



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC APPEAL NO. 8 OF 2017

FRANCIS KASUKI NZIOKA & 50 OTHERSAPPELLANTS

VERSUS

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

THE KENYA RAILWAYS CORPORATION.....2ND RESPONDENT

KAJIADO COUNTY GOVERNMENT.....3RD RESPONDENT

AND

CHINA ROAD BRIDGE & CONSTRUCTION COMPANY.....INTERESTED PARTY

RULING

What is before Court for determination is the 1st Respondent's application dated the 2nd March, 2018 brought pursuant to Order 2 rule 15(1) of the Civil Procedure Rules where it is seeking the following orders:

1. That the Honourable Court be pleased to strike out the Memorandum of Appeal dated the 30th April, 2015 with costs.
2. That the costs of this application be provided for.

The application is premised on the following grounds:

- a. That the Appeal as filed under sections 128 and 113 (1) of the Land Act is fatally defective as both provisions do not provide for appeal or any procedure for such an appeal.
- b. That the law is that the Appellants should have rejected the award of the tribunal and immediately referred the matter to the Land Court as a land case.
- c. That the purported Appellants accepted the award and are estopped from challenging the same.

The application is supported by the affidavit of MARTIN NJERU NYAGA who is an advocate in conduct of the matter on behalf of the applicant. He deposes that at the onset of acquisition of land for the purpose of construction of the standard gauge railway line, the Applicant issued a gazette notice of its intention to acquire specific parcels of land within Emali Township of Kajiado County and subsequently conducted due diligence in respect to the same. He claims all the payees, being persons that had structures on the affected land accepted the awards and furnished the Applicant with their Bank account details. Further, that in conjunction with the 2nd Respondent, they were duly paid as per the list that was available at that time. He contends that subsequently there were disputes in respect of ownership of some of the parcels of land on the affected areas which situation is occasioned by failure of the Kajiado County Government who is the custodian of the land to shed light on the ownership. He explains that the said quagmire has given rise to the instant appeal which notably does not adhere to the requisite procedure for appeals. He insists there is no Order of this Court in respect of the Notice of Motion filed on 30th April, 2015 for admission of the Appeal and viva voce evidence. He avers that the Appellants have filed submissions dated the 14th November, 2017; witness statements and a hearing would precipitate in submissions by all the parties to the suit and not a section of it. Further, it would not be sensible for the Appellants to file submissions without examining makers of witness statements which would only happen if there was a hearing. He states that it is unheard of to have witnesses testifying on appeal as this is only a practice in the main suit. He reiterates that the Appellants have the option of filing a normal land court case or apply for Judicial Review, the Appeal is therefore bad in law, misconceived, incompetent, a nullity, frivolous and an abuse of the court process, the same should be struck out with costs.

The Appellants opposed the application and filed a replying affidavit sworn by FRANCIS KASUKI NZIOKA the 1st Appellant herein who deposes that the Environment and Land Court has jurisdiction to hear and determine disputes, actions and proceedings concerning land. He explains that the Appeal before Court is on compulsory acquisition of land and they are expressly entitled to be compensated in a just manner for the losses occasioned to them on account of the Respondents' acts and or omissions. He insists the affidavit in support of the application herein should not have been sworn by an advocate. He denies that not all parties were compensated for their land and the Appellants have not been compensated for their parcels of land. He explains that the 1st and 2nd Respondents were present in Court on 14th September, 2016 when their advocates informed court that they intended to lodge an application seeking for directions on hearing of the Appeal and no objection was raised. He contends that on 10th October, 2017 the Court ordered the Respondents to file submissions and no one raised an objection. He reiterates that the Appeal has merit and was admitted and that the court has jurisdiction to hear as well as determine it. Further, that the application lacks merit, is an attempt to delay the hearing of this Appeal and should be dismissed with costs.

Both the Applicant/1st Respondent as well as the Respondent/Appellant filed their submissions that I have considered.

Analysis and Determination

Upon perusal of the Notice of Motion dated the 2nd March, 2018 including the supporting and replying affidavit and submissions herein, the following are the issues for determination:

- Whether the Court has jurisdiction to hear and determine the Appeal
- Whether the Memorandum of Appeal dated the 30th April, 2015 should be struck out.
- Whether the supporting affidavit in the application dated 2nd March, 2018 should be struck out.

It was the applicant's contention that the Appeal as filed under sections 128 and 113 (1) of the Land Act is fatally defective as both provisions do not provide for appeal or any procedure for such an appeal. It insists that the Appellants who were aggrieved by the procedure of compensation should have filed a Land Case in Court or Judicial Review and since they accepted the award, they are estopped from challenging it in this appeal. It relied on sections 128 and 113 (1) of the Land Act as well as Order 42 to support its arguments. It cited the following authorities: **Abincha & Co. Advocates Vs Trident Insurance Co. Ltd (2013) eKLR; Hassan Zubeidi Vs Patrick Mwangangi Kibaiya & another (2014) eKLR; and Kenya Union of Journalists & Allied Workers Vs Sunday Express Newspapers Ltd (2016) eKLR to support its arguments.**

The Respondents who are the Appellants herein this Court has jurisdiction to hear and determine herein that concerns compulsory acquisition of land. They claim that are entitled to be compensated in a just manner for the losses occasioned to them on account of the Respondents' acts and or omissions. They challenge the applicant's affidavit and state that the same should not have been sworn by an advocate. The refer Court to the proceedings on 14th September, 2016 and 10th October, 2017 and insists Appeal has merit and was admitted. The Respondents quoted **Order 19 rule 1 of the Civil Procedure Rules; Section 113 & 128 of the Land Act; and Section 13 (4) of the Environment and Land Court Act to support their arguments. They further relied on various judicial authorities including; Nicholas Kipchirchir Kimaiyo Vs Wilson Kibet Kimutai & Anor (2014) eKLR; Barrack Ofulo Otieno Vs Instarect Limited (2015) eKLR; Gerphas Alphonse Odhiambo Vs Felix Adiego (2006) eKLR; Abdurahman Abdi aka Abdurahman Muhumed Abdi Vs Safi Petroleum Products Ltd & 6 others Civil Application No. Nai. 173 of 2010; and Christopher Wafula Mutoro Vs Richard Lordia Lokere (2017) eKLR to oppose the application.**

As to whether this Court has jurisdiction to hear and determine the dispute herein, Section 13 (1) of the Environment and Land Court Act confers jurisdiction to the ELC and stipulates as follows:

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

Section 13 (2) (c) & (d) further stipulates that ' in exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the Court shall have power to hear and determine disputes - (c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land'

Section 13 (4) of the Act further provides that:' in addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of this court.'

The above provisions are distinct in terms of jurisdiction of the Environment and Land Court and in relying on the case of **Christopher Wafula Mutoro Vs Richard Lordia Lokere (2017) eKLR** where the Court of Appeal interpreted the jurisdiction of the ELC, I find that the Appeal herein that revolves around compulsory acquisition of land falls within the ambit of the jurisdiction of this Court.

As to whether the supporting affidavit in the application dated 2nd March, 2018 should be struck out. I note the Respondent's contend that the deponent who is an advocate should not have sworn it, as he is placing himself in a situation where he will be summoned as a witnesses, in matters he does not have full knowledge on. Order 19 rule 1 of the Civil Procedure Rules provides that: ' Any court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable.'

Order 19 rule 3 (1) states that, ‘**affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove.**’

In the case of **Nicholas Kipchirchir Kimaiyo Vs Wilson Kibet Kimutai & another (2014) eKLR**, Judge Ochieng held as follows: ‘**Although the deponent described those facts as instructions, the truth is that they are the pieces of evidence which form the core foundation for the application before this court. In effect, the advocate was no longer only acting as the lawyer handling this case on behalf of the Applicant; he had also tendered evidence on behalf of the said client. In the case of KISYA INVESTMENTS LIMITED & OTHERS VS KENYA FINANCE CORPORATION LIMITED, NBI HCCC NO. 5304 OF 1993, Ringera J (as he then was), expressed himself thus: ‘ by deponing to such matters, the advocates courts an adversarial invitation to step from his privileged position at the bar into the witness box. He is liable to be cross examined on his disposition. It is impossible and unseemly for an advocate to discharge his duty to the court and to his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same case.’**

In the current scenario, the advocate for the applicant actually proceed to enumerate the circumstances under which the Appellants were compensated for their land, which facts were well within the knowledge of his client but not himself. At this juncture, I will concur with the Respondent and in relying on the above cited legal provisions as well as being persuaded with the judicial authority quoted above, I hold that the applicant’s counsel should not have deponed the supporting affidavit herein and will proceed to strike it out.

As to whether the Memorandum of Appeal dated the 30th April, 2015 should be struck out. I note the Memorandum of Appeal relates to dispute around compulsory acquisition of land. It was the Applicant’s contention that the Appeal has not been admitted for hearing and it is unheard of, for the same to be heard through viva voce evidence. It relied on section 128 of the Land Act which provides that: ‘ **Any dispute arising out of any matter provided for under this Act may be referred to the Land and Environment Court for determination.**’ And section 113 (1) of the Land Act provides that: ‘ **upon the conclusion of the inquiry, the Commission shall prepare a written award , in which the Commission shall make a separate award of compensation for every person whom the Commission has determined to have an interest in the land.**’ It argued that the Appeal is fatally defective.

I note that as per the Order of the Court dated the 19th June, 2017, Justice Angote entered as Consent as follows: ‘ **By consent, the application dated the 3rd November, 2016 is allowed as prayed. Appellants to serve all the parties with their witness statements within 30 days. Supporting affidavit sworn on 28th April, 2015 is adopted for the purposes of the appeal.....**’ I note the application dated the 3rd November, 2016 was seeking the Appeal to be admitted and that the same be heard by viva voce evidence. This in essence means the directions of the Appeal had already been granted by consent and there is no way the Applicant proceeded to institute the instant application there was no Order of this Court in respect of the Notice of Motion filed on 30th April, 2015 for admission of the Appeal and viva voce evidence. Since I have already struck out the supporting affidavit and in so far as I note that the issues raised by the Applicant are pertinent, but in order to achieve substantive justice, it is my considered view that all the questions raised herein are best dealt with conclusively at the hearing and final determination of the instant appeal.

It is against the foregoing I proceed to strike out the application dated the 3rd March, 2018. I further direct that parties set the Appeal down for hearing within the next 60 days from the date hereof.

The costs will be in the cause.

Dated signed and delivered in open court at Ngong this 15th day of October, 2018.

CHRISTINE OCHIENG

JUDGE