



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

ELC PETITION NO. 9 OF 2016

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER

ARTICLE 22 AND 40 OF THE CONSTITUTION OF KENYA 2010

BETWEEN

RICHARD KIMAIYO KIYENG AND

PHILIP KIPKOGEI KIYENG.....PETITIONERS

AND

THE COUNTY LAND REGISTRAR,

ELGEYO MARAKWET COUNTY.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

Richard Kimaiyo Kiyeng and **Philip Kipkogei Kiyeng** brought this petition for and on behalf of the estate of Chepkuiyeng Katam against the County Land Registrar and the Attorney General alleging that at all material times to this suit the petitioners are the administrators and beneficiaries of the Estate of the late Chepkuiyeng Katam registered proprietor of that land known as ELGEYO MARAKWET/KAPSOWAR/67 herein after referred to as suit property. The petitioners assert that the 1st respondent at a time and on facts unknown to them without any justification, illegally and or unprocedurally placed an inhibition, caution and or a restriction with an endorsement which reads **"All land has been acquired by the Government for Kapsowar Divisional Headquarters DO's letter EON/16/1/VIL/II OF 89."** The petitioners claim that they have all along been in quiet and continuous occupation of the suit property where they have established their homes and are living their families.

The petitioners allege that the respondents have violated their constitutional rights within article 40 of the constitution of Kenya 2010 by depriving them their right to acquire the suit properties by way of transmission despite a certificate of confirmation of grant bequeathing/vesting the portions of the suit property.

The petitioners further aver that the respondents' action amounted to arbitrary deprivation of property, interest or right over the land. The petitioners admit having instituted earlier proceedings being E&L Misc. Civil suit No. 13 of 2015. The Petitioners pray for the following reliefs:

- a) An order of permanent injunction restraining the respondents from trespassing, entering and or evicting the petitioners land.**
- b) A declaration that the respondent's action to lodge a restriction on the suit property was illegal, unprocedural and in contravention of the petitioner's rights under article 40 of the constitution.**
- c) An order of directing the 1st respondent to remove the restriction lodged against the title of the suit property.**
- d) Damages for trespass and wrongful caveat/restriction.**
- e) Costs of the petition.**

The first petitioner on his behalf and on behalf of the 2nd Petitioner states in the supporting affidavit that the late Chepkuiyeng Katam was his

father and the registered owner of the parcels known as MOIBEN KAPSOWAR/67 where at the time he died he had established a home for the family where they live up to date. Sometimes in 2012 they initiated succession proceedings with a view of having the land shared among the heirs of the deceased which grant was confirmed on 3rd March 2014 and issued on 26th May 2014. He states further that before they initiated those proceedings they conducted a search which revealed that the inhibition, cautions and restrictions over the suit property was nil. Sometimes on 26th /5/2014 the High Court of Kenya in Eldoret issued a certificate of confirmation of grant distributing the suit property among the petitioners. However, when they wanted to register the said certificate they were informed by the registrar that the land had been taken by the Government for purposes of developing a District Headquarters and that upon conducting the search he noticed that the district registrar had placed a caution between 16/7/2009 and 25th/3/2015.

He states that the acquisition was illegal in view of the fact that they were never consulted and or informed and that he is advised by his advocate which advise he verily believes to be true that the law demands that before the government acquires land compulsorily the person affected must be involved and adequately compensated and that to the best of his knowledge no compensation has ever been done to justify the Governments claim for compulsory acquisition. The 1st Petitioner states that there is no evidence that the land was acquired compulsorily and that the Petitioners were compensated.

In the replying affidavit of Hellen N. Kharemwa, she states that the Petition is incurably defective, incompetent, frivolous and scandalous and devoid of substance in facts and law and Supporting Affidavit and annexures thereto are misleading and full of falsehoods and misrepresentations tailored to hoodwink and win sympathy of the court and that this petition is res subjudice in view of Eldoret E&L Misc. Application No. 13 of 2015.

She states that to the best of her knowledge the suit land herein, Elgeyo Marakwet/Kapsowar/67, initially registered in the name of Chepkiyeng Katam (now deceased) was among the several parcels of land which were compulsorily acquired by the Government of Kenya for extension of Kapsowar Divisional Headquarters and that after the compulsory acquisition the people whose lands were acquired including Chepkiyeng Katam were settled elsewhere by way of compensation for the lands they donated but they inadvertently failed to surrender their titles prompting the issuance of notices, as per letters dated 26-7-1991, and 9-8-1994. In order to safeguard its interest acquired by way of compulsory acquisition in 1989 the Government of Kenya registered an easement over all the said parcels of land including the suit land herein which easement still remains on the suit land to-date.

The interest of the Government of Kenya was safeguarded and registered in 1989 with full knowledge and participation of the said Chepkiyeng Katam who never raised any objection or laid any claim on the said land having relinquished all rights and interest in the suit land to the Government of Kenya through compulsory acquisition.

The petitioners cannot feign ignorance of the compulsory acquisition which the registered proprietor and their father, Chepkiyeng Katam, was fully involved, participated, consented and promptly compensated by resettlement (adequate consideration) hence their claim is not only time-barred but it is also strange to the respondents.

The petitioners have not demonstrated whether they have any registrable interest in the suit land or whether, how and in what manner their alleged right or interest in the suit land was violated or infringed and I invite strict proof of each of the allegations from the petitioners.

According to the deponent, the suit land herein being public land cannot and has never been part of the estate of the late Chepkiyeng Katam and it was wrong and amounting to fraud, non-disclosure and misrepresentation of material facts for the petitioners to purport to subject public land to succession proceedings.

She has been advised by the State Counsel on record which advice she verily believes to be correct that to the extent that the Petition does not meet the threshold adumbrated in the celebrated case of Anarita Karimi Njeru -versus- Republic (1976-1980) KLR 1272 the Petition is incompetent and incurably defective hence it ought to be struck out in /imine.

She has been advised further by the State Counsel that the provisions of the Land Acquisition Act Cap 295 Laws of Kenya and the Constitution were complied with and no objection against registration of the easement by the state was ever received from Chepkiyeng Katam or any of his children including the petitioners and that upon taking possession under sections 19 and 20 of the Land Acquisition Act the Government of Kenya became an absolute owner of the suit land herein free from any encumbrances hence the easement registered and that public interest that informed the compulsory acquisition far outweighs the petitioners' undisclosed interest in the suit land.

In a further supplementary affidavit, Richard Kimayio states that the land Registrar lacks capacity to depone to a number of issues pertaining on matter relating to compulsory acquisition of the suit property and that there is no evidence that the suit property was compulsorily acquired as due process was not followed. There was no resettlement, and no compensation by the Government.

The petitioners submit that the action of entering a restriction on the parcel of land violated Article 40(1) & (3) of the constitution of Kenya 2010. Moreover, the Petitioner submits that the process of compulsory acquisition was irregular and that the petitioners are still in possession and that their rights have not been extinguished. The Petitioners further submit that they are the registered proprietors of the land and therefore should enjoy all rights and privileges appurtenant to the property. The petitioners further submit that they are entitled to damages to respect of Trespass on the land.

The respondents on their part submit that the land in dispute was subject to compulsory acquisition in 1989. The petitioners father was compensated by being resettled in Charar scheme. The respondents submit that it is not the courts duty to inquire into the process of compulsory acquisition undertaken in 1989. The respondent submits that the court should limit itself on the legality of the easement.

On whether the acquisition violated the petitioner's rights to property the respondent submits that he petitioners have failed to demonstrate violation of their rights. According to the respondents, the petitioners have failed to demonstrate that the process was flawed. The Respondents further argue that the petition is res subjudice in view of Eldoret E&L Misc. Application No. 13 of 2015 which they are seeking

the same reliefs in the petitioners.

After considering the written submissions of the petitioners and the written submissions of the respondents this court finds that the first issue to be determined is whether the petition is res-subjudice.

The principle of **Res Sub Judice Is** that when two or more cases are filed between the same parties on the same subject matter, in two or more different Courts, the competent court has power to “Stay Proceedings” of another Court

In this matter, the petitioner and respondents have been heard on the merits of the petition and the only pending process is judgment and therefore the principle of subjudice does not apply as the respondents are estopped from raising the said defence. Moreover, the respondents ought to have raised the issue of subjudice as a preliminary objection before the commencement of the hearing of the petition. In the alternative, the respondent ought to have made an application for stay of proceedings in the petition pending hearing and determination of the Miscellaneous Application or could have applied for consolidation but not to wait until the matter is heard only to apply for stay of proceedings. In this petition, there are no proceedings to stay.

The second issue to be determined is whether the land was subject of compulsory acquisition in 1989. The law on compulsory acquisition prior to promulgation of the constitution of Kenya 2010 was enshrined in the Constitution of Kenya (repealed) Section 75 of the Constitution of Kenya repealed provided for the individual’s right to property.

Section 3 of the compulsory acquisition Act Cap 295(repealed) which is applicable in this case as the land was allegedly acquired in 1989, provided for the procedure of compulsory acquisition of private land. Thus, whenever the Minister was satisfied that the need was likely to arise for the acquisition of some particular land under section 6, the Commissioner was to cause a preliminary notice thereof to be published in the Gazette, and was to deliver a copy of the notice to every person who appeared to him to be interested in the land.

Section 6 of the said Act provided for the notice of acquisition of private land for the purposes of a public body, and that the minister for land was to consider the interests of defense, 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 also provides for the necessity to afford reasonable justification for the causing of any hardship that may result to any person interested in the land, and was to certify in writing to the Commissioner, and was to direct the Commissioner in writing to acquire the land compulsorily.

On receiving the aforesaid direction the Commissioner was to cause a notice that the Government intended to acquire the land to be published in the Gazette, and was required to serve a copy of the notice on every person who appears to him to be interested in the land. The land to be acquired is supposed to be mapped out in accordance with section 7 of the land acquisition Act Cap 295 Laws of Kenya. (repealed) Sections 8, 9 and 10 to 16 of the repealed Act deal with compensation.

The respondents stated that the petitioners father was compensated with a piece of land elsewhere. The particulars of the land are not given save that the same is in Charar scheme.

Section 12 (1) of the Act provided that notwithstanding anything contained in the Government Lands Act, where the land was acquired for the Government the Commissioner could agree with the person whom he has determined to be the proprietor of the land that that person, instead of receiving an award, would receive a grant of land, not exceeding in value the amount of compensation which the Commissioner considers would have been awarded, and upon the conclusion of the agreement that person shall, subject to section 18, be deemed conclusively to have been awarded and to have received all the compensation to which he is entitled in respect of his interest. The agreement was to be recorded in the award. The respondents have neither produced the agreement nor the award.

This court finds that the respondents have not established that the due process of compulsory acquisition was complied with as there is no evidence of the gazette notices in compliance with section 3 of the Land Acquisition Act. The respondent has not demonstrated that there were gazette Notices in compliance with the law at all.

The petitioners’ proprietary right is based on the title to the suit property issued under **section 27 of the registered land Act cap 300 (repealed.)** which gives the petitioner special protection by conferring indefeasibility which is similar to the provisions of section **26(1)** of the **Land Registration Act, Act No. 3 of 2012.**

The petitioner’s case is that he is entitled to protection of **Article 40** and his land cannot be taken arbitrarily and without compensation. The respondents’ case is that the petitioner’s title is illegal and should be surrendered as the land was compulsorily acquired.

The issue for consideration in this respect is whether the suit property was the subject of land acquisition in the 1989. The petitioner’s title is impugned on the basis that the land was acquired in the 1989 for the construction of the district headquarters.

Mutungi J., in ***Eunice Grace Njambi Kambi Kamau and Another v Attorney General and Others*** Nairobi ELC No. 976 of 2012 (**Unreported**) dealt with the issue of proof of compulsory acquisition. He observed that,

“In my view and having regard to the provisions of the Land Acquisition Act (now repealed) the Government has an obligation to execute the process of land acquisition to finality to effectuate title acquisition. The Commissioner of Land and the Land Registrars have duties and obligations which they are required to execute to ensure land is properly documented and protected. I believed that the intention of the elaborate process and procedure set under the Land Acquisition Act”

I agree with the position taken by the learned judge as the provisions in **Land Acquisition Act (Repealed)** set out an elaborate process for acquisition of land. **Sections 17, 18, 19 and 20** of the **Act** provide for survey of the compulsorily acquired land and vesting in the

Government. The procedures require that appropriate notice be given to the Registrar of Lands and the fact of acquisition noted on the land register to serve as a notice to all persons dealing with the land. In this case only evidence of the acquisition are letters between the provincial administration as it then was and the ministry of lands.

In this respect, the decision of Mumbi Ngugi J., in *Cycad Properties Ltd v Attorney General and Others*, where she held that compulsory acquisition where established is an overriding interest and that the Court cannot inquire into the legality of the acquisition is distinguished on the basis that the process of compulsory acquisition was complied with and compensation made as opposed to this case where there is no scintilla of evidence that the process was followed and compensation made.

This court agrees with Mutungi J., in *Virenda Ramji Gudka and 3 Other v Attorney General [2014] eKLR* where he stated, **“Rights of compulsory acquisition are conferred by specific provisions of the law being Article 40 of the Constitution and sections 107 and 133 of the Land Act, Act No. 6 of 2013 which replaced the provisions previously contained in the Land Acquisition Act ... These provisions have to be complied with for the rights of acquisition to crystallise.”** In this case the respondents have not proved that the acquisition was done procedurally.

As the petitioner is the title holder he is entitled to the protections of **section 25(1)** of the *Land Registration Act, Act No. 3 of 2012* and he the absolute and indefeasible owner and under **section 26** of the Act his title can only be challenged on the ground of fraud or misrepresentation to which he has to be proved to be a party or if it is shown he acquired the title illegally, unprocedurally or through a corrupt scheme.

Having found that there is no evidence that the process of compulsory acquisition was followed, and that compensation was made, I do further find that the entry of a restriction in the register was a violation of the provisions of section 75 of the Constitution of Kenya (repealed) as it denied the petitioners the right to enjoy their property. **Article 40 of The Constitution of Kenya 2010 provides thus: -**

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,**
- 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 any property of any description or 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 rights over that property, a right over that property a right of access to a court of law.**

(4)-----

(5)-----

(6) The rights under this article do not extend to any property that has been found to have been unlawfully acquired.

The Petitioners have demonstrated on the face of it that they are the registered owners of the property in issue and therefore are entitled to protection by the court. Ultimately, I do grant the following orders, namely: -

a) An order of permanent injunction restraining the respondents from trespassing, entering and or evicting the petitioners from that land known as ELGEYO MARAKWET/KAPSOWAR/67

b) A declaration that the respondent's action to lodge a restriction on the suit property was illegal, unprocedural and in contravention of the petitioner's rights under article 40 of the constitution.

c) An order of directing the 1st respondent to remove the restriction lodged against the title of the suit property.

I do find that the petitioners have not demonstrated that they have suffered damages due to the caveat or restriction. I do award costs of the Petition to the Petitioners. Orders accordingly.

Dated, delivered and signed at Eldoret this 7th day of September, 2018.

A. OMBWAYO

JUDGE