



**Omar & another (As Executors of the will of Omar Bin Khamis) v
Kenya Airports Authority & another (Environment & Land Petition
7 of 2023) [2024] KEELC 964 (KLR) (28 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 964 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION 7 OF 2023
NA MATHEKA, J
FEBRUARY 28, 2024**

BETWEEN

**ABEID AWADH OMAR 1ST PETITIONER
OMAR KHAMIS OMAR 2ND PETITIONER
AS EXECUTORS OF THE WILL OF OMAR BIN KHAMIS**

AND

**KENYA AIRPORTS AUTHORITY 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT**

JUDGMENT

1. Prior to meeting his death in the year 1945 the late Omar Bin Khamis Al-Mashjary (deceased) was the owner of all that property known as Plot L.R No. MN/VI/350 (350/VI/MN, CR 2434) located at Kwa Jomvu Mainland North, Mombasa. Upon the demise of Omar Bin Khamis Al Mashjary, Mohamed Bin Said and Abdulla Seif were appointed the deceased trustee, administrators and executors of the Deceased's estate and will. The Estate of the deceased then applied to revoke the appointment of Mohamed Bin Said and Abdulla Seif and replace them with Abeid Awadh Omar and Omar Khamis Omar. Vide the Kadhi's judgment delivered on the 4th of June, 2019, the court proceeded to, among others: Revoke the appointment of Mohamed Bin Said and Abdulla Seif over the Estate of Omar Bin Khamis Al-Mashjary (deceased). Appoint Abeid Awadh Omar and Omar Khamis Omar as administrators over the estate of Omar Bin Khamis Al-Mashjary (deceased) in the property known as Plot L.R No. MN/VI/350 (350/VI/MN, CR 2434) located at Kwa Jomvu Mainland North, Mombasa.
2. In the year 1978 the government vide the Gazette Notices Nos. 1460 and 1461 dated 13th May, 1978, the Government acquired 2 acres of Plot L.R No. MN/VI/350 (350/VI/MN, CR 2434). Vide the



- letter dated 30th of November, 1978 the Commissioner of Lands gave the deceased's Estate notice of taking possession and vesting to the Government (1st Respondent) of the land acquired. Vide the notification of awards issued to the Estate of the Deceased, the Government awarded the Estate Kshs. 46,000/- for the acquisition.
3. In 1979, after the Government had acquired the 2 acres of land, the Estate of the Deceased conducted a survey of the remainder land and discovered that the Government had occupied more than the 2 acres acquired through compulsory acquisition. The survey disclosed that the additional land irregularly fenced off was 1.5 acres of the remainder of L.R No. MN/VI/350 (350/VI/MN, CR 2434) located at Kwa Jomvu Mainland North, Mombasa. Upon such discovery, the Estate of the Deceased wrote to the Commissioner of Lands vide the letter dated 19th February, 1979 seeking that the Government, resurveys the land and places the beacons correctly to reflect the acreage compulsorily acquired. The 1st Respondent, after receiving many follow ups from the Petitioners submitted the dispute to the Ministry of Lands as a boundary dispute. The Ministry of Lands, upon receiving the boundary dispute instructed the District Surveyor Mombasa District to investigate and determine the boundary dispute. The Ministry of Lands however delayed in determining the boundary dispute following which the Petitioners wrote to the 1st Respondent seeking for compensation for the additional 1.5 acres of land fenced off but not lawfully compulsorily acquired.
 4. The petitioners are the executors of the estate of Omar Bin Khamis Al-Mashjry (deceased) the registered proprietor of Land Parcel No. MN/VI/350. Vide a Gazette Notice No. 1460 dated 19th May 1978, the then Commissioner of Lands on behalf of the 1st respondent acquired part of MN/350/2/VI measuring 2.00 acres for Kshs 46,000/= . After the 1st respondent had taken possession of the suit premises, it was apparent that the 1st respondent had occupied 3.5 acres as opposed to the 2 acres they had acquired. Omar Bin Khamis wrote to the Commissioner of Lands on 7th February 1979 and requested for a survey of the suit premises to ascertain the extent of the land that was acquired by the 1st respondent. The issue remained unresolved until the 28th of January 2004 when the petitioner wrote to the 1st respondent appealing for compensation for the 1.5 acres they believed was wrongfully fenced off. The 1st respondent wrote back to the petitioners on 19th February 2004 requesting inter alia for deed plans for the suit premises before and after the land acquisition, with a view of investigating how 3.5 acres were fenced off.
 5. The Surveyors from the Ministry of Lands and Settlement, on the other hand, were tasked to re-establish the survey of the suit premises. On 29th June 2005 the District Surveyor wrote to the petitioners with preliminary findings that indicated the western part of the suit premises had been encroached on by the 1st respondent to the extent of 1.288ha. This led to the petitioner through their advocates Kiarie Kariuki Advocates to write to the 1st respondent on 14th July 2014 demanding the surrender of the illegally acquired part of the suit premises. The 1st respondent responded to the said letter on 6th August 2014 and requested the petitioners to hold any precipitate action as they address the said concerns. This was then followed by a letter dated 19th August 2014 where the 1st respondent requested the petitioners to forward inter alia the vesting order, official search as well as survey and deed plans for the suit premises for them to respond effectively. The petitioners did supply the 1st respondent with these documents vide a letter dated 4th September 2014 but since then the 1st respondent has been non-forthcoming with any response.



6. Article 40 (1) of *the Constitution* guarantees individual proprietary rights. Where statutory authority deprives one of those rights, the laid down procedure of compulsory acquisition of private land by the state for public use must be adhered. Article 40 (3) of *the Constitution* states,

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.
7. From the evidence adduced before the court, the Commissioner of Lands compulsorily acquired 2 acres of the suit premises on 13th May 1978 and paid compensation to the petitioners. However, the 1st respondent took possession and vested an additional 1.288ha of the suit premises. This encroachment of the petitioners' suit premises without the full and just compensation was a violation of the right to property. The 1st respondent could only have deprived the petitioners of part of or all of their property through compulsory acquisition as stated in Article 40 (3) of *the Constitution* and in line with the procedure stipulated in the Land Acquisition Act (repealed) which at the time was applicable. The Supreme Court in *Attorney General v Zinj Limited* (Petition 1 of 2020) [2021] KESC 23 (KLR) (Civ) (3 December 2021) (Judgment) held that;

“It follows that any compulsory acquisition process, ought to have commenced with a requisite Notice to the respondent, and any other persons claiming an interest in the land. The public purpose for which the land was to be acquired, ought to have been clearly stated. Most critically, the resultant acquisition ought to have been attended with prompt payment in full, of a just compensation to the respondent. There is nothing on the record to show, that any of these mandatory processes, was followed before a portion of the suit property was acquired. This being the case, and despite the appellant’s protestations to the contrary, we must reach the conclusion, in agreement with the trial court, that the issuance of titles over a portion of the suit property, in favour of third parties was unlawful, un-procedural, and an egregious violation of the respondent’s right to property. We therefore have no doubt, that the issuance of titles to third parties over a portion of the suit property, amounted to a violation of article 40(3)(a) and (b) of *the Constitution*.”

8. It is the finding of this court that the 1st respondent unlawfully deprived the petitioners of their suit premises by encroaching on their land. The petitioners availed evidence in court to support its claim that a portion of their had been encroached upon. To be specific, the Ministry of Lands and Settlement, through its Mombasa District Surveyor vide a letter dated 29th June 2005 informed the petitioners that there was an encroachment of 1.288ha into their land by the 1st respondent. Further, the petitioners carried out a valuation of their suit premises on 17th February 2023 and reported that the encroached area measured approximately 1.2 acres or 0.4856ha and the value of the said portion. The petitioners



are entitled to be paid promptly in full and just compensation as stipulated in Article 40 (3) of the Constitution.

9. The Supreme Court in Attorney General vs Zinj Limited (supra) had this to say about the action of the Government violating the right to property while acquiring private land as compulsory acquisition. In particular, the Supreme Court held that;

“In addition, we have held that such action could not be regarded as “a compulsory acquisition” as it was done contrary to the Constitution and the law. The acquisition was “compulsory” only because the Government used its coercive powers to deprive the respondent of its property in disregard of the Constitution. However, such governmental action cannot be regarded as “a compulsory acquisition” as known to law. It was simply a brazen and an unlawful deprivation of the respondent’s right to property, for which just recompense was awarded by the trial court.”

10. It follows, therefore, that only upon the payment of compensation for the entire portion that was hived off by the 1st respondent can deem that the petitioners have relinquished their title to the suit premises. The right to be compensated when a person is deprived of his property for public use cannot be over emphasised. This was stated in Patrick Musimba vs National Land Commission & 4 others (2016) eKLR that;

“There exists, no doubt, an overarching right to compensation under Article 40 (3) of the Constitution where a person is deprived of his property for a public purpose or in the public interest.

The power to expropriate private property as donated to the State by both the Constitution and statute law (the Land Act) leaves the private land owner with no alternative. The power involves the taking of a person’s land against his will. It is a serious invasion of his proprietary rights through the use of statutory authority. The private land owner has no alternative but wait for compensation. It is consequently necessary that the court must remain vigilant to see to it that the State or any organ of the state does not abuse the constitutional and statutory authority to expropriate private property. It is on this basis that courts have consistently held that the use of statutory authority to destroy proprietary rights requires to be most carefully scrutinized.”

11. From the material placed before this court, it is evident that the 1st respondent has been on the suit premises since the year 1978. It is evident that 1st respondent was well aware that the late Omar Bin Khamis was following up on the suit premises. The 1st respondent’s Managing Director wrote to him on 19th February 2004 requesting documentation for inquisition as to how land not meant for acquisition was fenced off. In addition to the said letter, the 1st respondent was in touch with the firm of advocates representing the petitioners in August 2014 requesting for supply of similar documentation and promising to revert to the 1st respondent. Despite being aware of the situation at hand, the respondent did not demonstrate to the court that they made further inquiries into their encroachment of the suit premises since they became aware of the petitioners’ predicament.
12. This court finds that the actions of the 1st respondent of compulsorily acquiring the suit property were unconstitutional. There was a violation of the petitioners’ right to property and they are entitled to remedies and the court enters judgement for the petitioners as against the 1st respondent in the following terms;



1. A declaration that the unlawful fencing off of 1.2 acres and compulsory acquisition of Land Parcel No. MN/VI/350 without prompt, just and full compensation was a violation of the petitioners' right to property as guaranteed by Article 40 (3) of *the Constitution*.
2. An order of Compensation be issued in favour of the Petitioners against the Respondents for the payment of the value of the 1.2 acres of the Petitioners' land L.R No. MN/VI/350 (350NI/MN, CR 2434) located at Kwa Jomvu Mainland North, Mombasa illegally fenced off being Kshs.84,000,000.00.
3. The petitioner shall have the costs of this petition from the 1st respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 28TH DAY OF FEBRUARY 2024.

N.A. MATHEKA

JUDGE

