acquisition Act (now repealed) provided for the procedure to be followed in the compulsory acquisition of property by the Government of Kenya. When the compulsory acquisition herein began, the Land Acquisition Act Cap 295 Laws of Kenya, Section 3 of the Land Acquisition Act provided as follows:-

“Whenever the Minister is satisfied that the need is likely to arise for the acquisition of some particular land under section 6, the Commissioner may cause notice thereof to be published in the Gazette, and shall deliver a copy of the notice to every person who appears to him to be interested in the land.”

The Universal Declaration of Human Rights has the force of law in Kenya. In the case of R vs Chief Immigration Officer (1976) 3 AER 843 Lord Denning stated thus regarding the Universal Declaration of Human Rights;

“... Among the important rights which individuals traditionally have enjoyed is the right to own property. This right is recognised in the Universal Declaration of Human Rights (1948). Article 17(1) which states that everyone has the right own property and Article 17(2) guarantees that “no one shall be deprived of his property” The contention of the State counsel negates this right. An intention to provide for arbitrary infringement of human rights cannot be attributed to the legislature unless such intention is unequivocally manifest. When Parliament is enacting a statute, the court will assume that it had regard to the Universal Declaration of Human Rights and intended to make the enactment accord with the Declaration and will interpret it accordingly...”

And Justice G.V. Odunga in Republic v Council of Legal Education Ex-parte Nyabira Oguta (2016) eKLR, phrased it thus:

Our Constitution embodies the values of the Kenyan Society, as well as the aspirations, dreams and fears of our nation as espoused in Article 10. It is not focused on presenting an organisation of Government, but rather is a value system itself hence not concerned only with defining human rights and duties of individuals and state organs, but goes further to find values and goals in the Constitution and to transform them into reality.

As was stated by Scott L.J, in relation to compulsory acquisition, in the case of Horn-v- Sunderland Corporation (1941) 2 KB 26,40:

“The word “compensation” almost of itself carries the corollary that the loss to the seller must be completely made up to him, on the ground that unless he receives a price that fully equaled his pecuniary detriment, the compensation would not be equivalent to the compulsory sacrifice”.

In that regard, in the case of Raticliffe vs Evans (1892) QB 524 with regard to damages, the Court stated that;

“...The character of the acts themselves which produce the damages and the circumstances under which those acts are done must regulate the degree of certainty and particularity with which the damages done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage as is reasonable having regard to the circumstances and to the nature of the acts themselves by which the damage is done to relax old and intelligent principles, to insist upon more would be the vainest pendency...”

In the case of Commissioner of Lands & Another vs. Coastal Aquaculture Ltd Civil Appeal No. 252 of 1996 KLR (E&L 264) the Court of Appeal held that in cases of compulsory acquisition the government is required to strictly adhere to the provisions of the Constitution and the Land Acquisition Act (now repealed). In Arnacherry Limited v Attorney General (2014) eKLR the court held that;

“This is indeed a sad and distressing Petition. It is not expected that the State, in this age and time and with a robust Constitution such as ours, can actively participate in acts of impunity such as the forceful take-over of personal property without due compensation. The take-over has lasted 30 years and that makes the said action all the more disturbing.”

If land is so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined. This is in line with the Constitutional requirement under Article 40(3) of the Constitution that no person shall be deprived of his property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation.

From my above observations, the Respondent has not proved in any way shown how their actions are in accordance with the law hence their actions are illegal. The Respondent’s actions are in contradiction with 2, 2(4), 3, 10, 40 and 47 of the Constitution of Kenya. The Respondent also has not produced any Environmental Impact Assessment report to prove that their actions does not infringe the rights of the Petitioners accrued under article 42 of the Constitution of Kenya. The law as discussed above, provides for compensation in cases of compulsory acquisition hence they have a right to compensation. The Respondent is yet to comply or even make an inquiry. The Petitioners have a right to be compensated. I find that the petition is merited and I grant the following orders;

1. A Declaration that the intended expansion of Butamu-Church of God road in Luanda Ward is unconstitutional and is in breach of the petitioner’s economic and social rights.
2. An order declaring that the Respondent’s action in seeking to curtail, undermine and/or deprive the petitioners off their rights to their various properties within Luanda Ward without just cause and adequate compensation is unfair, unlawful and unconstitutional.
3. The Respondent is ordered to adequately compensate the petitioners before compulsorily acquiring their parcels.

4. Cost of the petition to the petitioners.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26TH DAY OF SEPTEMBER 2018.

N.A. MATHEKA

JUDGE