REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION NO. 171 OF 2016

AFRICAN GAS AND OIL COMPANY LIMITED.....PETITIONER

-versus-

THE ATTORNEY GENERAL.....1ST RESPONDENT

KENYA RAILWAYS CORPORATION ……..……..2ND RESPONDENT

NATIONAL LAND COMMISSION …….……...……. 3RD RESPONDENT

CHINA ROAD & BRIDGE CONSTRUCTION (K) LIMITED..…..... 4TH RESPONDENT

RULING

Introduction

1. This Petition was filed by African Gas and Oil Company Limited, the Petitioner herein, on 24th June 2016. Contemporaneously with the Petition, the Petitioner filed a notice of motion application under certificate of urgency dated 24th June 2016 (hereinafter "the Petitioner's application"). The main order sought in the Petitioner's application is that **pending hearing and determination of the Petition, the Respondents, jointly and severally, either by themselves, employees or agents be restrained from entering, further remaining onto, constructing, excavating, demolishing, destroying and/or interfering with** the **structures and developments on all that parcel of land formerly known as LR, No. MN/VI/4838 which comprises** of the **following** parcels **MN/VI/1515, MN/VI/1673/ MN/VI/1674, MN/VI/1798, MN/VI/3690, MN/VI/4737 and MN/VI/4810**.

2. The Petitioner's application was placed before this court on 24th June 2016 during which the court granted the above restraining order ("conservatory order") pending hearing and determination of the Petitioner's application.

3. The Petitioner's application and the conservatory order were served upon the Respondents who responded to the same in various ways. The 1st Respondent, the Hon. Attorney General, responded by filing grounds of opposition dated 5th July 2016. The 2nd Respondent, Kenya Railways Corporation, responded by filing a notice of motion application dated 30th June 2016 (hereinafter "the 2nd Respondent's application") in which it seeks to have the conservatory order stayed and or set aside. The

3rd Respondent, the National Land Commission, responded via a replying affidavit sworn on its behalf by the deputy director of Legal Affairs and Enforcement, Brian Ikol. The 4th Respondent, China Road & Bridge Corporation (K) Limited, responded by filing a notice of motion application dated 1st July 2016 (the 4th Respondent's application"). Just like the 2nd Respondent's application, the 4th Respondent's application seeks the staying of and the discharge of the conservatory order.

4. All the three applications, that is, the Petitioner's application for conservatory orders on the one hand and the 2nd and 4th Respondents' applications seeking the stay of and discharge of the conservatory orders were heard together and form the basis of this ruling. The advocates for the parties also agreed that the proceedings and the findings in this file shall apply mutatis mutandis in Petition no 170 of 2016 because the issues are the same.

5. The Petitioner's case is that it is the registered owner of all that parcel of land formerly known as **LR NO. MN/VI/4838** which comprises of the following parcels **MN/VI/1515, MN/VI/1673/ MN/VI/1674, MN/VI/1798, MN/VI/3690, MN/VI/4737** and **MN/VI/4810** ("the suit property"). That vide a letter dated 22nd January 2015, the 2nd Respondent informed the Petitioner that its said parcel of land had been listed for compulsory acquisition by the Government under Gazette Notice No. 405 dated 24th January 2014 for purposes of Mombasa Port Area Development Project (MPARD) – Mombasa Southern bypass and Kipevu New Terminal Link Road. That the suit property was also required for the construction of the Mombasa-Nairobi Standard Gauge Railway (SGR) Project.

6. That thereafter, the 3rd Respondent assessed compensation due to the Petitioner and vide an award dated 7th January 2016; put the amount of compensation as Kshs. 159,913,977.00 for the land and Kshs. 360,000,000.00 for interruption of business. That the awards were accepted by the Petitioner on 9th January 2016. (And the award in respect of Petition no 170 of 2016 was assessed at Kshs 1,475,486,485.00)

7. The Petitioners contend that since the issuance of the award, it has on numerous occasions contacted the Respondents seeking payment of the awarded compensation but has been met with a wall of silence and inaction. That despite the non-payment of the assessed compensation, the 4th Respondent is on site on the suit property and is currently continuing with construction works thereon.

8. It is the Petitioner's case that the refusal by the Respondents to promptly pay the Petitioner compensation as awarded by the 3rd Respondents seven months after the award is occasioning loss and economic hardship to the Petitioner. That there is no discernable reason why the Respondents have neglected to pay the Petitioner's compensation when the law is clear that such payment must be made promptly and in full before property can change hands. It is the Petitioner's case that the 3rd Respondent declared them the registered owners of the suit parcels via its determination dated 1st and 3rd December 2015.

9. The 1st Respondent, the Hon. Attorney General opposed the Petitioner's application vides grounds of opposition filed on 6th July 2016. The 1st Respondent contends that **Article 40 (3)** of the Constitution of Kenya, 2010 (hereinafter simply referred to as "the Constitution") as read together with **Sections 117 (1)** and **120(2)** of the Land Act, 2012 allows the Government to have immediate possession of the land for public purpose pending finalization of quantum of award payable together with charged interest. The 1st Respondent stated that by dint of **Article 40 (3)** of the Constitution of Kenya, 2010 as read together with **Sections 111(1), 117 (1)** and **120(2)** of the Land Act, the term "prompt payment of just compensation" is a term of art which merely indicates that compensation ought to be paid without delay.

10. The 1st Respondent stated that the issuance of injunction against public interest project will result in delay of infrastructural development and massive loss of public funds through payment for idle manpower and plant charges to the contractor. The 1st Respondent contends that **Section 113 (2)** of the Land Act as read together with **Article 40 (3) (ii)** of the Constitution regulates the right of access to court

in terms of limiting challenge to the substantive determination by the National Land Commission but allowing for a review of the compulsory acquisition process on application by a dissatisfied party.

11. The 2nd Respondent, Kenya Railways Corporation, in its application, seeks the suspension of and discharge of the conservatory orders issued by this court on 24th June 2016. The 2nd Respondent contends that the conservatory orders are not in the public interest as they will cause the 2nd Respondent to breach its contractual obligations thereby exposing the 2nd Respondent to claims of breach of contract thereby leading to financial loss to the tax payers. That the conservatory orders will delay the completion of the Standard Gauge Railway and thereby deny the 2nd Respondent and the Government of Kenya the much needed revenue to carry out public services and will result in payment by the Government of higher sums of interest on loans borrowed for the project.

12. The 2nd Respondent stated that the 3rd Respondent took possession of the suit property in accordance with **section 120(2)** of the Land Act and the Petitioner can adequately be compensated by costs.

13. In its Replying Affidavit, the 3rd Respondent admits that indeed an award was made in favour of the Petitioner. The 3rd Respondent stated that it received complaints from the County Government of Mombasa concerning the legality of the grant held by the Petitioner over the suit pr1operty upon which it conducted a review process under **Article 68 (v)** of the Constitution and **Section 14** of the National Land Commission Act to establish whether the Petitioner is the legitimate owner of the suit property.

14. That on 1st December 2015, the 3rd Respondent rendered a preliminary determination which was subject to ratification by the Plenary of the Commission and which has not been so ratified to date. That therefore, the 3rd Respondent is yet to render a final determination on the legality of the Petitioner's title. The 3rd Respondent averred that the prompt payment of compensation only applies where the property in question has no ownership dispute and there is a clear uncontested registered owner of the property.

15. That **Article 40 (6)** of the Constitution provides that the rights under **Article 40** do not extend to any property found to have been unlawfully acquired while **section 115 (1)** of the Land Act is clear that compensation should only be paid promptly but with the exception of a case where there is a dispute as to the right of the persons entitled to receive the compensation. It is the 3rd Respondent's case that **section 115 (2)** of the Land Act does not place any timelines or urgency in the payment of compensation and that this suit is premature as the issue of payment of compensation cannot arise until a final determination is rendered on the ownership of the suit property.

16. The 3rd Respondent explained that the award has not been settled owing to cash flow delays from the National Treasury which has been engaged in the budget making process and closure of the financial year. That the 3rd Respondent only makes compensation and settles awards upon receipt of funds from the acquiring authority or the National Treasury. The 3rd Respondent averred that it invoked the provisions of **section 120 (2)** of the Land Act which allows it to take possession of land before the payment of compensation after issuance of a fifteen- day notice because of the urgent necessity to complete the Standard Gauge Railway. That before doing so, the 3rd Respondent issued a notice on 11th June 2015 notifying the Petitioners of the intended taking of possession of the suit properties. Finally, the 3rd Respondent contended that the Petitioners can be compensated by damages which are quantifiable and is entitled to additional remedies in terms of interest. That the public interest involved is in favour of discharging the conservatory orders.

17. The 4th Respondent, in its application, contended that the conservatory orders should be discharged because the Petitioners obtained them without disclosing to court that it had been notified on 11th June 2015 under **section 120 (2)** of the Land Act that the Respondents would take possession of the suit property before compensation is paid. The 4th Respondent stated that upon expiry of the 15 days, the suit property vested in the National Government and the legal claim by the Petitioner on the suit property was converted, by operation of law, into a claim for monetary compensation. That there is no provision in law

for enforcing a claim for monetary compensation by purporting to reverse compulsory acquisition, possession, or restraining the works thereon.

18. The 4th Respondent stated that compensation was not immediately payable as the matter is currently being investigated by Parliament. The 4th Respondent averred that the stoppage of works is causing loss and damage at the rate of USD 290,000.00 per day being the cost of labour for 1,600 personnel and USD 86,000 per day being cost of idle equipment and machineries.

19. In response to the issues raised by the Respondent, the Petitioner filed two replying affidavits both sworn by Joseph Mwella on 4th July 2016. The Petitioner averred that the order it is seeking is to preserve the suit property pending determination of this Petition. The Petitioner contended that the principles upon which the court may set aside interim/conservatory orders are well set out to wit; the Applicant must have misrepresented material facts; the Applicant must have concealed material facts; and/or that the court must have made the order mistakenly. That the Respondents' applications do not meet the foregoing criteria.

20. On non-disclosure of material facts, the Petitioner stated that the notice on acquisition of the suit property after expiry of 15 days was a newspaper advertisement and does not constitute personal service upon the Petitioner as envisaged by **section 131 (1) (e)** of the Land Act. That the said notice was not in the exclusive knowledge of the Petitioner alone as the same was meant for public consumption. Further that the said notice is in contravention of **section 120 (4)** of the Land Act which stipulates that it is only upon the taking of possession and the payment of just compensation that land shall vest on the Government absolutely free from encumbrances and therefore the suit property is not yet legally vested in the Government.

21. It is the Petitioners' case that by virtue of **section 113 (1) (2) (a)** of the Land Act, the award made by the 3rd Respondent is final and conclusive unless an aggrieved party takes recourse in the Environment and Land Court. On public interest, the Petitioners' stated that the Constitution was enacted to protect both the rights of private entities as well as those of the general public.

22. I have considered the issues raised by the parties in their respective applications, the grounds of opposition by the 1st Respondent and the replying affidavit by the 3rd Respondent. I have also considered the documents filed in court in support of the parties' respective applications. I have further considered the oral submissions made by the learned counsel for the parties as well as the authorities supplied by them. In my view the main issue before court is whether the conservatory orders issued by this court on 24th June 2016 should be discharged or whether the same should be confirmed pending hearing and determination of this Petition.

23. That this court has jurisdiction to issue the conservatory orders is not in doubt. The jurisdiction is derived from **Rule 23 (1)** of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice Procedure Rules, 2013.

24. The 1st Respondent contends that the Petitioner is guilty of non-disclosure of material facts in that the Petitioner did not disclose to court that it had been issued with a notice dated 11th June 2015 under which the Government took possession of the suit property upon the expiry of 15 days of that notice. In support of this submission, Mr Mutinda state counsel cited the cases of **BP Bhat & Ano vs Habib V. Rajani (1958)1EA 536, Puran Chand Many vs Collector under ILAA (1957)1EA 125 and Maisha Nishike Ltd vs Commissioner of Lands & 3 Others (2011)eKLR.** I find all the three cases distinguishable. The first two cases, the facts are entirely different and what was disclosed for instance in the Bhat case was found to be different from the actual works that were to be undertaken and whether the Rent Restriction Board was permitted to give approval. In the Maisha case, the award had not been served upon the petitioner and the petitioner therein was unhappy with the award that was assessed. The court stated that it did not have powers to assess the compensation payable.

25. In the instant case, the Petitioner already received the award and provided details of its account where

the money is to be paid. The issue raised by the Respondents is that having been served with notice under section 120(2) of the Land Act, it cannot again move the court to stop works for nonpayment of the award. Further that the Petitioner is aware the determination is not final on account of inquiries being made by Parliament. In my view, the Petitioner cannot be faulted and the interim orders should not be discharged on account of non-disclosure of the said notice because of two main reasons which I wish to discuss in the following paragraphs.

26. First, it is correct that **section 120 (2)** of the Land Act empowers the 3rd Respondent, in cases where there is an urgent necessity for the acquisition of land, and it would be contrary to the public interest for the acquisition to be delayed by following the normal procedures of compulsory acquisition under the Land Act, to take possession of land upon the expiration of fifteen days from the date of publication of the notice of intention to acquire. Section 131 of the Land Act provides for the manner in which notices under Part VIII of the Act that deals with compulsory acquisition of land are supposed to be served. This section provides as follows:

> **"131. (1) a notice which may be given under this Part may be served on a person—**
>
> **(*a*) By delivering it to the person personally;**
>
> **(*b*) By sending it by registered post to the person;**
>
> **(*d*) if the person is a body corporate, society or other association of persons, by serving it personally on a secretary, director or other officer thereof or on a person concerned or acting in the management thereof, or by leaving it or sending it by registered post addressed to the body corporate, society, or, if there is no registered office, at any place where it carries on business, or, if there is none, by leaving it with the occupier of the land concerned, or, if there is no occupier, by affixing it upon some prominent part of the land; or**
>
> **(*e*) The Commission may <u>in addition</u> to serving notice by paragraph (*c*) and (*d*), place an advertisement in two newspapers with a national circulation."** (Underlining mine for emphasis)

27. My interpretation of **section 131** is that a notice required to be given can only be served personally or by registered post. However, in instances where the whereabouts of the person is not known or their address cannot be ascertained after inquiry, the notice may be served by leaving it with the person occupying the land to be compulsorily acquired or by affixing it on that land and **in addition** to so serving, the Commission may place an advertisement in two newspapers of national circulation. The advertisement is not to be the only mode of serving a notice as the same is used in addition to service through other modes provided. In this instance, the notice was not served personally on the Petitioner or sent to them via registered post. The Petitioners cannot therefore be faulted for failure to disclose the said notice which was not properly served in the first place.

28. Secondly, assuming that the notice of 11th June 2015 was properly served, I have carefully gone through it. Save for land parcel numbers **MN/VI/4737 and 4805** which are listed as item Nos. 18 & 20 respectively in the said notice, the remainder of the small parcels that comprised no **LR No**. **4838** and which are part of the subject of this Petition are not listed in the notice. Clearly, the notice could not have been the basis upon which the Respondents took possession of the other subject parcels which were not listed therein.

29. For the two foregoing reasons, to wit, that the notice dated 11th June 2015 was not properly served on the Petitioner and the same did not contain all the subject parcels except two, I decline to use the non-disclosure of the notice as a basis upon which the conservatory orders should be stayed and or set aside.

30.mThe question then is, should the conservatory orders be confirmed? The 3rd Respondent has raised a

very pertinent issue which although is not available for determination at this stage, is very material in the determination of that question. The 3rd Respondent has stated that the reason why the payment of the award could not be made is, *inter alia*, because there is a dispute on ownership of the suit property. The 3rd Respondent's determination dated 3rd December 2015 on ownership and title of the suit parcels is before court having been annexed by both the Petitioners and the 3rd Respondent. In that determination, the 3rd Respondent stated that:

> *"In view of the foregoing the Commission determines that the Respondent (AGOL) purchased the properties from various owners after conducting due diligence of the Lands records. No information has also been submitted to confirm that the first allotees unlawfully acquired the land. Therefore the grants for the parcels MN/VI/1515, MN/VI/1673, MN/VI/1674, MN/VI/1798, MN/VI/3690, MN/VI/4737 and MN/VI/4810 should be regularized to the Respondent.*
>
> *The Commission orders that the title held by AGOL is upheld…"*

31. Similarly in the second Petition, the determination dated 1st December 2015 relating to the Miritini Free Port property, the Petitioner's title was also upheld and should be regularised. In later determination, the 3rd Respondent used a phrase in the said determination, ***"the decision shall be ratified by the plenary of the Commission"*** to show that the Petitioner's title was subject to ratification by the Commission's Plenary and that until such ratification, no award could be paid. However there is annexed award made to both Petitioners irrespective of the submission that the determination was subject to ratification.

32. On what basis did the 3rd Respondent issue the awards if it doubted the legality of the Petitioner's title? Doesn't logic demand that the 3rd Respondent should have awaited final determination of the issue of title before making the awards? These are questions that can be answered during the hearing of this petition but which forms a ground for issuance of conservatory orders.

33. During the hearing of this application, Mr. Miller, learned counsel for the 2nd Respondent stated in court that parcel number MN/VI/755 is a subject of court case in ELC No. 161 of 2013. He referred this court to three authorities to wit; **Gaitaru Peter Munya v Dickson Kithinji & 2 Others (201)eKLR Kevin Mwiti & Others v Kenya School of Law (2015)eKLR and Martin Wambora v Speaker of County Assembly of Meru 7 3 Others (2014)KLR.** In all these cases, the principles to be considered for granting conservatory orders were laid out. In the Gaitaru Peter case was quoted in the second case at page three where the judge stated that conservatory orders should be granted on **"the inherent merit of the case bearing in mind the public interest, the constitutional values and the proportionate magnitudes and priority levels attributable to the relevant causes."**

34. Although pleadings in that case were not annexed, I perused the file and it relates to a claim on encroachment by parcel no 4737. This is not a new issue since in the determination; the 3rd Respondent had made a finding that the extent of the encroachment be established. There is however no mention made if there is any dispute over the suit property in Petition no 170 of 2016. Be that as it may, the dispute if any would not exclude the 3rd Respondent from complying with the provisions of section **117(1**) of the Land Act of opening an interest earning account.

35. The Respondents urged the court to consider public interest of the matter and to discharge the conservatory orders on that basis. It cannot be gainsaid that this matter is of great public importance. The interest of the public must however be weighed against the private rights of an individual.

36. In this case, I have looked at the Petition and I agree with Mr. Ndegwa, learned counsel for the 4th Respondent that the Petitioner's claim and rights are in respect of monetary compensation. It appears to me that once the Petitioner is paid its full compensation plus accrued interest, it will rest easy. It appears to me that all parties agree that the Petitioner is entitled to compensation. The only dispute is whether such compensation is payable immediately or whether the same should await certain processes to be concluded. **Article 40 (3) (i)** of the Constitution provides for compulsory acquisition after prompt

payment in full or just compensation to the property owner. The court is not in a position to make a determination on what amounts to prompt payment and whether the Petitioner has been denied the right to prompt compensation as provided for in the Constitution. That must await the hearing of the main Petition.

37. However for the purposes of this application, the court noted, going by the pleadings and the submissions, that the Respondents took possession in June 2015. The award was made on 15th Dec 2015 and 6th Jan 2016 respectively. No evidence was put forth that an account had been opened by the 3rd Respondent as provided for in section **117(1)** of the Land Act. In paragraph 5 of the 4th Respondent's affidavit, it is deposed that the project is **70% complete**. The 3rd Respondent explained that money has not been forthcoming from the National Treasury because of the budget making process. This was not communicated to the Petitioners irrespective of the enquiries they made in writing. Further, there was no document annexed in the replying affidavit of the 3rd Respondent to support the explanation that the cause of delay was because of the budget processes. At the time of urging the application which was after the budget had been read, there was no proposal made by the any of the Respondents of the funds being paid out soon.

38. Instead, the Respondents are enjoying possession of the suit premises irrespective of their claim that the determination and the awards issued by the 3rd Respondent are not final and that there is a "dispute"yet to be resolved. The Respondents thus want to have their cake and eat it at the same time. In light of the contents of the preceding paragraphs, the Petitioners rights also need to be secured and guaranteed by the 1st, 2nd and 3rd Respondents. When they wrote to the said Respondents and received no, they opted to come to this court and I see no wrongdoing in filing the present case. The action they have taken is provided for under article 40(3)(b) of the Constitution. I am satisfied that there is merit in the Petitioners application dated 24th June 2016. The consequence of this is that the applications made by the 2nd and 4th Respondents fails and are hereby dismissed.

38. In the end and in the circumstances of this case and the public interest involved as weighed against the private rights of the Petitioners vis a vi the urgency of this project, the orders that commend themselves to me and which I hereby issue are as follows:

i. Pending the hearing and determination of this Petition and Petition no 170 of 2016, the Respondents do deposit the total sum of Kshs. 519,913,977.00 awarded in respect of this petition and the sum of Kshs 1, 475,486,485.00 awarded in the Petition no 170 of 2016 in an escrow interest earning account to be opened in the joint names of the advocates for the Petitioner, the 2nd Respondent and the 3rd Respondent within 21 days from the date of this ruling.

ii. The conservatory orders granted by this court on 24th June 2016 are confirmed to remain in force until the monies are disbursed in accordance with order (i) above. Upon compliance of the orders, the Respondents shall be at liberty to continue to undertake constructions work and activities thereon as appropriate.

iii. Should there be a default to comply in terms of Order 1 above, there shall remain in force the conservatory orders pending the hearing and determination of the petition.

iv. The two Petitions be fixed for hearing on priority basis.

v. Costs of all the applications ordered in the cause.

DATED, SIGNED & DELIVERED at MOMBASA This 21st Day of July 2016

A. OMOLLO

JUDGE