



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION NO. 18 OF 2016

HAMISI TSUMA MWERO.....PETITIONER

-versus-

NATIONAL LAND COMMISSION.....1ST RESPONDENT

KENYA RAILWAYS CORPORATION.....2ND RESPONDENT

CHIEF LAND REGISTRAR.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

DOPP INVESTMENTS LIMITED.....5TH RESPONDENT

Ruling

Introduction

1. The application before court is the Chamber Summons dated 10th February 2016 in which the Petitioner seeks the following orders:

i. That leave be granted to the Petitioner to circulate information and notice of the filing of this Petition to the community and other members of the public who may be interested to be enjoined in this Petition to do so within 21 days from the date of such notice.

ii. That conservatory order be issued restraining the 1st, 2nd, 3rd and or 4th Respondents, whether by themselves, servants and/or their agents or whomsoever is acting on their behalf from paying out from the Public Funds due on account of all that piece and or parcel of land known as Land Reference Number 1040/2 located South of Mazeras Township within Kwale County and registered at the Titles Registry at Mombasa under Cr. 21749 consisting of approximately 246.86 hectares or 610 acres or thereabouts and which land falls within the Mwache Valley and is famously known as Mwamdudu Village in Kwale County Kshs. 667, 903, 887/= or any other lesser or larger sum being compensation due from the Standard Gauge Railway Construction to the 5th Respondent and or any other third parties other than the Petitioner pending the hearing and determination of this Petition.

2. The Application is supported by the annexed affidavit of HAMISI TSUMA MWERO, the Petitioner

herein. On 25th November 2016, the Petitioner withdrew the Petition as against the 3rd and 4th Respondents. The application was opposed by the 1st, 2nd and 5th Respondents. The 1st Respondent relied on the Replying Affidavit sworn on 23rd June 2016 by BRIAN IKOL, its Deputy Director Land Valuation and Taxation and filed on 28th June 2016. The 2nd Respondent relied on an undated Replying Affidavit sworn by HELEN MUNGANIA and filed on 21st April 2016. The 5th Respondent relied on its Affidavit in Reply to the Petition sworn by HARSHIL PATEL and filed on 4th May 2016 and

The Petitioner's Case

3. The Petitioner contends that he is among thousands of residents in active occupation, use and possession of all that piece of land known as Land Reference Number 1040/2 located South of Mazeras Township within Kwale County and registered at the Titles Registry at Mombasa under Cr. 21749 consisting of approximately 246.86 hectares or 610 acres or thereabouts and which land falls within the Mwache Valley and is famously known as Mwamdudu Village in Kwale County (hereinafter "the suit property"). That around 1932, while the Petitioner's ancestors were in active occupation, use and or possession of the suit property, the Colony and Protectorate of Kenya alienated the property and allotted the same to one RAMJI JETHABHAI LIMITED who on or about 17th July 1970, transferred its interest in the suit property to one PETER MUIGAI JOMO KENYATTA.

4. The Petitioner averred that despite the allotment and the eventual transfer, neither the allottee nor the transferee undertook any development or activities on the property and that to date there are no activities undertaken by any of the registered claimants except those undertaken by the Petitioner and his kinsmen, ancestors and the Mwamdudu community. According to the Petitioner, on or about 1982, PETER MUIGAI JOMO KENYATTA transferred the property to MUKINYE ENTERPRISES LIMITED (hereinafter "Mukinye") while the Petitioner and several other members of the Mwamdudu Community were already born on and resident within the suit property.

5. The Petitioner further alleges that sometime in 1991 negotiations were held between Mukinye, defunct Kwale County Council, Ministry of Lands, the Provincial Administration and members of the community who were in active occupation, use and or possession of the suit property and that Mukinye conceded to the rights, entitlement and or claims by the community, including the Petitioner, in the suit property and that the same was to be subdivided into 76 industrial plots, three community open spaces, one community trading center, two community special purpose plots, one community health center, two commercial plots, one mosque plot, one *madrassa* and nursery school plot, one secondary school plot, one primary school plot and four squatter settlement plots. That the said subdivisions were approved and the Petitioner and the Mwamdudu community still await the 1st and 3rd Respondents to act on the same.

6. It is the Petitioner's case that the Standard Gauge Railway cuts across the suit property hence the 1st Respondent was expected to initiate discussions with the Petitioner and the community for compensation. The Petitioner contends that instead of engaging him directly, the 1st Respondent placed an advert in the newspaper and Kenya Gazette calling for representations on "REVIEW OF GRANTS AND DISPOSITION OF PUBLIC LAND" and the suit property was listed as the first item in the said notices.

7. The Petitioner states that he and the community made submissions during the review session held at the Kenya School of Government on 3rd August 2015. That however, while still awaiting the outcome of the deliberations held during the review session, the 1st Respondent issued a letter dated 11th January 2016 to the 2nd Respondent which recommended payments to the 5th Respondent of Kshs. 667,903,887/= in respect of the acquisition of the suit property for purposes of the standard gauge railway project.

8. The Petitioner contends that the actions of the Respondents constitute various breaches of the Constitution and should be declared unconstitutional, fraudulent and unlawful for being in breach of Articles 40, 47 (1) and (2), 60 (1) (a) and (d), 62 (2), 67 (2) and 201 of the Constitution. The Petitioner avers that the Respondents have began the process of paying out the Kshs. 667,903,887/= from public funds which sum is legally and justly due to the Petitioner and that if allowed to proceed will result in

massive wastage of public funds.

9. In his submissions, the Petitioner relied on the case of **FEISAL HASSAN & 2 OTHERS V. PUBLIC SERVICE BOARD OF MARSABIT COUNTY & ANOTHER [2016] eKLR** and urged the court that at this stage all that is required is to consider whether there is an arguable case, whether there will be prejudice to the Applicant if the orders are not granted, the public interest involved and the balance of convenience.

10. On whether he has an arguable case, the Petitioner submitted that the Petition discloses an arguable case since it is abundantly clear that the agitation for ownership of the property by the Petitioner and his forefathers started prior to the conception the SGR project and a concession was reached. The Petitioner submitted that the fact of actual prolonged occupation and use of the property by the Petitioner and other residents are issues which meet the threshold for ownership rights which the 1st Respondent was required to uphold and which form basis for arguable case.

11. It is the Petitioner's submission that other than his rights and those of other residents over the suit property, the Petition has disclosed that there are public utilities on the property such as Mwamdudu Secondary School and as such an element of public interest therefore arises under Article 62 (2) of the Constitution. On balance of convenience, the Petitioner urged that the same tilts in favour of granting his application since the Petition raises fundamental issues which need to be preserved until the same is heard and determined.

The 1st Respondent's Case

12. The 1st Respondent, National Land Commission opposed the application. According to the 1st Respondent proprietary issues were raised by the local residents regarding the legality of the title held by the 5th Respondent. The 1st Respondent states that in light of the issues raised by the locals, it deemed it necessary to first establish the legality of the title held by the 5th Respondent. That after conducting public hearings and taking into consideration all material placed before it, the 1st Respondent reached the conclusion that the title held by the 5th Respondent over the suit property was acquired in a lawful manner.

13. According to the 1st Respondent there are only 13.5 hectares which are the subject of compulsory acquisition and which constitute vacant uncultivated land with no developments/improvements and not in use or physical occupation by the Petitioner or any local resident. That section 120(2) of the Land Act permits the 1st Respondent to take possession of uncultivated, pasture or arable land where there is urgent need for acquisition. The 1st Respondent contends that the Petitioner has not demonstrated what interest it has over the 13.5 hectares of land that is being compulsorily acquired.

14. The 1st Respondent further contends that the schedule of payment contained the letter of 11th January 2016 simply shows that the award of compensation ought to be paid to the 1st Respondent and not the 5th Respondent. That the monies were payable to the 1st Respondent pending determination of the legality of the grant over the subject parcel. It is the 1st Respondent's case that the issues raised in the Petition border on claims of historical injustices which the current Petition cannot cure.

The 2nd Respondent's Case

15. The 2nd Respondent, Kenya Railways Corporation also opposed the application. It contends that the total area of the suit property is 246.86 hectares but only 13.3 hectares is affected by the SGR Project. According to the 2nd Respondent, when it visited the suit property, it noted that there existed conflicts of interest over the suit property between the registered owner, the 5th Respondent and the villagers who inhabit and live thereon.

16. The 2nd Respondent stated that it was authorized to pay Kshs. 667,903,887/= to the 5th Respondent by the 1st Respondent who has the mandate to value, review or authenticate the title to the suit property and determine its true value and owner prior to acquisition. It is the 2nd Respondent's case that from the records and information availed to it on the title and occupation of the suit property prior to acquisition, there is no evidence to show that the Applicant has been resident or resides on the suit property. That all persons residing on the suit property were compensated.

17. In its written submissions, the 2nd Respondent stated that the Petitioner has no claim known in law and this Petition is vexatious, frivolous and an abuse of the court process. The 2nd Respondent in that regard relied on the cases of **TRUST BANK LIMITED V. AMIN COMPANY LTD & ANOTHER (2000) KLR 164, CIVIL APPLICATION NO. 14 OF 2014: CHARO HASSAN NYANGE V. MWASHETANI HATIBU & 3 OTHERS** and **JOHN PATRICK MACHIRA T/A MACHIRA & CO. ADVOCATES V. GRACE WAHU NJOROGE [2006] eKLR.**

18. It is the 2nd Respondent's submission that this Petition is fatally defective and ought to be struck out for the reason that the Petitioner purports to bring it in the representative capacity under the Constitution without giving names and filing authority from the alleged members of the community he purports to represent. The 2nd Respondent relied on the case of **KIRINYAGA UNITED BAR OWNERS ORGANIZATION VS. COUNTY SECRETARY KIRINYAGA COUNTY GOVERNMENT & 6 OTHERS [2014] eKRL.**

19. The 2nd Respondent further submitted that the Petitioner has not established a *prima facie* case to warrant the granting of the conservatory orders. That the Petitioner has not established his title in the suit property or that he was resident thereon. That without legal title, not being a squatter on the suit property and not having made any claim known in law to the suit property, the Petitioner has failed to establish a *prima facie* case with a probability of success.

The 5th Respondent's Case

20. The 5th Respondent, DOPP Investment Limited, relied on its affidavit in reply to the Petition to oppose the application. The 5th Respondent contends that it is the registered owner of the suit property. The 5th Respondent states that it acquired lawful and indefeasible title to the suit property which cannot be impugned save for the exceptional reasons such as fraud which has neither been pleaded nor particularized.

21. The 5th Respondent stated that the Applicant does not reside on the suit land. Further that the Applicant is a vexatious litigant who habitually claims that he resides on various pieces of land with a view to benefitting himself from lawfully registered proprietors. The 5th Respondent referred to Mombasa High Court Civil Application No. 632 of 2011 (OS) against COLFAX HOLDINGS LTD.

22. The 5th Respondent pleaded that the list provided to it of the persons residing on the suit land by the Chief of Kasemeni Location in Mazeras does not contain the Petitioner's name. The 5th Respondent contends that as the lawful owner of the suit property, it is entitled in law to be paid for that portion of the land compulsorily acquired from it by the 2nd Respondent and that all the actual occupants of the land have been compensated by the 2nd Respondent.

23. The 5th Respondent submitted that the Petitioner has no *locus standi* to bring this Petition since he has failed to demonstrate that he has sufficient interest on the subject matter and has demonstrated no authority given to him by the community members he purports to represent and for whom no proper reason has been given why they could not have been part of this Petition. The 5th Respondent in that regard relied on the case of **JOSHUA KARIANJAH WAIGANJO V. ATTORNEY GENERAL & 4 OTHERS [2013] eKLR.**

24. While relying on the case of **DR. JOSEPH ARAP NGOK V. JUSTICE MOIJO OLE KEIWUA & OTHERS, CIVIL APPEAL NO. NAI. 60 OF 1997**, the 5th Respondent urged that its title to the suit property is absolute and indefeasible and can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. The 5th Respondent also submitted that the Petitioner has failed to show a *prima facie* case with a likelihood of success.

Determination

25. In answer to prayer (i) of the motion, the applicant is seeking leave of this court to circulate the petition to members of his community and any parties that may be present to be joined in this Petition. In his further affidavit filed in Court on 2nd Sept 2016 he deposed in paragraph 3 thus, *“That as admitted at paragraph 6 of Brian’s affidavit, I was not alone in presenting claims to the land but I was acting not only on my own behalf but also on behalf of several residents in active occupation of the land majority of whom presented themselves at the public hearings but the 1st Respondent only gave me as a representative, our advocate and our county assembly member the chance to make the presentations on behalf of the residents who had made their claims.”*(underline mine for emphasis).

26. I have lifted just a portion of the applicant’s deposition that states that he made representations on behalf of the residents. If it is true that he has brought this petition on his own behalf and on behalf of the residents in occupation of the suit land then he does not need leave of the court to circulate the Petition. The several residents were present during the public hearings and having made presentations on their behalf, he ought to have circulated the outcome of the hearings to them. Secondly he would have convened a meeting and expressed his intention to bring this Petition and asked any of them interested to join him. Alternatively after filing of the Petition, nothing stopped him from informing the members of his community that such a suit exists and anyone interested can join. The petitioner has not shown why he needs the leave of the court to talk to the people he had previously made presentations on tKheir behalf. Other than his community members, he did not specify who else he intended to be joined.

27. The second issue is whether a case has been made out for grant of the conservatory orders. In the case of **Gatirau Peter Munya vs Dickson Mwenda & 2 Others (2014)Eklr**, the Supreme Court stated that *Conservatory Orders bear a more decided public law connotation*; for they are orders to facilitate ordered functioning within public agencies as well as uphold the adjudicatory authority of the court. That they are not linked to private-party issues and should be given on the inherent merit of a case bearing in mind the **public interest, the constitutional values and proportionate magnitudes & priority levels attributable to the relevant case.**

28. The issue here is whether this application meets the above principles. The subject of the dispute relates to land acquired for the construction of the Standard Gauge Railway (SGR). Consequent to the acquisition, the 1st respondent valued the land and found the amount payable and due to the 5th is KSHS 667,903,887. The Petitioner claims that he and the community are entitled to the compensation in place of the 5th respondent as the land is owned by them. This is confirmed by the reliefs sought in the Petition where they are seeking for orders that the said sum be paid to them.

29. The Petitioner argues that the case is of public interest because of the existence of Mwamdudu secondary school on the part of the land that has been acquired. Secondly that public fund due to them should not be expended before the Petition is heard. And their right to property under article 40 of the constitution should be protected. The 5th respondent submitted that his title is indefeasible and can only be challenged on account that it was obtained by fraud or misrepresentation to which he is proved to be a party to and that has not been done. This is a matter that can only be determined through a hearing although I wonder if a petition would be the proper forum to question the 5th Respondent’s title.

30. Weighing the two scenarios presenting themselves in this case, it is my considered opinion that the issue in dispute is who owns the land that has been acquired by the 1st and 2nd respondents and thus should be entitled to be compensated. According to me this is a private dispute that has no public interest link as is being put forward by the Petitioner. It is distinguishable from the case of **Micro & Small**

Enterprises Association, Mombasa Branch versus Mombasa County Government & 43 Others
(2014)eKLR because in this case the loss is quantifiable in the amount already decided by the 1st Respondent. It is therefore my considered opinion and I so hold that if the Petition succeeds then the court will make appropriate orders for the 5th Respondent to refund. Consequently any violation if any suffered if the conservatory orders are not granted in this case will be adequately addressed.

31. From the foregoing analysis, I do hereby reach a conclusion that this application is without merit. I proceed to dismiss it with an order that each party shall bear their respective costs.

Dated & Signed at Mombasa this 23rd Day of March 2017

A. OMOLLO

JUDGE

Delivered in Mombasa this 24th Day of March 2017 by

C. YANO

JUDGE