



**Singh v Kenya National Highway Authority & 2 others (Environment & Land  
Petition E010 of 2023) [2024] KEELC 1650 (KLR) (19 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1650 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND PETITION E010 OF 2023**

**NA MATHEKA, J  
MARCH 19, 2024**

**BETWEEN**

**BALJEET SINGH ..... PETITIONER**

**AND**

**KENYA NATIONAL HIGHWAY AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**LAND REGISTRAR, MOMBASAS ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner is the registered proprietor of L.R NO. MN/VI/2444 measuring approximately 1.84 acres and was issued with a provisional certificate of title on 15<sup>th</sup> October 1997. On 17<sup>th</sup> December 2023 vide a Gazette Notice No. 405 in Vol CXVI No. 10 dated 24<sup>th</sup> January 2024, the 2<sup>nd</sup> respondent issued a Notice of Intention to Acquire Land for the 1<sup>st</sup> respondent for the construction of Mombasa Port Area Road Development Project (Mombasa Southern Bypass and Kipevu New Terminal Link Road). In the said Notice, the 2<sup>nd</sup> respondent intended to compulsorily acquire 0.0735ha of the suit property. On 21<sup>st</sup> March 2014, the 2<sup>nd</sup> respondent vide Gazette Notice No. 1796 issued a Notice of Inquiry for the hearing of claims for compensation for the registered owners of the parcels of land being compulsorily acquired for the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent concluded the inquiry process pursuant to Section 113 (1) of the [Land Act](#) and on 1<sup>st</sup> September 2014 issued the petitioner with an Award of Kshs 16,905,000/=.
2. However, before the award could be paid to the petitioner, the 2<sup>nd</sup> respondent published on the Daily Nation on 27<sup>th</sup> July 2015 a list of parcels of land (the suit property included) to be reviewed under Section 14 of the [National Land Commission Act](#). In the said notice, the 2<sup>nd</sup> respondent maintained that they were conducting the review following complaints regarding the legality of various grants and dispositions of public land. The 2<sup>nd</sup> respondent then issued a Notice of Intention to Acquire Land vide



Gazette Notice No. 340 on 13<sup>th</sup> January 2017 and deleted the suit property from the list of the parcels of land to be acquired on behalf of the 1<sup>st</sup> respondent. The petitioner has maintained that despite the degazettement of his suit property on 13<sup>th</sup> January 2017, the encumbrances that were placed against the suit property by the respondents have never been lifted to date. The petitioner has argued that the encumbrances against his title are illegal and an infringement of his right to property as enshrined in Article 40 of *the Constitution*.

3. The 1<sup>st</sup> respondent contended that the suit property was earmarked for acquisition when the intimal designs for the Mombasa Port Area Road Development Project were conceptualised. However, when the road designs were completed, it emerged that the road terminated before the location of the suit property and as such the suit property was not affected by the project. The acquisition was cancelled and the suit property was degazetted vide Gazette Notice No. 340 of 13<sup>th</sup> January 2017. The 1<sup>st</sup> respondent stated that it has never taken possession of the suit property and as such has at no time denied the petitioner his right to a peaceful and quiet possession of the suit property.
4. The principles of drafting a constitutional petition were set out in *Anarita Karimi Njeru v The Republic* [1979] eKLR, it was stated,

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

5. Lenaola J (as he then was) reiterated the principles in *Anarita Karimi in Stephen Nyarangi Onsomu & another v George Magoha & 7 others* [2014] eKLR, where he stated,

“In answer to that issue, this Court has in the past expressed its concern about the manner in which parties coming before the Court and alleging a violation of constitutional rights have presented their cases. As a basic minimum, a Petitioner is required to cite the provisions of *the Constitution* which have allegedly been violated, and the manner in which they have been violated, and the remedy which he seeks for that violation - See *Anarita Karimi Njeru v Republic* (1976-1980) 1 KLR 1272. In demonstrating the manner in which there has been a violation, a Petitioner should present before the Court evidence of the factual basis upon which the court can make a determination whether or not there has been a violation. This basic rule has been affirmed by the Court of Appeal in the *Mumo Matemu Case*.”

6. In this petition, the petitioner has referred to Articles 10, 19, 20, 23, 40, 47, 162, 165 and 258 of *the Constitution*. The petitioner alleges that the encumbrance placed upon his suit property by the respondents on the ground that the same was being compulsorily acquired has been an infringement on his right to property. He has placed before the court an evidential and factual basis of the chronological events that took place from the time the 2<sup>nd</sup> respondent intended to acquire his suit property until the same was cancelled just before compensation was paid. He contended that the fact that the respondents have not lifted the encumbrance on his suit property despite them degazetting it and no longer being interested in acquiring it has become an infringement on his right to quiet possession and ownership of his suit property. It is the view of this court that this instant petition qualifies as a competent constitutional petition since it has pleaded with some measure of precision and specificity the provision of *the constitution* that has been violation and in what manner. The respondents are well aware of the



violations they are accused of, the manner of violation and they are in a position to respond. In *Patrick Musimba v National Land Commission & 4 others* [2016] eKLR it was held;

“We start by pointing out that even though the Petitioner’s claims were not pleaded with absolute particularity, we were able to painlessly ascertain the Petitioner’s complaints and rule out the application of the edict in *Anarita Karimi Njeru v Republic* [1980]KLR 154. In our view, the threshold of reasonable precision in pleadings had been met. It was apparent to us that three core issues stood out for determination.”

7. 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.
8. The Chairman, National Land Commission initiated the process of compulsorily acquiring the suit property with Gazette Notice No. 405 of 24<sup>th</sup> January 2014 a Notice of Intention to Acquire Land for the 1<sup>st</sup> respondent to undertake the Mombasa Port Area Road Development Project. The 2<sup>nd</sup> respondent proceeded to award the petitioner with Kshs 16,905,000/= as compensation for the acquisition of the suit property. However before the award was paid to the petitioner, the 2<sup>nd</sup> defendant degazetted the suit property from the parcels of land to be acquired. Despite this degazettement, the encumbrances registered against the title of the suit property by the respondents have never been lifted, denying the petitioner quiet possession of the same. In response, the 2<sup>nd</sup> respondent contended that though, the initial conceptualisation of the Mombasa Port Area Road Development Project earmarked the suit property for acquisition; the actual road designs did not need the suit property hence its degazettement. The 2<sup>nd</sup> respondent maintained that it never took possession of the suit property and hence cannot be said to have violated the petitioner’s right to property.
9. Sections 107 to 110 of the *Land Act* present the preliminary stage of compulsory acquisition of private land. In this instance, the 2<sup>nd</sup> respondent intended to acquire the suit property among other parcels of land on behalf of the 1<sup>st</sup> respondent for the construction of the Mombasa Port Area Road Development Project. The 2<sup>nd</sup> respondent proceeded to issue a notice of intention to acquire the suit property as well as delivered the notice to the registrar who continued to register an encumbrance against the title.
10. After the preliminary stage, the next step in compulsory acquisition is the investigation stage where the 2<sup>nd</sup> respondent involves the registered proprietor in inquiring about the purpose of compensation. In the instance petition, the 2<sup>nd</sup> respondent issued a gazette notice of an intended inquiry under Section 112 of the *Land Act* inviting the petitioner and others to determine who is to be compensated. On completion of the inquiry, the 2<sup>nd</sup> respondent issued the petitioner with a Notice of Award of Kshs



16,905,000/=. However, before the petitioner could be paid, the 2<sup>nd</sup> respondent degazetted the suit property from the acquisition process.

11. None of the respondents placed evidence before the court challenging the petitioner's title. The petitioner's right to property is enshrined in Section 26 of the Land Registration Act, which gives him indefeasibility of title. It means therefore that the petitioner's right to property is protected by Article 40 of the Constitution and that his land cannot be taken arbitrarily without compensation. The petitioner has argued that the existence of an encumbrance against his title, when his suit property is no longer being compulsorily acquired by the 2<sup>nd</sup> respondent has denied him the right to use it as he wishes which is a violation of his right to property. The point raised by the petitioner is that the respondents ought to have lifted the encumbrance against his title once it was degazetted. It is evident that once the process of compulsory acquisition is initiated, a registered owner has a direct loss and is left as a mere bystander with substantial interest. In *Patrick Musimba v National Land Commission & 4 others* (supra) it was stated 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.”

Section 107 (5) and (6) of the Land Act provides that;

Upon approval of a request under subsection (1), the Commission shall publish a notice to that effect in the Gazette and the county Gazette, and shall deliver a copy of the notice to the Registrar and every person who appears to the Commission to be interested in the land.

Upon service of the notice, the registrar shall make an entry in the register of the intended acquisition

12. The registrar made an entry in the title of the suit property in the form of an encumbrance, that the same was in the process of being compulsorily acquired. This encumbrance has never been lifted to date, technically the suit property has never been formally surrendered by the 2<sup>nd</sup> respondent back to the petitioner. The documents of title of the suit property were neither acquired under the Land Act nor have they been yielded to the petitioner. Without a removal of the entry in the registrar recording the acquisition has been discontinued and without a formal notification to the petitioner that the offer to compulsorily acquire his land has been withdrawn, the petitioner was justified in claiming that his right to use the suit property has been violated. The conclusion that can be inferred from these facts is that the 2<sup>nd</sup> respondent did not strictly follow the critical steps that precede compulsory acquisition. The 2<sup>nd</sup> respondent did not complete the process, there was no formal communication to the 3<sup>rd</sup> respondent to lift the encumbrance registered against the title of the suit property. Essentially the actors in this process of compulsory acquisition did not conduct it scrupulously and strictly per the Constitution and law and for that there ought to be consequences.



13. Section 107 (6) of the *Land Act* is in mandatory language, which compels the registrar, upon service of the notice by the Commission, to register an encumbrance against the title at the initial stage of the acquisition process. There is therefore a corresponding responsibility to be placed on the 2<sup>nd</sup> respondent to notify the registrar where the acquisition process has been halted for any reason. It is the finding of this court that the 2<sup>nd</sup> respondent ought to have formally written to the 3<sup>rd</sup> respondent to lift the encumbrance registered against the title of the suit property once initiated its degazettement. Where the acquisition process is revoked the law mandates the Commission to compensate the person for damages suffered. Section 123 of the *Land Act* provides:
- (1) At any time before possession is taken of any land acquired under this Act, the Commission may, revoke a direction to acquire the land, and, shall determine and pay compensation for all damage suffered and all costs and expenses reasonably incurred by persons interested in the land by reason of or in consequence of the proceedings for acquiring the land.
  - (2) The principles relating to the determination of compensation set out in the rules shall apply, so far as they are relevant, to the determination of compensation payable under this section.
14. The petitioner’s right to property was infringed by the 2<sup>nd</sup> respondent who failed to notify the 3<sup>rd</sup> respondent of the degazettement of the suit property from the acquisition process. The inaction of the 2<sup>nd</sup> respondent has caused the petitioner to be unable to use his property as he wishes since the termination of a lawful process of land acquisition by the state. The Court of Appeal in *Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others* [2019] eKLR held that;
- “Article 40 of *the Constitution* provides for the protection of the right to property and forbids Parliament and the State from arbitrarily depriving a person of his or her property. The key word in the Article is “arbitrarily”. The Article defines the extent to which the State can legitimately regulate private property and the circumstances under which a lawful expropriation of property can take place. While it is uncontested that property rights are not absolute; that they may legitimately be limited to facilitate the achievement of important social purposes, the limitation must not be arbitrary. The deprivation must comply with the requirements of Article 40 and all the laws on compulsory acquisition.”
15. The respondents violated the rights of the petitioner under Articles 40 and 47 by failing to lift the encumbrance registered against the title of the suit property after revoking its acquisition. The petitioner was not accorded fair administrative action as enshrined in Article 47 of *the Constitution*. The respondent’s action that led to the delay in lifting the encumbrance on the title of the suit property is unfair administrative action as enshrined in Article 47 of *the Constitution*. In this case, the petitioners are entitled to the compensation envisioned in Section 123 of the *Land Act* as a violation of their right to property between the time the suit property was degazetted on 13<sup>th</sup> January 2017 until the encumbrance against the title will be lifted. Under Article 20 (3) (b) of *the Constitution*, in applying a provision of the Bill of Rights, a court “shall adopt the interpretation that most favours the enforcement of a right or fundamental freedom”. The Supreme Court in *Attorney General v Zinj Limited* (Petition 1 of 2020) [2021] KESC 23 (KLR) (Civ) (3 December 2021) (Judgment) stated,
- “It is a trite principle of law, that any injury or loss suffered by a person either through a tortious act, omission or breach of contract, attracts redress in a court of law. The redress includes an award of damages to the extent possible as may be determined by the court. The question regarding the type, extent, and quantum of damages to be awarded, has long been settled through a long line of decisions from the courts. Under Article 22(1) of *the Constitution*, every person has the right to institute court proceedings claiming that a



right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or is threatened. Among the reliefs that a court may grant upon proof of violation of a fundamental right, is an order for compensation (Article 23 (3)(e)). The quantum of damages to be awarded depends on the nature of the right that is proven to have been violated, the extent of the violation, and the gravity of the injury caused.”

16. On the claim of mesne profits, it is trite law that mesne profit ought to be specifically pleaded and proved. The petitioner has pleaded Kshs 3,600,000/= per month as mesne profit, however, no evidence has been exhibited to this court nor has there been any expected income exhibited to this court to attract such an award. Mesne profit has to be ascertained and qualified since the petitioner did not place tangible evidence in this regard, the same is not available for the petitioners.
17. Ultimately therefore and having considered the evidence herein, I enter judgment for the petitioner as against the respondents jointly and severally in the following terms:
  - a. A declaration that the existing encumbrance that was placed on 24<sup>th</sup> January 2014 by the 2<sup>nd</sup> respondent against the petitioner’s parcel of land known as LR No. MN/VI/2444 after the 2<sup>nd</sup> respondent’s Gazette Notice No. 340 of 13<sup>th</sup> January 2017 violates the petitioner’s constitutional right guaranteed under Articles 40 (3) of *the Constitution*.
  - b. A declaration that the failure by the 2<sup>nd</sup> respondent to comply with the mandatory provisions of the *Land Act* on compulsory acquisition violated the petitioner’s constitutional right to fair administrative action that is expedient, lawful, reasonable and procedurally fair guaranteed under Article 47 (1) of *the Constitution*.
  - c. An order is issued to the Land Registrar Mombasa to remove the encumbrance placed on 24<sup>th</sup> January 2014 against the petitioner’s parcel of land known as LR No. MN/VI/2444.
  - d. The petitioner is awarded Kshs.500,000/= as general damages.
  - e. The petitioner shall have the costs of this petition from the 1<sup>st</sup> respondent.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 19<sup>TH</sup> DAY OF MARCH 2024.**

**N.A. MATHEKA**

**JUDGE**

