



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC PETITION NO 94 OF 2016

IN THE MATTER OF : ENFORCEMENT OF THE CONSTITUTION OF

KENYA & THE BILL OF RIGHTS UNDER THE CONSTITUTION

OF KENYA ARTICLE 22(1) & 2 OF THE CONSTITUTION

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF

FUNDAMENTAL BILL RIGHTS UNDER THE CONSTITUTION

OF KENYA ARTICLE 40 (3) AND 63 (2) (A)

BETWEEN

MWAVUMBO GROUP RANCH.....PLAINTIFF

VERSUS

1. THE NATIONAL LAND COMMISSIONS

2. KENYA RAILWAYS CORPORATION

3. CHIEF LAND REGISTRAR

4. ATTORNEY GENERAL

5. TOM KALIMBO MWERO

6. JOHNSON MKALA MWERO

7. SIMON NDEGWA MWERO.....RESPONDENTS

JUDGMENT

1. Then Humble Petition of Mwavumbo Group Ranch of P. O Box 516 Mariakani Kwale County. The petitioner is a group of ranch with corporate identity duly registered as such under the Land (Group Representatives) Act, Chapter 287 Laws of Kenya. Its address of service for purposes of this petition shall be care of Odongo B. O. And Company Advocates, 1st Floor Furaha Plaza, Nkrumah Road P. O Box 42053 – 80100 Mombasa.

2. The first respondent is the National Land Commission established under Article 67(1) of the constitution of Kenya. Service of the petition shall be effected through the petitioner's advocate's office.

3. The 2nd respondent is a state Corporation established under Kenya Railways Act Service of the petition shall be effected through the

petitioner's advocate's office.

4. The 3rd respondent is the Chief Land Registrar appointed under Section 12(1) of the Land Registration Act, 2012. Service of this petition and summons shall be effected through the petitioner's advocate's office.

5. The 4th respondent is the Attorney General of the Republic of Kenya whose office is established under Article 156(1) of the Constitution of Kenya, and is the principal legal adviser to the Government shall be effected through the petitioner's advocate's office.

6. The petitioner is the registered proprietor of all that parcel of land known as Kwale/Mwavumbo/1 (hereinafter referred to as the ranch), measuring approximately 24,908 hectares situated within Mariakani area of Kwale County.

7. The petitioner states that the said ranch is one of the private parcels of land which were affected by the construction of the Standard Gauge Railway, whose phase one construction is ongoing. In paragraph 9-27 of the petition it states that they were not compensated adequately hence this petition.

8. Your petitioner prays for;

a) A declaration that the 1st, 2nd, 3rd & 4th respondents' refusal to compensate the petitioner for the 174,646 hectares (436,615 acres) of its land being Kwale/Mwavumbo/1 compulsorily acquired for the construction of the Standard Gauge Railway is a breach and a violation of its constitutional right as enshrined under Article 40(3) (b) (i) of the Constitution of Kenya.

b) An order directing the 1st, 3rd & 4th respondents to value the said 174,646 hectares (436,615 acres) falling within the undisputed portion of the petitioner's land Number Kwale/Mwavumbo/1 affected by the Standard Gauge Railway and compensate the petitioner the valued amount.

c) A permanent injunction restraining the 1st, 2nd & 3rd respondents whether by themselves, servants and/or their agents or whomsoever acting on their behalf from diverting public funds due on account of the petitioner and the community on the property to pay out to third parties other than the petitioner.

d) Any other order(s) this Honourable Court may deem just to grant.

e) Costs of the petition.

9. The petition is supported by the affidavit of Mbitio Mongo, the chairman of the petitioner herein, sworn on the 5th May, 2016.

10. After they were served, the 1st to 4th respondents each entered appearance and filed responses to the Notice of Motion dated 5th May, 2016 and the petition.

11. Mr. Makuto for the 3rd & 4th respondents filed their responses dated 25th July, 2016. The 1st respondents through its counsel, filed a replying affidavit on the 25th July, 2016. The 2nd respondent filed grounds of opposition dated 23rd July, 2016 and a notice of preliminary objection dated the same day.

12. On the 25th January, 2017 the 1st, 3rd & 4th respondents were given seven (7) days to file their grounds of opposition and replying affidavits to the petition.

13. On the 25th July, 2016 the petitioner withdrew their claim against the 5th, 6th & 7th respondents hence withdrew prayers (b), (d) and (f) of the petition.

14. By the time of writing this judgment, the 1st, 3rd & 4th respondents had not filed any responses.

The matter came up for mention on 13th March, 2017 and a date for judgment was given. Only the petitioner and 2nd respondents had filed their written submissions. The 1st, 3rd & 4th respondents never filed any.

15. THE PETITIONER'S SUBMISSIONS.

This petition is necessitated by the 1st and 2nd respondents' action in compulsorily acquiring a portion of the petitioner's land and refused to compensate it. The petitioner owns plot Number Kwale/Mwavumbo/1 measuring 24,908 hectares on thereabouts situated in Kwale County.

16. That the land is a group ranch within the meaning of The Land (Group Representative) Act Chapter 287 Laws of Kenya and the petitioner is a duly incorporated entity under this Act.

17. A Portion that land measuring about 174,646 hectares (436,615 acres) was compulsorily taken by the 1st and 2nd respondents for purposes of the construction of the Standard Gauge Railway. The said portion was duly gazetted in the Kenya Gazette of 20th June, 2014.

The petitioner through a letter dated 22nd March, 2015 requested the 1st respondent for compensation in respect of the portion taken for the said project.

18. The 1st respondent in a letter date 6th May, 2015 alleged that some members had been compensated and referred the petitioner to the 2nd respondent. The petitioner wrote to the 2nd respondent who in a letter dated 6th June, 2015 informed the petitioner that there was no extra compensation payable to the group as requested.

The petitioner later raised the issue of compensation with the 1st respondent at a public rally inquiry organized by the 1st respondent at Matuga school of Government but the 1st respondent never made any decision on the issue.

19. The petitioner states that it is the registered proprietor of Kwale/ Mwavumbo/1. Which portion measuring 174,646 hectares (436,615 acres) was compulsorily acquired by the 1st and 2nd respondents for purposes of constructing the Standard Gauge Railway.

Further that the petitioner as entitled to compensation for the said portion as per Article 40(3) of the constitution.

20. That the refusal by the 1st and 2nd respondents to compensate the petitioner is therefore a violation of the said Article. No reason has been given for their refusal to compensate the petitioner.

21. They relied on the case of

Kanini Farm Limited –versus- Commissioner of Lands (1986) KLR 310 where it was held that, “**a person whose land is acquired is entitled to prompt and full compensation.**”

22. That none of the petitioner’s members was compensated.

23. With regard to the 2nd respondents preliminary objection the petitioner submitted that the matter was raised before the 1st and 2nd respondents before this matter was filed in court but they did not respond adequately.

24. That section 112 of the Land Act, 2012 does not establish a permanent body with what may be termed as original jurisdiction in compensation matters where one can institute a claim. That it does not take away the original jurisdiction of this Honourable Court to deal with such issues.

25. That it is the 1st respondent who carried out survey and gazette the same and clearly shown that Kwale/Mwabumbo/1 belongs to the petitioner but it has not shown that it complied with the provisions of Section 112 of the Land Act by causing notice of inquiry to be published at least 15 days before the inquiry and served the same upon the petitioner. The petitioner prays that the preliminary objection be dismissed.

26. THE 2ND RESPONDENT’S SUBMISSIONS

The petitioner has not shown any right or title that can be protected by the court because the petitioner’s title is not genuine. The petitioner was registered under Section 7 (2) of the Law (Group Representative) Act on 30th July, 2015. The alleged document title exhibited was registered on 26th March, 1994.

27. Consequently, the petitioner could not have been registered as the owner of the property known as Kwale/Mwavumbo/1 thirty one years before the petition came into existence.

That the document of title shows it was issued under the Registered Land Act (Cap 300) Laws of Kenya (repealed) and not under the Land Group Representative) Act, Cap 287 Laws of Kenya.

Further, that the property that was compulsorily acquired by the 1st respondent does not belong to the petitioner as the title belonging to the petitioner is L. R. No Kwale/Mwavumbo/1 while the property subject of compulsory acquisition is L.R No Mwavumbo Group Ranch/1.

28. Further that there is no evidence that these two titles are one and the same parcel of land hence the petitioner cannot enforce its rights under Article 40 of the constitution. They have put forward the case of;

a) Paul Mutwiwa Wambua –versus - Komarock Ranching & Farming Society (2016) eKLR.

b) Abdulahi Mangi Mohamed –versus- Lazarus Benja And 5 others (2012) eKLR

c) Peter Maingi Mule –versus- Kenya Power And Lighting Company Limited (2014) eKLR.

29. The 2nd respondent’s view is that the Environment And Land Court does not have original jurisdiction to hear and determine this dispute to the extent that it is challenging compulsory acquisition of law by the National Land Commission under part vii of the Land Act, 2012.

30. Section 112 resets original jurisdiction to determine disputes on the ownership, value and compensation payable on the recommendation

by a commissions inquiry established under this Section 118 to 120 addresses the issues of compensation Section 113 (3) states that an award of National Land Commission is final and conclusive evidence of the size of Land, value, amount of compensation payable whether the persons interested appear at the inquiry or not.

31. Under Section 128, any dispute arising may be referred to the Environment And Land Court. That the dispute herein does not fall within the jurisdiction of the Environment and Land Court exercising its jurisdiction as a constitutional court because parliament has provided sufficient statutory framework under the Land Act, 2012 resolving of disputes arising from compulsory acquisition of land.

32. That the petitioner does not attest that the statutory framework under the Land Act is unconstitutional or that the remedies are insufficient. The petitioner should not be allowed to ignore the statutory framework prescribed by parliament by baptizing an ordinary compulsory acquisition dispute into a constitutional question. They also relied on the case of;

a) East Africa Gas Company Limited And Another –versus- National Land Commission And 3 Others (2015) eKLR.

b) Speaker of the National Assembly –versus- James Njenga Karume (1992) eKLR.

c) Narok County Council –versus- Transmara County Council And Another Civil Appeal No. 25 of 2000.

They pray that the Notice of Motion and the petition be dismissed with costs.

33. I have considered the petition dated 5 May, 2016 the affidavit in support and the annexures. I have also considered the grounds of opposition to the petition dated 5th May, 2016, the notice of preliminary objection dated 23rd June, 2016. I have also considered the written submissions of counsel and the authorities cited. The issues for determination are;

i) Whether the petitioner owns land parcel number Kwale/Mwavumbo/1.

ii) Whether the 2nd respondents preliminary objection is merited.

iii) Whether the petition herein raised constitutional issues capable of being determined by this court sitting as constitutional court.

34. Annexure “B” to the petition is a Land Certificate issued under the Register Land Act, Cap 300, Kwale/Mwavumbo/1. The registered proprietor is Mwavumbo Group Ranch. The title deed was issued on 26th March, 1994.

The certificate of incorporation Annexure “A” shows that Mwavumbo Group Ranch was incorporated on 30th July, 2015.

I find that prima facie case, the petitioner has proved that it is the registered proprietor of Kwale/ Mwavumbo/1 as far back as 1978.

35. No material has been placed before court by the 2nd respondent to rebutt these facts.

36. There is no doubt that a portion of the said parcel was compulsory acquired for the construction of the Standard Gauge Railway.

37. Article 40 (3) of the constitution states;

a) “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 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 the chapter five or;

b) Is for Public purpose or in public interest and is carried out in accordance with this constitution and any Act of parliament that it requires prompt payment in full, of just compensation to the person and allows any person who has an interest in or right over that property a right of access to a court of law.

Provision may be made for compensation to be paid to occupants in good faith of law acquired under clause (3) who may not hold title to the land”.

38. It is the petitioners contention that they were not compensated hence a violation of Article 40 of the constitution. Further that the petitioner was never involved in identification of who was a genuine occupier, and who was as a squatter.

39. Section 54 of the Community Land Act 2016 states,

“Subject to Article 40(3) of the Constitution and the law Act, 2012 no interest in right over community land may be compulsorily acquired by the state except in accordance with the law for a public purpose and upon prompt payment of just compensation to the person or persons in full or by negotiated settlement.”

40. The petitioner relied on the letters by the 1st and 2nd respondents dated 6th May, 2015 and 6th July, 2015 respectively to the effect that the affected members of the petitioner had been compensated. They further contend that after this petition was file the said respondents failed to table any document of payment to any of the petitioners members.

41. Let me now turn to the 2nd respondent's preliminary objection. The same is premised on part vii of the Law Act 2012. That part has provided sufficient statutory framework to resolving disputes arising from compulsory acquisition.

Sections 112 to 120 of the Land Act 2012 addresses all the issued relating to compulsory acquisition. It is only after the National Land Commission has complied with all the steps set out in Sections 112 – 120 that if there is still any dispute then the matter can be referred to court for determination of any question.

42. It is the 2nd respondents contention that the petitioner has not exhausted the framework set out in Section 112 – 120 of the Land Act, 2012. In the case of *speaker of the National Assembly –versus- James Njenga Karume (1992) KRL 425*

The court stated,

“... Where there was a clear procedure for the redress of any particular grievance prescribed by the constitution or an Act of parliament, that procedure should be strictly followed.”

43. I agree with the 2nd respondents submissions that the procedure for redress has been provided under Section 112 -120 of the Land Act, 2012. The petitioner was under an obligation to go through the said process in seeking redress.

44. Also in

Fredrick Mworira –versus- District Land Adjudication officer Tigania West/East And 3 Others Meru Petition No 129 of 2011

Lenaola held that;

“I find that though courts can grant orders of certiorari in constitutional petitions, parties must demonstrate that they do not seek them in an attempt to avoid the application of the provisions of the relevant statutory provisions like in this case where in my view, this petition was filed to avoid the consequences that would befall the petitioner for having avoided to abide by the stipulation contained in the Land Adjudication Act.”

45. Also in the case of

East Africa Gas Company Limited And Another –versus- National Land Commission And 3 Others (2015) eKLR,

It was held that;

“..... where the constitution and any law not inconsistent with the constitution provides a procedure for resolution of disputes, that procedure ought to be followed, adhered to and applied in the resolution of disputes to which such law or the constitution prescribes.....”

The petitioner has failed to demonstrate that it went through the frame work for resolution of disputes under Section 112 – 120 of the law Act, 2012.

To this extent I find the 2nd respondents preliminary objection to be merited and the same is up held.

In essence this ground is enough the strike out the petition herein.

46. I will however go ahead and deal with the third issue, which is whether the petition before court raises constitutional issues worthy of consideration by this court sitting as a constitutional court.

47. The petition alleges violation of its rights under Article 40 (3) of the constitution. Section 112 – 120 of the Land Act prescribes the procedure in which it is done.

48. I agree with the respondents that this is an ordinary compulsory acquisition dispute and not a constitutional question.

In the case of

Revital Health Care (EPZ) Limited And Another –versus- Ministry of Health And 5 Others, Mombasa Hc Constitutional petition No. 63 of 2013

Anyara Emukule J. referred to the case of

S. –versus- Mhlungu (1995) (3) S.A 867 CC

Where in the constitutional court, Kertidge J. articulated the principle of avoidance in his minority judgment as follows at paragraph 59;

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal without reaching a constitutional issue, that is the course which should be followed.”

49. It was also held in

Abdalla Mangi Mohamed –versus- Lazarus Benja And 5 Others Mombasa HC Constitutional petition No 59 of 2011

That;

“Where there is a dispute as to the applicant’s entitlement to property and where there exists a statutory mechanism for the resolution of the dispute, the statutory procedure should be utilized in the determination of the applicants claim to the property rather than clog the constitutional court with applications for enforcement that require prior determination. The improper practice of making private disputes as to ownership of property as application for enforcement of constitutional rights to property should be discouraged.

50. I am guided by the above authorities I find that the petition here does not arise constitutional issues worthy of consideration by this court sitting as a constitutional court.

51. Finally, the petitioners prayer (b) states;

“An order directing the 1st and 2nd respondents to value the said 174,646 hectares (436,615 acres) falling within the undisputed portion of the petitioner’s land Kwale/Mwavumbo/1 affected by the Standard Gauge Railway and compensated the petitioner the valued amount.”

In my view what the petitioner ought to have done is to have a valuation be undertaken on the property under compulsory acquisition before filing a suit against the respondents.

52. The petitioner has come to court improperly. It should have instituted a suit whereby they would file a valuation report and present evidence on the compensation due.

53. In conclusion I find that the petition herein does not raise any constitutional issues worthy of consideration by this court sitting as a constitutional court.

54. I find the preliminary objection by the 2nd respondent to be merited and the same is upheld.

55. The upshot of the matter is that this petition is not merited and the same is dismissed with costs to the 1st, 2nd, 3rd and 4th respectively.

It is so ordered.

Dated, signed and delivered at Mombasa on the 29th day of November 2017.

L. KOMINGOI

JUDGE

29/11/2017

Mr. Siminyu : I apply that the petitioner be supplied with certified copies of proceedings and judgment I also seek leave to appeal.

L. KOMINGOI

JUDGE

Court : Leave to appeal is granted. The petitioner be supplied with copies of proceedings and judgment to issue upon payment of the requisite fees.

L. KOMINGOI

JUDGE