



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC PETITION NO. 2 OF 2018**

**JAPHETH AZEGELE.....PETITIONER**

**VERSUS**

**THE CHIEF LAND REGISTRAR**

**THE LAND ADJUDICATION OFFICER, NANDI COUNTY**

**NANDI COUNTY COUNCIL**

**HON. ATTORNEY GENERAL.....RESPONDENTS**

**JUDGEMENT**

This petition is dated 26<sup>th</sup> March 2012 and is brought under rule 20 and 21 of the constitution of Kenya, High Court Practice and Procedure Rules 2006 and Articles 20 and 21 of the Constitution of Kenya 2010 and sections 7 and 19 of the 6<sup>th</sup> Schedule thereof seeking the following orders;

1. That this application be certified urgent and be heard ex-parte in the 1<sup>st</sup> instance.
2. That a conservatory order of injunction be issued to stop the respondents from forcefully illegally and unprocedurally acquiring and or evicting the applicants from a portion measuring approximately 0.7 acres out of the applicants land parcel No. NANDI/KOIBARAK "A"/234 and annexing it to the 3<sup>rd</sup> respondent's land parcel No. NANDI/KOIBARAK "A"/238 pending the hearing and determination of this petition.
3. An inhibition order do issue against titles NANDI/KOIBARAK "A"/234 and NANDI KOIBARAKA "A"/238 pending the hearing and determination of this petition.
4. That a conservatory order of injunction be granted to restrain the respondents from creating and offering lease holds and/or plots out of land parcel No. NANDI/KOIBARAK "A"/234.
5. That a conservatory order of injunction be issued restraining the respondents from laying claim to trespassing, occupying, utilizing or registering a portion out of land parcel No. NANDI/KOIBARAK "A"/234 measuring approximately 0.7 acres or whatever size, as part of NANDI/KOIBARAK "A"/238.
6. That the costs of this petition be provided for.

The petitioner submitted that, he is the absolute owner of land parcel No. NANDI/KOIBARAK "A"/234 which he obtained after adjudication in 1980. That from adjudication time to date no objection has ever been registered with the land adjudication office against his land aforesaid. That his land aforesaid is contiguous with land parcel No. NANDI/KOIBARAK "A"/238 which is owned by the 3<sup>rd</sup> respondent herein; NANDI COUNTY COUNCIL. That he has learnt that the commissioner of lands, through the Land Registrar, Nandi County are planning to hive off about 0.7 acres out of his land and annex it on land parcel land No. NANDI/KOIBARAK "A"/238. (| attached is a copy of the letter dated 5/3/2012 marked "JA-1") That the action aforesaid was stopped by this court when it quashed the decision of the Land Adjudication officer, Nandi District vide Kakamega High Court Judicial Review case No. 49 of 2004 (Attached hereto are copies of the decision and the order quashing it marked "JA-2"). That the Land Registrar is set to effect the quashed decision. (Attached is a copy of the letter dated 5/3/2012). That his right to own the suit land as provided for in Article 40 of the Constitution is being violated. That the procedure provided for under the Compulsory Acquisition Act has not been followed. That it is obvious from the letter that the Ministry of Lands is still bent on effecting a quashed decision. That it is proper that the respondent be compelled to return his 0.7 acres to his land parcel No. NANDI/KOIBARAK "A"/234 That he will suffer irreparable loss and damage if part of his land is hived off as intended as he derive his livelihood from the land.

This court has carefully considered the petition and the submissions herein. The respondents were served but failed to attend court or file any submissions in opposition. The petition is based on the grounds that, the applicant is the registered proprietor of land parcel No. NANDI/KOIBARAK "A"/234 which is contiguous with NANDI/KOIBARAK "A"/238. The adjudication officer prepared a register to Chief Land Registrar for registration purposes. The said register indicates that approximately 0.7 acres of land has been hived off from the applicant's land parcel No. NANDI/KOIBARAK "A"/234 and annexed to NANDI/KOIBARAK "A"/238 which belongs to the 3<sup>rd</sup> respondent. The register forwarded to the Chief Land Registrar is yet to be registered but may be registered any time from now. The decision purportedly annexing the applicant's land was made by the Land Adjudication officer for Nandi, upheld by the Ministry of Lands on appeal but was quashed by this honourable court vide Judicial Review case No. 49 of 2004. The respondents have disregarded this honourable court's decision. If order sought are not granted the applicant will suffer great loss and damage. The applicant had not been compensated by the Government. The 3<sup>rd</sup> respondent is already creating plots out of the area in dispute and selling them to 3<sup>rd</sup> parties. These facts have not been disputed.

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 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 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. That a conservatory order of injunction be granted to restrain the respondents from creating and offering lease holds and/or plots out of land parcel No. NANDI/KOIBARAK “A”/234.
2. That a conservatory order of injunction be issued restraining the respondents from laying claim to trespassing, occupying, utilizing or registering a portion out of land parcel No. NANDI/KOIBARAK “A”/234 measuring approximately 0.7 acres or whatever size, as part of NANDI/KOIBARAK “A”/238.
3. The Respondents are ordered to adequately compensate the petitioners before compulsorily acquiring their parcels.
4. Costs to the Petitioner.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 23<sup>RD</sup> DAY OF OCTOBER 2018.**

**N.A. MATHEKA**

**JUDGE**