



REPUBLIC OF KENYA



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**National Land Commission v Runji & 4 others (Civil Appeal (Application)
24 of 2020) [2024] KECA 1483 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KECA 1483 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) 24 OF 2020
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
OCTOBER 25, 2024**

BETWEEN

THE NATIONAL LAND COMMISSION APPLICANT

AND

THERESIA RUNJI 1ST RESPONDENT

MARIETA GITONGA CHEGE 2ND RESPONDENT

NAOMI KIIO 3RD RESPONDENT

SAMMY M KARA 4TH RESPONDENT

MIRITINI FREE PORT LIMITED 5TH RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Mombasa (Hon. E. K. Ogola, J.) dated 12th November, 2019 in Constitutional Petition No. 17 of 2018.)

RULING

1. The 1st to 4th respondents, Theresia Runji, Marieta Gitonga Chege, Naomi Kiiro and Sammy Macharia Kara, filed a Constitutional Petition against the appellant, the National Land Commission, (the Commission in the appeal) seeking orders that the Commission had abused its statutory powers in refusing to compensate them to the value of their properties, namely Plot Nos. 3912 and 3913/VI/MN (the subject plots) as at July 2000, and an order that they are entitled to interest, and any other damages applicable in law on the compensation to be awarded.
2. It was their case that they were originally allocated the parcels of land by the Kenya Government as compensation after eviction from Sheikh Sayed Children's Centre in Bombolulu, Mombasa. They claimed that, in consideration of their vacating the land at Bombolulu, the Commissioner of Lands allocated them the subject plots, and that they had the legitimate expectation that the then Commissioner of Lands would issue titles to them. However, they claimed that they later



- learned that the Commissioner of Lands cancelled their survey plan without informing them or obtaining their consent and allocated the subject plots to other parties, to wit, Miqdad Enterprises. Subsequently, the subject plots were consolidated into Plot Number 4688/V/MN and then further consolidated to culminate into Plot Number 4805/VI/MN which was thereafter unlawfully gifted by the Commissioner of Lands to Miritini Free Port Limited; that the net effect of the consolidations and transfer was a total violation of their constitutional rights to protection of their property rights.
3. Aggrieved, they moved the court by way of an application dated 20th November, 2007 in HC Misc Civil Application Number 318 of 1996, Elizabeth Mundingi & 7 others versus The Attorney General and The Commissioner of Lands for orders that the Commissioner of Lands be restrained from registering Grant of Plot Number 4688/VI/MN in the name of Miqdad Enterprises. The orders were granted on 28th November, 2008 and served upon the Commissioner of Lands, but, in blatant violation of the court order, the Commissioner of Lands registered Plot number 4688/VI/MN in the name of Miqdad Enterprises, who later sold it to Miritini Free Port Limited.
 4. Subsequently, on 9th January 2015, the Commission, by a Gazette Notice No. 149 dated 7th January 2015, informed the public that the Government of Kenya intended to acquire 22.11 Ha) from the property known as LR. No. MN/VI/4805 for purposes of construction of the Mombasa–Nairobi Standard Gauge Railway. In return, Miritini Free Port Limited was awarded Kshs. 1,475,486,485 and a further interruption award of Kshs. 360,000,000, yet Miritini Free Port Limited was and is not the absolute owner of the land which also comprised the subject plots. The applicant’s case is that the Commission failed to promptly compensate them for the acquisition of their land, which was a clear violation of their rights under *the Constitution*. They therefore claimed their rightful share in the subject plots.
 5. The Commission opposed the petition and stated that the court was devoid of original jurisdiction to hear and determine the issues raised in the Petition dated 13th February 2018, as such matters fall within the exclusive jurisdiction of the Commission, and that the applicant had not adduced evidence to show that the subject plots were compulsorily acquired by Government, or that L.R. No. 4805/VI/MN was formed as a result of amalgamation of the subject plots; that no survey plans were adduced in support of their claim; and that LR. No. MN/VI/4805 was a grant of public land measuring approximately 91.09Ha and is registered in favour of Miritini Free Ports Limited on a leasehold term of 99 years from 1st December 1994. It further claimed that it reviewed the manner of allocation of the subject plots and upheld the legality of LR No. MN/VI/4805 issued to the Miritini Free Port Ltd and that, on this basis, awarded compensation to it on 15th December 2015.
 6. Also opposing the Petition, Miritini Free Port Ltd, the 5th respondent, contended that, after a review, the Commission awarded the land to it, but failed to pay the compensation; that it moved to court vide Mombasa ELC Petition No. 170 of 2016 to compel the Commission to pay up the compensation due, whereupon, in an application dated 30th August 2016, the applicants sought to be joined in the proceedings, but later withdrew their application.
 7. Upon considering the Petition, the trial Judge, by a Judgment dated 12th November 2019, allowed the Petition for the reasons that the Commission abused its statutory powers in refusing to compensate the applicants. The court ordered inter alia that: the Commission do forthwith tabulate, assess and compensate them to the value of their subject plots as at the date of lawful acquisition together with interests at commercial rates; damages from the date of lawful acquisition until payment in full together with interests at commercial rates.
 8. It is on the basis of this Judgment that the Commission has lodged an appeal before this Court.



9. Whilst the appeal was pending, the 4th applicant lodged a Notice of motion dated 22nd January 2024 brought pursuant to sections 1A, 1B and 3A of the [Appellate Jurisdiction Act](#), rules 43, 44, 45 and 49 of the Court of Appeal Rules, 2022 seeking inter alia:
 - a. That this appeal be marked as settled following resolutions made by the National Land Commission through Commission Paper No. 29.
 - b. That the costs of this Application be provided for.
10. The applicants' motion is made on several grounds set out on its face that: there have been numerous deliberations on this matter with a view to having the dispute settled; that in a letter dated 15th June, 2023 the Parliamentary Commission summoned the Chief Executive Officer and the Chairman of the Commission to deliberate on why the 1st to 4th respondents had not been compensated; that, through Commission Paper No. 29, the Commission resolved that:
 - a. "The valuation & Taxation Directorate to tabulate and assess the actual monetary compensation claim by Theresia Runji & others.
 - b. The Commission to invoke the provisions of Section 116 of the [Land Act](#), 2012 (payment in error) and recall the funds paid in error to Miritini Free Port.
 - c. Mombasa Court of Appeal Civil Appeal No. 24 of 2020; The National Land Commission vs Theresia Runji & others the application by the 4th respondent to have the Appeal marked as Settled.
 - d. If there is or there will be any funds due to Miritini Free Port the Commission may use the funds to settle the claim to the claimants after award and acceptance of the award by the claimants subject to applicable law.
 - e. The Commission to consider withdrawal of the Appeal.
 - f. The Commission approved payment schedule and disbursement of payments to project-affected persons as presented in Annexure 1".
11. It was contended that the Commission is now in the process of implementing Commission Paper No. 29, but, since this Court had granted an order of stay of execution through a ruling delivered on 20th November, 2020 in Civil Application No. 10 of 2020, the National Land Commission vs Theresia Runji & 4 others, there is need for this matter be marked as settled, so that it does not impede the implementation of the recommendations and that, further, that the parties do not spend time on the appeal which ought to be settled in view of the resolutions reached in Commission Paper No. 29.
12. The application is supported by the affidavit of Joseph Mbugua Gichanga the duly appointed and nominated donee of the special power of Attorney by David Macharia, also known as Sammy Macharia Kara by a power of Attorney [PA/19103](#) dated 11th October 2017, Teresa Runji also known as Theresa Runji Gichoni by a power of Attorney [PA/1904](#) dated 11th October 2017 and Marieta Gitonga Chege by a power of Attorney [PA/19106](#) in which he reiterates the grounds on the face of the application and further deposes: that further to the judgment of 12th November, 2019 and following the applicants deliberations with the Commission, the parties intended to have the dispute settled; that the deliberations culminated in the resolutions in Commission Paper No. 29; that there was need for the matter to be marked as settled so as to pave way for the implementation of the recommendations and that, further, that parties avoid the appeal which has been settled on account of the Commission Paper No. 29; and that, according to the Commission, by a letter dated 16th January 2024, Mr. Solomon



- Mbuthia Advocate sought instructions from the Chairperson of the Commission to withdraw the appeal, which should be marked as settled to allow the full implementation of Commission Paper No. 29.
13. The 3rd respondent also filed a replying affidavit dated 25th May 2024 under power of attorney issued to Joseph Mbugua Gichanga reiterating the contents of the motion and the affidavit in support.
 14. In a replying affidavit sworn on 25th April 2024, Joseph Mwella, the 5th respondent's Legal Officer, opposed the application and deposed that: the application lacks merit, is frivolous and an abuse of the Court's process; that the applicants' motion to have the appeal marked as settled is impulsive, premature and ill-informed and utilizes confidential institutional documents which have been obtained in violation of the provisions of the [Access to Information Act](#); that, while the Court issued an order of stay of execution in Mombasa Civil Application Number 10 of 2020, the applicants, in disobedience of the order, have purported to seek satisfaction of the Judgment rendered in Mombasa Petition Number 17 of 2018; that, furthermore, the documents attached to the 4th applicant's motion have never been copied to the applicants and consist of internal documents of the 5th respondent and that, therefore, they were illegally obtained by the applicants; that it is settled that the documents which are screenshots that have neither been certified nor verified and were obtained illegally and irregularly and for this reason are incapable of being relied upon in a court of law; that on these premises, the 5th respondent seeks to have them expunged from the Court's record; and that, furthermore, the 4th applicant has not produced the alleged Commission Paper No. 29 to establish the veracity of its claims.
 15. It was further asserted that in the event the application is allowed, it would wrongly compromise the appeal being Mombasa Civil Appeal Number E044 of 2021, Miritini Free Port Limited versus Theresia Runji and Others, which was ready for hearing by this Court.
 16. When the application came up for hearing on a virtual platform, learned Counsel Mr. M. Mwanzia appeared for the 4th respondent/the applicant, Mr. Mbuthia and Mr. Odoyo appeared for the appellant/ the Commission, Mr. Gikandi was for the 1st respondent, and Mr. Kamunde Njue was for the 2nd respondent, Mr. J. Mbugua appeared in person under power of attorney of the 3rd respondent while there was no appearance for the 5th respondent though served.
 17. Mr. Mwanzia submitted that the Notice of motion seeks orders for the appeal to be marked as settled to pave way for payment to the decree holders of the sums owed to them; that the parties invoked the provisions of Article 159 of [the Constitution](#) so as to have the appeal determined out of court pursuant to discussions between the parties that gave rise to Commission Paper No. 29 where the Commission resolved to settle the appeal.
 18. Counsel submitted that Article 159(2) (c) of [the Constitution](#) provides for the promotion of alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. It was submitted that the Commission Paper No. 29, is intended to address the violations of the 1st to 4th respondents constitutional rights, as found by the trial court, and that since the Commission has not filed any replying affidavit to controvert the factual averments made in the application, then the averments should be construed as the legitimate position of the parties; that the Commission, being a State organ, is bound by the written correspondence and the resolutions in Commission Paper No. 29 confirming the decision to compensate the 1st to 4th respondents, and that the 5th respondent cannot purport to disregard its contents; that having confirmed that the subject plots are located where the Standard Gauge Railway was constructed, it followed that the Commission must comply with the contents of the affidavit dated 14th February, 2020 and ensure that compensation is paid without further delay.



19. On their part, counsel for the 1st, 2nd and 3rd respondents submitted that the Commission, having rendered its investigations and recommendations pursuant to Article 67(2)(e) of *the Constitution*, it was now functus officio and lacked the jurisdiction to file a Notice of appeal; that the Commission was therefore estopped from alleging that the 1st to 4th respondents are not entitled to compensation, particularly as the Commission had violated Article 67 of *the Constitution* as read with Articles 10, 47, 248 (2)(b), 249 (1)(b) and (c) and 259 (1) (b) and (d) of *the Constitution*; that having passed Commission Paper No. 2, despite its issuance on 21st June, 2023, more than one and a half years later, compensation to the applicants has yet to be realized; that the Commission’s actions are in violation of *the Constitution*, and the principle of fair administrative action.
20. It was finally submitted that, in order to ensure that the matter was finally concluded, the trial court directed the Commission to adopt the report prepared by M/s Njihia Muoka Rashid & Co. Ltd to compute the compensation payable to the 1st to 4th respondent.
21. On their part, counsel for the 5th respondent submitted that the applicants adduced screenshot pictures of documents of the Commission which are confidential and were obtained illegally; that the *Evidence Act* provides that documentary evidence produced can be either primary or secondary. Primary evidence has been defined as the “document itself”, and that section 65 (1) provides that primary evidence means the document produced for the inspection of the court; that Section 67 of the *Evidence Act* is couched in mandatory terms and requires documentary evidence to be produced in its primary form, unless it is secondary evidence and falls within the exceptions provided in the Act; that the rules of evidence require that the original documents be produced or the certified copies of the documents.
22. It was argued that the 4th applicant was not the recipient of, and nor was he copied in, Commission Paper No. 29, as he has neither produced the original nor a certified copy of the Paper to enable this Court confirm its authenticity; that the 4th applicant seeks to rely on documents obtained from the appellant’s internal communications, and that this Court should question how the 4th applicant obtained internal documents not ordinarily accessible to members of the public; that, further, the 4th applicant has not demonstrated that the internal documents it obtained were acquired in accordance with the procedures specified under the *Access to Information Act*. Counsel submitted that the 4th applicant cannot purport to rely on illegally obtained internal documents of the Commission to seek to have the Court mark the appeal as settled; that reliance on the illegally obtained documents to allow this application would be detrimental to the administration of justice, and especially to the 5th respondent’s appeal in Mombasa Civil Appeal No. E044 of 2021 Miritini Free Port Limited versus Theresia Runji and Others, which touches on the subject matter of this application.
23. We have considered the motion, the affidavit in support, the replies and the parties’ submissions. Evidently, what the applicants are seeking is that this appeal be marked as settled following alleged resolutions reached by the Commission through Commission Paper No 29. The settlement of appeals by parties is provided for under the rules of this Court.

Rule 99 states that:

“An appeal may, with the approval of the Court be marked as settled on such terms as the parties may agree, in which event the agreed terms of settlement shall be adopted as an order of the Court, and the appeal shall be marked as settled.”

24. This means that, for an appeal to be marked as settled, there must, firstly, be an agreement between the parties; and, secondly, on terms, if any, which shall be adopted as an order of the Court.



- 25. As to whether the parties have reached an agreement, the applicants contend that, by way of internal resolutions of the Commission, a Commission Paper No. 29 had resolved that any amounts owed to the applicants be assessed, and that any funds due to Miritini Free Port Limited be paid towards settlement of the applicants’ claim; that the Commission do consider withdrawal of the appeal and that the Commission had approved the payment schedule of disbursement of payments to project affected persons. The applicants’ claim is that, on the basis of Commission Paper No. 29, payment to the applicants had been agreed upon and that, therefore, the appeal should be marked as settled.
- 26. For its part, the Commission has denied that an agreement had been reached with the applicants and asserted that, in the event the Commission Paper No. 29 exists, it forms a part of confidential documents belonging to the Commission for which the applicants are not privy and that, since the information was obtained unlawfully and in contravention of the Access to Information Act, it cannot be relied upon as a basis for settlement of the appeal. The 5th respondent agrees and further contends that the applicants cannot purport to rely on illegally obtained internal documents seeking to have the appeal marked as settled; and that allowing this application will be prejudicial to its appeal in Mombasa Civil Appeal Number E044 of 2021 Miritini Free Port Limited versus Theresia Runji and Others.
- 27. In interrogating the application and its annexures, can it be concluded with certainty that the parties have reached a settlement? Our assessment of the positions taken by the parties would lead us to conclude that neither the Commission nor the 5th respondent are in agreement with the applicants’ assertion that a settlement had been reached.
- 28. Our conclusion is supported by the fact that, contrary to the requirements of rule 99, this Court has not been provided with an agreement or any binding terms of settlement between the parties that it can adopt as an order of this Court. Without an agreement between the parties, there is no basis on which to find that a settlement between the parties has been reached. Therefore, this Court cannot in and of itself find that the parties have settled the appeal. If anything, the Commission and the 5th respondent are explicit that they intend to press ahead with their appeals and are apprehensive that further discourse on this application may jeopardise them. In view of the opposing hardline positions taken by the parties, we think we have said enough to show that the orders sought cannot be granted.
- 29. As a consequence, the Notice of motion dated 22nd January 2024 is unmerited and is hereby dismissed with costs to the Commission and the 5th respondent.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 25TH DAY OF OCTOBER, 2024

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL



I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

