



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC PETITION NO. 271 OF 2016

CRISPUS MAINA GAITHO.....PETITIONER/APPLICANT

-VERSUS-

THE ATTORNEY GENERAL.....1ST RESPONDENT

KENYA RAILWAYS CORPORATION.....2ND RESPONDENT

NATIONAL LAND COMMISSION.....3RD RESPONDENT

CHINA ROAD & BRIDGE CORPORATION (K) LTD.....4TH RESPONDENT

RULING

1. This determination is on the preliminary objection raised by the 2nd and 4th Respondent first that this Court lacks original jurisdiction to hear and determine the petition. The second objection is the form in which the claim has been made i.e. that it should not have been brought by way of a constitutional petition but in the manner provided under the Land Act, ELC Act, Civil Procedure Act and other applicable statutes.

2. In support of the first limb, the 2nd & 4th Respondents submitted that the Petitioner acknowledges that in his petition that the acts of the 1st and 2nd Respondents are compulsory acquisition under Part VIII of the Land Act in respect to land parcel No Mbololo/Tausa/2681. The two Respondents pleaded that section 112, 118, 119 & 120 of the Land Act vests the original jurisdiction to determine the acreage of the land in dispute on the commission's inquiry set up by the 3rd Respondent.

3. In the Petition before this Court, the reliefs sought as per the Petition are for:

i) A declaration that the Petitioner's right under Art 40(3) & 47(1) of the Constitution has been violated by the Respondents jointly and severally

ii) An order of injunction directed at the 2nd & 4th Respondents either by themselves, their servants, agents or persons acting under their direction from carrying on any construction works howsoever on the suit property until the Petitioner herein is fully compensated as by law provided."

Does this Court have original jurisdiction to hear the dispute? In answering this question, the 2nd & 4th Respondents quoted several Court decisions inter alia **Mutanga Tea & Coffee Co. Ltd vs Shikara Ltd**

& Municipal Council of MSA Civil Appeal No 54 of 2014 (2015) eKLR where the Court of Appeal held that aggrieved parties should strictly follow procedures that are specifically prescribed for the resolution of particular disputes. The Respondents quoted page 14 of the judgement where the learned Judges said thus, ***“we entertain no doubt in our mind that the reasoning of the Court must apply with equal force to require an aggrieved party where a specific dispute resolution mechanism is provided by the Constitution or a statute to resort to that mechanism jurisdiction of the High Court.”***

4. The Petitioner on his part referred this Court to the provisions of Article 2 (4) of the Constitution which provides that any law that is inconsistent with the Constitution is void to the extent of that inconsistency and therefore invalid. He also submits that their Petition does not challenge the compulsory acquisition except he wishes to be fully compensated as provided in article 40 (3) of the Constitution. Thus their Petition is intended to enforce the provisions of article 40 (1). Further that the issue of ownership is not in dispute as he has annexed copies of search, valuation report and gazette notice – published by the 3rd Respondent.

5. This Court then asks the question what is the issue in dispute to be resolved and does this Court have original jurisdiction to determine the said dispute? As submitted by both parties, the suit property appears to have been compulsorily acquired by the 1st & 2nd Respondents for the construction of the Standard Gauge Railway (SGR) and shown by a copy of the Kenya gazette annexed as **CMM 2** in the Petitioner’s affidavit in support of the application. In paragraph 10 of the Petition, the Petitioner pleaded *“that I did instruct the able valuation firm of Paul Wambua who visited the land and conducted a valuation which shows the land value at Kshs 1,840,000=.* This is yet to be paid to date.” Further in prayer (1) the Petitioner prays for a declaration that his rights under article 40 (3) and 47 (1) of the Constitution have been violated and infringed by the Respondents in the manner pleaded in the Petition.

6. Article 40 (3) of the Constitution requires the state not to deprive a party of his property unless the deprivation:

(a) results from an acquisition of land in accordance of Chapter Five or

(b) for public purposes or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament. (underline mine for emphasis).

(i) requires prompt compensation in full.

(iii) allows any person who has an interest in or

right over that property a right of access to

to a Court of law.

7. Any act of Parliament referred to in article 40 (3) in this instant is the Land Act 2012. Since the Petitioner is not questioning the compulsory acquisition, in my opinion what I hold to be in dispute and which the Petitioner himself admits as the issue is **the just compensation payable to him and which should be paid promptly.** Therefore the question arising is how the amount of compensation that is payable should be determined. Under the Land Act, section 111 provides that compensation be paid promptly in full to all persons whose interests in the land have been determined. Section 112 provides the procedure of making that award.

8. The claim as pleaded does not seem to suggest that the 3rd Respondent has formed an inquiry in accordance with section 112 of the Act or that an award has been made as provided under section 113 & 114. The Petitioner has instead annexed his own report giving his own valuation of the land. The sections under which the 2nd and 4th Respondents submit as ousting the original jurisdiction of this court does not give a procedure for a party who is aggrieved to follow. The commission is set at the discretion of the 3rd Respondent and it is not a tribunal. Secondly, **section 128 of the Land Act** clearly states that

any disputes' arising out of any matter provided for under this Act is to be referred to the Environment & Land Court. In the absence of steps a party may take where both the provisions of article 40 (3) of the Constitution and section 112 has not been undertaken I find nothing wrong to invoke the original jurisdiction of this Court. In the Mutanga Tea & Coffee Ltd case *supra* referred to by the Respondents, the applicable statutes had provided procedures & institutions for which an aggrieved party could follow to air their grievance i.e the PPA and the National environmental Tribunal (NET). It is therefore distinguishable from this one.

9. The second limb of the objection is that the claim should not have been commenced as a constitutional petition. As already mentioned above, the right the Petitioner is trying to enforce is given to him both by the Constitution under article 40 and expanded under part VIII of the Land Act 2012. The argument that there is no constitutional right which has been infringed is not true. In terms of not getting an opportunity to ventilate their claim is neither here nor there as the Respondents have a right to file any response they may wish to just like if this suit was commenced by way of a plaint. The petition can proceed to be heard in the normal manner as an ordinary suit. This in my view is a technical objection the Respondents are trying to use to deny a party the protection of this court for which he is entitled to.

10. For these reasons I find the claim as pleaded is proper and this Court in exercise of its original jurisdiction has powers to determine the dispute as provided under section 28 of the Land Act. Consequently, I find no merit on both limbs of the objection. The preliminary objection dated 14th November is hereby dismissed with costs to the Petitioner.

Dated, signed & delivered at Mombasa this 3rd day of May 2017.

A. OMOLLO

JUDGE