



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT NAIROBI**

**ELC CASE NO 227 OF 2018**

**DORCAS MATOKE.....PLAINTIFF**

**=VERSUS=**

**ATTORNEY GENERAL.....1ST DEFENDANT**

**MINISTRY OF LANDS.....2ND DEFENDANT**

**NATIONAL LAND COMMISSION.....3RD DEFENDANT**

**RULING**

1. On 14/5/2018, the plaintiff, Dorcas Matoke, brought a suit by way of plaint contending that the defendants are in the process of acquiring her property, Land Title Number Nairobi/Block 90/595 (the **suit property**) without adhering to the mandatory requirements of the law. She itemized the following as the verbatim omissions committed by the defendants:

- i. the plaintiff has not done any surrender***
- ii. the plaintiff has not applied for subdivision or Change of user.***
- iii. the necessary approvals have not been obtained.***
- iv. due compensation has not been paid after valuation.***
- v. plaintiffs' title documents, deed plans and Survey Plans have not been amended as required***

2. Consequently, the plaintiff sought the following final prayers in the plaint:

- a) A permanent injunction does issue restraining he Defenants either by themselves, their servants, agents and/or employees from demolishing the Plaintiffs' perimeter walls and/or buildings, encroaching into the plaintiffs' land parcel namely LR No Nairobi/Block 90/595 or in any other way interfering with plaintiffs' quiet enjoyment and possession of the suit property.***
- b) Costs of this suit and the interest thereon be provided for.***
- c) Any other and further relief that this honourable court may deem fit and just to grant in the circumstances.***

3. Together with the plaint, the plaintiff brought a notice motion dated 11/5/2018 seeking an order restraining the defendants against demolishing her perimeter wall and/or buildings and encroaching into the suit property or in any other way interfering with her quiet enjoyment and possession of the suit property. The application was supported by her affidavit sworn on 11/5/2018 in which she deposed that she had not been served with any notice of intended compulsory acquisition and that the due process had not been complied with. She further deposed thus:

***“before the defendant/respondent commences construction of the railway, there is urgent need for the respondent to comply with the provisions of the Limitation of Action Act, Chapter 22 of the Laws of Kenya on compulsory acquisition so as to safeguard against future challenges”***

4. The first and second defendant opposed the application through grounds of opposition dated 4/6/2018 in which they contended that the

Constitution vests in the State eminent domain over property within the territorial borders of Kenya. They further contended that the suit property is necessary and vital to the success of the big four initiative that is meant to improve the lives of the Kenyan citizenry. The 1st and 2nd defendants further stated that Section 120 of the Land Act provides for the taking of possession of certain categories of land before payment of compensation.. They added that the public benefit and interest in the compulsory acquisition outweighs the interest of the applicant in the suit property.

5. At the hearing, counsel for the applicant contended that the applicant is aggrieved because the mandatory procedures have not been followed. Counsel further argued that under Article 47 of the Constitution, the applicant is entitled to fair administrative action. Counsel stated that at this point the applicant does not have evidence that the suit property is being acquired or that the due process will not be followed.

6. In response, counsel for the first and second defendants submitted that eminent domain is a power vested in the State and is exercised on behalf of the people of Kenya. He added that private land is acquired for public purpose and acquisition is carried out in accordance with the Constitution and the relevant statutes. Counsel added that the grounds of opposition filed by the first and 2nd respondents are neither a confirmation nor a denial of the alleged acquisition; that it is upon the applicant to demonstrate that the State is in the process of acquiring the suit property and that the Constitution or the statutes are being breached. He argued that an injunction will fetter the State's power of eminent domain. He urged the court to decline the application.

7. On his part, counsel for the 3rd defendant argued that compulsory acquisition is not contestable by a property owner. He faulted the application for being too general and for failing to name the acquiring public body or department. He further faulted the application for failure to exhibit any letter written to either the acquiring body or the National Land Commission setting out the alleged irregularities.

8. I have considered the application together with the affidavit in support thereof. I have also considered the grounds of opposition and the parties' rival submissions. Similarly, I have considered the constitutional and statutory framework on the doctrine of eminent domain. Lastly, I have considered the relevant jurisprudence on eminent domain.

9. Under consideration is an application for an injunctive order against the Attorney General, the Ministry of Lands and the National Land Commission. Under the pre-2010 constitutional dispensation, reverence was made to Section 16 of the Government Proceedings Act. The jurisprudence which prevailed then was that no injunctive order would lie against the Government. The Constitution of Kenya 2010 redefined Kenya's law on injunctions. Articles 22 and 23 of the Constitution now grant the court jurisdiction to issue injunctive or conservatory orders against the Government. Secondly, the emerging jurisprudence is that Section 16 of the Government Proceedings Act is a pre - 2010 statute which should not be construed to deny the citizenry access to justice because access to justice is guaranteed under the Constitution.

10. Having made the above observation, and noting that under Articles 22 and 23 of the Constitution, an injunctive order would lie against the Government to restrain the State against violating a right guaranteed under the Constitution, the question which falls for determination in this application is whether the plaintiff has satisfied the criteria in **Giella v Cassman Brown (1973) EA 358**. The applicant was required to demonstrate a *prima facie* case with a probability of success. Secondly, she was required to demonstrate that if the injunctive order is not issued, she stands to suffer injury that cannot be indemnified through an award of damages. Were the court to be in doubt, the application would be determined on a balance of convenience.

11. In the application before court, the plaintiff alleges that the State is about to exercise the power of eminent domain without following the laid down procedure. The applicant has relied on the Limitations of Actions Act, Cap 22. In my view, this particular statute does not contain the relevant framework on how the power of eminent domain is to be exercised. That framework is contained in the Land Act. The fact that the applicant has relied on irrelevant legal framework casts doubt as to the basis of her claim.

12. Secondly, the applicant has not placed before court an iota of evidence to demonstrate that the State is about to exercise the power of eminent domain in contravention of the Constitution and the relevant procedural framework stipulated in the Land Act. What is before court is purely a speculative motion founded on unsupported apprehension. The plaintiff has not laid a proper basis upon which an injunctive order would ensue.

13. Without saying much, it is the finding of this court that the plaintiff has failed to demonstrate a *prima facie* case with a probability of success. Consequently, the court's finding is that the Notice of Motion dated 11/5/2018 is unmerited. The same is accordingly dismissed. The respondents shall have costs of the application.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF OCTOBER 2018.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Hannah - Court Clerk