



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC PETITION NO. 9 OF 2015**

**ISAAC FULA SIAKA.....PETITIONER**

**VERSUS**

**COUNTY GOVT. OF KAKAMEGA.....1<sup>ST</sup>RESPONDENT**

**COUNTY DIRECTOR OF SURVEY, KAKAMEGA....2<sup>ND</sup>RESPONDENT**

**THE KENYA RURAL ROADS AUTHORITY.....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

This petition is dated the 29<sup>th</sup> day of April, 2015 and it is the petitioner's case that he is the sole registered owner of title Number NORTH KABRAS/LWANDETI/1652. That the petitioner got registered as the owner to the title on the 16<sup>th</sup> July, 1991 and title deed was issued to him on the 8<sup>th</sup> August, 1991. That the petitioner has developed the parcel by putting up residential houses and has farming of maize, beans, sugarcane and commercial trees. That as from the beginning of June, 2014 a contractor under instructions from respondents invaded the petitioner's title, cut down maize, beans, sugar cane and commercial trees in preparation of putting up a new access road across the petitioner's title. That efforts by the petitioner to restrain the contractor were futile and hence the petitioner's maize, beans, sugar cane and commercial trees were extensively damaged. Further efforts by the petitioner to petition the Respondents and have their unlawful acts stopped were futile. The petitioner thus contends that the Respondents' acts on his title amount to violation of the petitioner's rights viz - a-viz.

1. Right to acquire and own property
2. Right not to be deprived of his property of any description.
3. Right to be compensated fully
4. Right not to have property taken arbitrarily without due process.
5. Right to be granted a hearing to any administrative action.
6. Right to be served/ issued with a notice prior to any action.

Due to the arbitrary acts by the Respondents jointly and severally the petitioner lost the value of the crops, trees and the land excised and put up for construction of the access road. The Respondents are charged with responsibility of ensuring that the law is followed to the letter whenever such an exercise is carried and in particular ensuring that all parties' rights as envisaged in the constitution are followed. The respondents have a responsibility to ensure that the letter and spirit of the constitution in regard to private property is followed. The 2<sup>nd</sup> Respondent who is the custodian of survey records have also a duty to ensure that before any action is taken on private property the rights of those to be affected are informed in advance. The Respondents who are in-charge of rural roads within the county have also a statutory duty to abide by the law whenever they want to implement any policy and more so to inform those to be affected of their decisions. Vide the letter dated 5<sup>th</sup> June 2014 the petitioner upon realizing of the Respondents' unlawful acts on his land wrote a protest note addressed to the office of the 1st Respondent and despite receipt of the said letter, the 1<sup>st</sup> Respondent went on with the illegal construction of an access road on the petitioner's title hence violating his rights of not being heard among others. When the petitioner failed to get a hearing from the 1<sup>st</sup> Respondent and the excise of his title went on, the petitioner petitioned the area assistant chief who vide his letter dated 6<sup>th</sup> June 2014 wrote to the ministry of Agriculture to access the damage occasioned to his crops on the suit title. That indeed on the 16<sup>th</sup> June 2014 the petitioner's damaged crops i.e maize, beans and sugar cane were assessed at Kshs. 17,908/ =. The petitioner's commercial trees were assessed at Kshs.

135,490/=. The 0.50 acres excised to put a road of access is valued at Kshs. 300,000/ =. Despite protests by the petitioner his land measuring 0.50 acres was excised and a road of access has to-date been established. The manner, conduct and behavior of the Respondents jointly and severally towards the petitioner's private property amount to violation of the petitioner's right to acquire and own property. The Respondents joint act of excising the petitioner's title 0.50 acres without notice and giving him a hearing amount to violation of the petitioner's right to a fair administrative action. The petitioner contends that it is the duty of the Respondents to ensure that the petitioner is not deprived of his basic rights. It is the duty of the Respondents to obey the law when it comes to private land. It is the duty of the Respondents to ensure that a party is heard before any action is passed against him/her. The petitioner has lodged this petition for enforcement of his Rights to acquire and own property as enshrined under Article 40 (i) of the Constitution of Kenya, right not to be deprived of any property of any description, or of any interest in, or right, over property of any description as enshrined under Article 40 (3) (a) of the constitution, right for prompt payment in full for any excised land or any part thereof as per Article 40 (3) of the constitution. The petitioner prays for the following orders;

1. THAT a declaration be issued to declare that the petitioner is the lawful owner of title Number NORTH KABRAS/LWANDETI/1652 within the meaning of Article 40 of the constitution.
2. THAT a declaration be issued to declare that the forcible entry, seizure, possession and construction of a road of access on the petitioner's Title Number NORTH KABRAS/LWANDETI/1652 amounts to violation of his rights to protection of property under article 40 of the constitution.
3. THAT a permanent injunction be issued to restrain the Respondents either severally and jointly from further entry into seizure, confiscation, occupation, alienation and further destruction of the petitioner's crops and commercial trees or any other property on Title Number NORTH KABRAS/LWANDETI/1652.
4. THAT an order of prohibition be issued to restrain the Respondents jointly and severally from entry into, seizure, confiscation, alienation and from taking possession of 0.2 acres or any other part thereof out of Title No. NORTH KABRAS/LWANDETI/1652 unless and until the Government has compulsorily acquired it under the land acquisition Act Cap: 295 & complied with Article 40 of the constitution. The petitioner's 0.50 acres was assessed at Kshs. 300,000/ =
5. THAT a declaration be issued to declare that the Respondents are jointly and severally liable to compensate the petitioner by way of damages for the loss of user and for other infringements of his rights and privileges as registered owner of land Title Number NORTH KABRAS/LWANDETI/1652 on account of having excised 0.50 acres thereof for construction of Lwandeti – Webuye access road.
6. General damages for breach of the petitioner's rights and freedoms under Articles 27,28,40,47 and 50 of the constitution
7. Special damages of Kshs. 17,908 for the maize, beans, sugar cane and Kshs. 135,490/= for commercial trees, Kshs. 300,000/= value of 0.50 acres excised from NORTH KABRAS/LWANDETI/1652 and assessment fees of Kshs. 6,000/ =.
8. The Respondents be ordered to pay costs of this petition.

The petitioner in submissions relied on several authorities.

The respondents submitted that, it is not in contention that the Petitioner is the registered owner of LAND PARCEL NO. N. KABRAS/LWANDETI/1652. He has exhibited a copy of his Title Deed as well as an Official Search Certificate.

The Respondent concedes to part of issued herein, to the extent that there was construction of road access through the Petitioner's LAND PARCEL NO. N. KABRAS/LWANDETI/1652. Then the major issue here is how much land was affected. the Petitioner in his own pleadings, the heading throughout in the pleadings claim for 0,2 acres, nowhere in his heading does he claim for the alleged 0.5 acres except in his Valuation Report, it is common law that parties should stick to their pleadings. The Respondents admit affecting the Petitioner's land by constructing an access road to the extent of 0.2 acres as per the Respondents' valuation report which is herein annexed to the respondents' Submissions and the value thereof assessed at Kenya Shillings Two Hundred and Thirty Thousand (Kshs. 230,000/-) only. The Respondents consequently deny that there was any forcible entry or seizure of the Petitioner's LAND PARCEL NO. N. KABRAS/LWANDETI/1652. The English Law Dictionary defines Compulsory Acquisition of Land as "Involuntary transfer of property by a private owner to the Government, also referred to as Eminent Domain, is the power possessed by the state over all the property in the country". The Petitioner's case is quite different from the issue herein. The Respondents have in no way endeavored to acquire the Petitioner's land by having it forcefully transferred into their names. The Petitioner's case does not fall under this ambit and therefore compensation under this ambit is not available. The Petitioner has not demonstrated that the Respondents have endeavored to have the Petitioner's land transferred into their names and or that the Respondents have marked any beacons on the Petitioner's land with a view of having it registered into their names for public use and compensation under this heading is not available hence the cited Authority in NAKURU HIGH COURT CONSTITUTIONAL PETITION NO. 29 OF 2012 is misplaced and does not apply to the Petitioner's case. The cited Authority in NAIROBI HC PETITION NO.613 OF 2014 equally deals with Compulsory Acquisition which is not the case here. The respondents have not in any way demonstrated that they intend to acquire or transfer the Petitioner's land into their ownership for public interest.

The Petitioner's portion so far affected as per the Petitioner's own pleadings, the heading of this Petition and Prayer No. (d) of the Petition as well as the valuation by the Respondents is for 0.2 acres valued at Kenya Shillings Two Hundred and Thirty Thousand (Kshs. 230,000/-) only. Loss of user has not been proved. The Petitioner ought to demonstrate to this court how much is raised per annum from the use of the aforesaid 0.2 acres per annum by way of Documentary Evidence which is not done. This particular ground has not been proved and should fail. In the Authority attached by the Petitioner of ELC NO. 112 OF 2016, THE NATIONAL LAND COMMISSION - VERSUS - THE ESTATE OF SISIWA ARAP MALAKAVEN & ANOTHER, this is a matter where a suit was filed, evidence taken and Judgment made. The suit land herein measures 100 acres for thirty Six (36) years. The facts of the case are quite different from this instant petition. In the cited case compensation for loss of user was done by use of valuation report in which case herein the two (2) valuation reports are provided to the court for petitioner and respondents. It would be against equity for 0.2 acres to attract an award of Kenya Shillings Ten Million

(Kshs.10,000,000/-) only for loss of user.

On general damages for the Petitioner's Right to Freedoms under Article 27,28,40,47 & 50 of the Constitution. The Petition herein does not attract the award under the above law. The Authorities cited relates to freedoms of a person, where a person fundamental freedom is cultivated. This particular award is misplaced, unproved and an abuse of court process. An Award under Special Damages ought to be specifically proved by way of receipts. The remedies available to the petitioner is for compensation of the affected 0.2 acres for current value of Kenya shillings Two Hundred and Thirty Thousand (Kshs. 230.000/-) only. The Petitioner seeks for extortion against the Respondents for several awards over a single claim. In ELDORET E & L PETITION NO. 1 OF 2013, it was held that the petitioners be compensated for the value of land and loss of use was not mitigated just as in this instant case and loss of user has not been proved. They cannot be awarded mesne profits as they did not pray for it.

This court has carefully considered the petition and the submissions herein. 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 to 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.

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”.*

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 actions are clear that they did not follow the due process. The Respondent has not proved in any way how their actions are in accordance with the law hence their actions are illegal. The Respondent's actions are in contradiction with Article 2, 2(4), 3, 10, 40 and 47 of the Constitution of Kenya.

The law 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 Petitioner has a right to be compensated. I find that the petition is merited and I grant the following orders;

1. THAT a declaration be issued to declare that the petitioner is the lawful owner of title Number NORTH KABRAS/LWANDETI/1652 within the meaning of Article 40 of the constitution.
2. THAT a declaration be issued to declare that the forcible entry, seizure, possession and construction of a road of access on the petitioner's Title Number NORTHKABRAS/LWANDETI/1652 amounts to violation of his rights to protection of property under article 40 of the constitution.
3. THAT an order of prohibition be issued to restrain the Respondents jointly and severally from entry into, seizure, confiscation, alienation and from taking possession of 0.2 acres or any other part thereof out of Title No. NORTH KABRAS/LWANDETI/1652 unless and until the Government has compulsorily acquired it under the land acquisition Act Cap: 295 & complied with Article 40 of the constitution.
4. Special damages of Kshs. 17,908 for the maize, beans, sugar cane and Kshs. 135,490/= for commercial trees, Kshs. 300,000/= value of 0.50 acres excised from NORTH KABRAS/LWANDETI/1652 and assessment fees of Kshs. 6,000/= with interest at court rates from the time of filing of this case.
5. The Respondents are to pay costs of this petition

The Petitioner prayed for general damages under prayers (6) of the petition but it was not demonstrated that any damages are payable and I will consequently not grant that prayer.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 18<sup>TH</sup> DAY OF SEPTEMBER 2018.**

**N.A. MATHEKA**

**JUDGE**