



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & MUSINGA, J.J.A)

CIVIL APPEAL NO. 56 OF 2018

BETWEEN

ZINJ LIMITED.....APPELLANT

AND

THE HONOURABLE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT

THE COMMISSIONER OF LANDS.....2<sup>ND</sup> RESPONDENT

THE PRINCIPAL REGISTRAR OF TITLES.....3<sup>RD</sup> RESPONDENT

THE CHIEF LAND REGISTRAR.....4<sup>TH</sup> RESPONDENT

*(An appeal from the Judgment of the Environment and Land Court at Malindi (Olola, J.) dated 15<sup>th</sup> March, 2018*

*in*

*E.L.C Petition No. 2 of 2010.)*

\*\*\*\*\*

**JUDGMENT OF THE COURT**

1. The right to property is sacrosanct and as such, that right is vigorously protected in this country under the *Constitution*. In the previous *Constitution* the protection of that right was enshrined under *Section 75* and currently it is delineated under *Article 40* of the *Constitution*. The inviolability of that right was succinctly appreciated by this Court in *Chief Land Registrar & 4 others vs. Nathan Tirop Koech & 4 others* [2018] eKLR as follows:

***“Land ownership and land rights is both a historical and emotive subject in Kenya. A right to hold property is a constitutional right as well as a human right and no person can be deprived of his property except in accordance with the provisions of the Constitution or Statute. The condition precedent to taking away anyone’s property is that the authority must ensure compliance with the Constitution and Statutory provisions.”***

2. It is on the basis of the foregoing that the appellant invoked the jurisdiction of the Environment and Land Court (ELC) vide an amended petition claiming that its right over L.R No. 25528 (suit property) had been infringed by the respondents herein. In particular, the appellant’s case was that the suit property which measured 425.7 hectares was registered in its favour on 1<sup>st</sup> April, 1977 via a grant issued under the repealed *Registration of Titles Act (RTA)*. Thereafter, sometime in the year 2007 the respondents without any colour of right issued duplicate titles over portions of the suit property to third parties under the repealed *Registered Land Act*.

3. According to the appellant, the duplicate titles were issued to trespassers who had encroached on portions of the suit property with the sole motive of swaying the public to vote in favour of the government in the then looming 2007 General Elections. Further, the respondents issued the said duplicate titles despite being aware of the appellant’s interest thereon. Consequently, the respondents conduct encouraged

further invasion of the suit property by squatters who hoped that they too would be issued with titles thereon. In addition, the respondents issued a duplicate title deed over a parcel described as L.R No. 24853, which was also a portion of the suit property, in favour of Permanent Secretary to the Treasury. All in all, the respondents' conduct unlawfully deprived the appellant of the suit property and was tantamount to compulsory acquisition of the suit property without compensation contrary to **Article 40 (3)** of the **Constitution**. As a result, the appellant had suffered loss.

4. Towards that end, the appellant sought the following orders:

- a) A declaration that the Petitioner was at all material and still is the proprietor and the holder of the indefeasible title and the whole and absolute interest in and right over LR No. 25528 and is entitled in relation to the said property to all the rights and protections provided by the Constitution of Kenya, in particular by, but not limited to, Articles 19, 20, 21, 22, 23 and 40 thereof, by the Registration of Titles Act, Cap 281 and by all provisions of law.*
- b) A declaration that the deprivation and or taking possession of parts of the said LR No. 25528 by the Government of Kenya under the Registered Land Act Cap 300 was and is unlawful and a nullity.*
- c) A declaration that the said taking of possession of parts of the said LR No. 25528 without any lawful and prescribed process under the law relating to acquisition was and is a compulsory taking and or deprivation of the Petitioner's said property.*
- d) A declaration that the said taking of possession and or deprivation by the Government of Kenya of the Petitioner's said properties is without the Government having satisfied the preconditions prescribed by the Constitution of Kenya(Article 40) and the law thereunder, in particular of the requirement of prompt payment of full and just compensation.*
- e) A declaration that the taking of possession of the part (purportedly known as LR No. 24853) of the said LR No. 22528 by the Government of Kenya under the Registration of Titles Act Cap 281 was and is unlawful and a nullity.*
- f) A declaration that the said taking of possession of part of the said LR No. 25528 under the Registration of Titles Act 281 was and is without any lawful and prescribed process under the law relating to acquisition and was and is a compulsory taking over and or deprivation of the petitioners said property.*
- g) A declaration that the said taking of possession under the Registration of Titles Act Cap 281 by the Government of Kenya of the Petitioner's said properties without first satisfying the conditions prescribed by the Constitution of Kenya and the law thereunder was and is a contravention by the Government of Kenya of Article 40, Constitution of Kenya in relation to the Petitioner.*

*Alternatively:*

- h) The Government of Kenya do promptly pay to the Petitioner full compensation for the said deprivation , taking over and compulsory possession of parts of the Petitioner's said land in contravention of the Petitioner's constitutional rights.*
- i) An order that the Government do pay to the Petitioner general damages for failure to protect the Petitioner's Constitutional rights, together with aggravated damages as this Honourable Court deems fit by reason of the Respondents and each of them having been and still being also in breach of the provisions of the Public Officer Ethics Act.*

*And:*

- j) This Honourable Court do grant appropriate relief and do make such further or other orders, issue such further or other writs and give such further or other directions as this Honourable Court may consider appropriate for the purposes of enforcing or securing the enforcement of the provisions of Articles 19, 20, 21, 22, 23 and 40 and any other articles, of the Constitution of Kenya in relation to the Petitioner and this Petition.*
- k) The Respondents do jointly and severally pay damages to the Petitioner for the loss, injury and damaged suffered by it, including loss of business opportunities, by all the aforesaid violations set out in this petition against the Petitioner's rights, title and interest in the suit land and otherwise.*
- l) The Respondents jointly and severally do pay the costs of this Petition.*
- m) In addition to general damages as hereinabove set out and otherwise the Respondents, jointly and severally, do pay to the Petitioner, special damages under the heads and in the sums set out hereinabove in paragraph 66 of the Petition.*

5. In reply, the respondents denied the allegations made by the appellant through affidavits sworn on their behalf. Paul Kiiru Mwangi, the then Deputy Director of Adjudication, deposed that the portions in question were allocated to squatters under the Ngomeni Settlement Scheme which was established in the year 1994. Prior to the identification of the squatters and

allocation of the portions, the 2<sup>nd</sup> respondent by a notice published in the Nation Newspaper of 24<sup>th</sup> January, 2011 called on all persons who held title or laid claim to the said portions to prove their entitlement. The notice read in part as follows:

**“NGOMENI SETTLEMENT SCHEME IN MAGARINI DISTRICT**

***The Government is in the process of finalizing issuance of Titles to the beneficiaries of land in Ngomeni Settlement Scheme ...***

***It is however been reported that there are other people claiming to have titles or letters of allotment to parcels of land within the above Scheme...***

***Under the circumstances NOTICE is hereby issued to all persons claiming to have letters of allotment or Titles within the above Settlement Scheme to make their claim within twenty one (21 days) from the date of this Notice. Any such claim accompanied by documentary evidence, should be presented to the District Land Officer Kilifi or Chief Land Registrar, Nairobi.***

***Failure to do so within the given time, any Allotment or Grant within Ngomeni Settlement Scheme ... shall be deemed to have been forfeited and the parcel of land reverted to the Government.”***

6. Following the said notice several individuals established their claims over portions under the Settlement Scheme which were subsequently, omitted from allocation to squatters. Nonetheless, the appellant herein did not lodge any claim within the requisite time frame which meant it had forfeited the same. Thereafter, the process of allocation of portions under the Settlement Scheme proceeded without any complaint or objection. As far as the respondents were concerned, the appellant’s claim was unfounded and should be dismissed.

7. The petition was disposed by way of affidavit and documentary evidence on record as well submissions made on behalf of the parties. It seems at some point the learned Judge (Olola, J.) directed for the survey of the suit property to determine the extent of the encroachment of the suit property by the Settlement Scheme. In that regard, L.M Dzoro, the District Survey Officer deposed that survey was carried out by Maritim Weldon who prepared a report to that effect.

8. Upon applying his mind to the evidence before him, the learned Judge in a judgment dated 15<sup>th</sup> March, 2018 found that the respondents’ actions amounted to unlawful compulsory acquisition. He went on to find that the appellant was only entitled to compensation for a portion of the suit property measuring 51.129 hectares and not the entire suit property. He also assessed the damages payable on account of violation of the appellant’s right to the said property on the basis of the aforementioned portion. In the end, the learned Judge issued the following orders:

“ 1.

***a. A declaration that the Petitioner was at all material and still is the proprietor and the holder of the indefeasible title and the whole and absolute interest in and right over LR No. 25528 and is entitled in relation to the said property to all the rights and protections provided by the Constitution of Kenya, in particular by, but not limited to, Articles 19, 20, 21, 22, 23 and 40 thereof, by the Registration of Titles Act, Cap 281 and by all provisions of law.***

***b. A declaration that the deprivation and or taking possession of parts of the said LR No. 25528 by the Government of Kenya under the Registered Land Act Cap 300 was and is unlawful and a nullity.***

***c. A declaration that the said taking of possession of parts of the said LR No. 25528 without any lawful and prescribed process under the law relating to acquisition was and is a compulsory taking and or deprivation of the Petitioner’s said property.***

***d. A declaration that the said taking of possession and or deprivation by the Government of Kenya of the Petitioner’s said properties is without the Government having satisfied the preconditions prescribed by the Constitution of Kenya(Article 40) and the law thereunder, in particular of the requirement of prompt payment of full and just compensation.***

***e. A declaration that the taking of possession of the part (purportedly known as LR No. 24853) of the said LR No. 22528 by the Government of Kenya under the Registration of Titles Act Cap 281 was and is unlawful and a nullity.***

***f. A declaration that the said taking of possession of part of the said LR No. 25528 under the Registration of Titles Act 281 was and is without any lawful and prescribed process under the law relating to acquisition and was and is a compulsory taking over and or deprivation of the petitioners said property.***

***g. A declaration that the said taking of possession under the Registration of Titles Act Cap 281 by the Government of Kenya of the Petitioner’s said properties without first satisfying the conditions prescribed by the Constitution of Kenya and the law thereunder was and is a contravention by the Government of Kenya of Article 40, Constitution of Kenya in relation to the Petitioner.***

***h. The Government of Kenya do promptly pay to the Petitioner full compensation for the said deprivation , taking over and compulsory possession of parts of the Petitioner’s said land in contravention of the Petitioner’s constitutional rights.***

And

*II. Kshs.413,844,248.70/= being the compensation for the value of the suit land.*

*III. General damages of Kshs.51,129,000/=*

*IV. Interest on all monetary awards, at Court rates from the date of Judgment until payment in full.*

*V. Costs to the Petitioner.”*

9. The appellant and the respondents were not amused with the aforementioned decision hence, the appeal and cross appeal before us. The appeal was premised on the grounds that the learned Judge erred by-

*a) Limiting the extent of compensation due to the appellant as a result of compulsory acquisition of the suit property by the respondents to a portion of 51.129 hectares as opposed to the entire suit property; and*

*b) Applying the said limitation in computing the damages due to the appellant.*

*c) Declining to grant the appellant loss of income which had been established to the required standard.*

*d) Failing to conclusively determine the fate and/or status of the suit property.*

10. On the other hand, the respondents in their cross appeal complained that the learned Judge erred by-

*a) Finding the respondents liable for the alleged encroachment of the suit property by squatters and compensating the appellant for the same.*

*b) Imposing punitive damages against the respondents.*

*c) Applying the provisions of the Land Acquisition Act which had since been repealed by the Land Act, 2012.*

11. In his opening remarks, Mr. Mwangi, learned counsel for the appellant, faulted the learned Judge for limiting the compensation the appellant was entitled to. The position taken by counsel was informed by the fact that the learned Judge had in the impugned judgment found that the respondents had unlawfully deprived the appellant of the suit property or otherwise acquired the same contrary to the prescribed procedure. Further, the learned Judge had failed to appreciate the uncontroverted evidence on record that the remaining portion of the suit property which had not been acquired by the respondents was unusable.

12. As per Mr. Mwangi, there was expert evidence on record to the effect that human settlement on the suit property interfered with the special use of the same by the appellant for aquaculture. As far as he was concerned, the fact that the appellant had charged the suit property did not derogate from the fact that the appellant had been deprived of the use of the suit property. It followed therefore, that the appellant should have been compensated for the entire suit property which measures 425.7 hectares. Likewise, the damages payable for violation of its right to property as enshrined under the **Constitution** should have been based on the entire suit property. Counsel also argued that the appellant had established that it had lost income as a consequence of the interference of its use of the suit property and the learned Judge ought to have awarded the same.

13. Mr. Mwangi urged that the learned Judge properly applied the provisions of the **Land Adjudication Act (repealed)** in assessing the compensation due to the appellant. This is because the petition was filed prior to the repeal of the said Act by the **Land Act** in 2012. He went on to add that the learned Judge in finding that the appellant was only entitled to compensation of a portion of 51.129 hectares of the suit property left the status of the remaining portion, which had otherwise been altered by his decision, in limbo. In conclusion, counsel asked to allow the appeal on the foregoing grounds.

14. Opposing the appeal, Ms. Lutta, Senior Litigation Counsel, contended that the appellant's claim in the amended petition was for compensation of the portion of the suit property which it deemed had been compulsorily acquired. In line with the settled principle of law that parties are bound by their pleadings, the appellant could not turn around and seek compensation of the entire suit property. To bolster that line of argument, counsel made reference to the Supreme Court's decision in **Raila Amolo Odinga & Another vs. Independent Electoral and Boundaries Commission & 2 others [2017] eKLR**.

15. According to counsel, the learned Judge properly applied his mind with respect to the claim for loss of income and dismissed the same. Placing reliance on this Court's decision in **National Social Security Fund Board of Trustees vs. Sifa International Limited [2016] eKLR**, Ms. Lutta submitted that the appellant had not proved loss of income which was in the nature of special damages

16. Turning to the cross appeal, Ms. Lutta indicated that the respondents had abandoned the ground with regard to the applicability of the

**Land Acquisition Act.** She went on to assert that there was no evidence that linked the respondents or the government to the alleged encroachment by squatters of the suit property. In other words, she posited that the totality of the evidence adduced by the appellant did not establish its case against the respondents to the required standard. Therefore, the learned Judge was wrong to hold the respondents liable for the said encroachment and imposing damages as he did.

17. Counsel took issue with the learned Judge imposing what it deemed as punitive compensation for the alleged compulsory acquisition despite contradictions of the value of the suit property by the reports adduced by the appellant. Besides, the learned Judge having found that the reports in question were based on the wrong assumption that the appellant was carrying on aquaculture on the suit property, should not have adopted the same as the basis of computing the compensation due to the appellants, if any.

18. On his part, Mr. Mwangi resisted the cross appeal on more or less similar grounds which were advanced in support of the appeal.

19. This being a first appeal, we are guided by the provisions of **Rule 29 (1)** of the **Court of Appeal Rules** which sets out the scope of our jurisdiction. The limit of our mandate was aptly captured Lord Simon in **Watt vs. Thomas [1947] AC, 484 at page 485** as follows:

**“...an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide.**

**But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight...”**

20. With the confines of our jurisdiction in mind, we find that the following issues arise for our determination:

- 1) Was the appellant’s right under Article 40(3) of the Constitution violated; if so,**
- 2) Was the appellant entitled to compensation and damages; and if so, to what extent?**
- 3) Was the appellant entitled to loss of income on account of the respondents conduct?**
- 4) What is the fate of the suit property?**

21. **Article 40(3)** of the **Constitution** stipulates that:

**“(3)**

**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.”**

22. In as much as the respondents denied depriving the appellant the right to use its suit property, the evidence on record was to the contrary. To begin with, the survey report dated 12<sup>th</sup> January, 2012 was categorical that there was an overlap of plots issued under the Ngomeni Settlement Scheme and the suit property. Furthermore, we concur with the findings of the learned Judge with regard to this aspect, to wit,

**“I am not therefore persuaded by the inference in the Replying Affidavit sworn by Paul Kiiru Mwangi for the respondents on 19<sup>th</sup> September, 2016 that the failure by the Petitioner, if at all it had notice of the media advertisement, had the effect of forfeiting or extinguishing the Petitioner’s rights and interest over the suit property. A perusal of the said public notice in fact reveals that no law was relied upon or cited to enable the then Commissioner of Lands to exercise such power or to give any such ultimatum of forfeiture to registered holders of land. In my view, the Constitutional rights to property cannot be “deemed to have been forfeited” whether by the said newspaper advertisement or at all.**

...

Accordingly, under whatever law the Commissioner of Lands was acting, he had no jurisdiction to deem the Petitioner's title forfeited whether in default of the performance of what was required in his public notice or any other condition. It is indeed noteworthy that on 24<sup>th</sup> January 2011 when the said Notice appeared in the media, this Petition had already been filed a couple of months earlier. From an Affidavit of Service sworn by one Titus Mburi, an authorized Court Process Server filed herein on 27<sup>th</sup> October 2010 this Petition documents including conservatory order issued by this Court on 15<sup>th</sup> September 2010 had on the 5<sup>th</sup> day of November 2010 been served upon the same Commissioner of Lands who is sued herein as the 2<sup>nd</sup> Respondent. That being the case, it can only be but surmised that the public notice was in itself an admission of the Respondents knowledge that the rights of existing title holders were going to be affected or had already been affected by their actions. That notice was therefore tainted with malice and in any case, offers no defence to the Respondents.

At any rate, the Notice was in itself a lie. From the Respondents Affidavit sworn by the said Paul Kiiru Mwangi and filed herein on 31<sup>st</sup> October 2016, Ngomeni Squatter Settlement Scheme was started in 1994. From the Affidavit of Mohammed Abubakar sworn on 13<sup>th</sup> September 2010 in support of the Petition, the titles issued to a number of people purported to be squatters were issued in 2007 when no such Public Notice had been issued by the Respondents."

23. In any event, no person can be deemed to have waived a fundamental right or freedom, such as the right to property, which is enshrined under the *Constitution*. Our position is fortified by the sentiments of this Court in *Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others (supra)* thus:

*"We have considered submissions by counsel on estoppel and acquiescence. In our view, there can be no estoppel against the Constitution which is the paramount law of the land. Subject to the express provisions of Article 24 of the 2010 Constitution, no individual can barter away fundamental rights and freedoms enshrined in the Constitution. One can neither acquiesce nor waive the fundamental rights and freedoms protected in the Constitution. Fundamental rights were not kept in the Constitution simply for individual benefits - these rights were put up as a matter of public policy and therefore the doctrine of inordinate delay, estoppel, acquiescence or waiver cannot unequivocally be applied as a bar to enforcement of fundamental rights."*

24. Accordingly, we, like the learned Judge, do find that the respondents' action amounted to unlawful compulsory acquisition of portions of the suit property.

25. Was the appellant entitled to compensation on account of the compulsory acquisition? The answer is a resounding yes as reflected under *Article 40(3)(b)(i)*. As to the extent of the said compensation, we concur with the learned Judge that assessment of the same should be in line with the principles set out in the *Land acquisition Act*. Further, 15% of the market value of the land in question should be added to the amount computed as compensation.

26. In our view, we see no reason to fault the learned Judge for relying on one of the valuation reports which was on record, namely the one prepared by Wesco Property Consultants, to determine the reasonable compensation. This is because the valuation was from an expert on the issue. The learned authors of *Phipson on Evidence 17<sup>th</sup> Edition at paragraph 33-10* observed:

*"Expert witnesses have the advantage of a particular skill or training. This not only enable them to form opinions and to draw inferences from observed facts, but also to identify facts which may be obscure or invisible to lay person."*

We are also guided by the case of *Dhalay vs. Republic [1995 – 1998] EA 29* wherein it was held:

*"Where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected. But if a court is satisfied on good and cogent ground(s) that the opinion though it be that of an expert, is not soundly based, then a court is not only entitled but would be under a duty, to reject it."*

27. Based on the foregoing we are satisfied that the learned Judge considered the two valuation reports which gave different figures of the reasonable compensation and exercised its discretion properly as follows:

*"I have considered the provisions and the need for a fair compensation to the Petitioner for the land. From the documents presented before me, the Valuation Report by Wesco property Consultants dated 25<sup>th</sup> November 2014 puts the open Market Value of the property at Kshs 2,996,232,000/= An additional 15% of that value as per the Regulations in the Schedule to the repealed Land Acquisition Act brings out a sum of Kshs 449,434,800/= These figures cited by Wesco are lower than the figure cited by W.J. Mukhongo of Wyco Valuers which places the value at Kshs 3,052,817,000/= Before me I have no evidence that the Valuation made by Mr. Wesco Kivumira of Wesco Property Consultants is inordinately high or unreasonable. The Respondents did not provide me with any reason to doubt the same and there was no counter valuation of the suitland."*

28. However, we part company with the learned Judge to the extent that he expressed that compensation was in respect of a portion of 51.129

hectares. His finding was based on the survey report on record. On our part, taking into account the deposition by L. M. Dzoro to the effect that the District Survey office could not determine the extent of encroachment and sand harvesting on the suit property coupled with the fact that the survey report indicated that the remaining portion of the suit property was swampy, we find that the same corroborates the appellant's assertion that the remaining portion was unusable. As such, we are of the considered view that the appellant was entitled to compensation for the entire suit property.

29. Additionally, the appellant was entitled to damages for violation of its right to the suit property on the basis of the entire suit property. Consequently, we find that the learned Judge did not exercise his discretion properly in computing the compensation and damages payable to the appellant as envisaged in the case of ***Kemro Africa Ltd. vs. Lubia & Another (No.2) [1987] KLR 30.***

30. On the issue of loss of user, we agree with the following observations of the learned Judge:

***“Regarding the claim for Kshs.2,648,978,000/= for loss of income, I did not find this claim proven. With respect and based on the principle that special damages must be pleaded and proved, I found no basis for this claim in the largely generalized reports and the assumption that a Prawn Farm was to be established by the petitioner. Accordingly I decline to grant the same.”***

31. Last but not least, having expressed that the appellant was entitled to compensation for the entire suit property we find that upon payment of the said compensation, the appellant will be deemed to have relinquished its title thereto.

32. The upshot of the foregoing is that the appeal herein succeeds in part for the reasons outlined herein above. For avoidance of doubt, we set aside the trial court's judgment to the extent of computation of the compensation for compulsory acquisition and damages payable for violation of the appellant's right to property and substitute the same with the following orders:

***a) Compensation for compulsory acquisition of the property shall be as per the report prepared by Wesco Property Consultants which puts the open Market Value of the property at Kshs.2,996,232,000/= plus an additional 15% of that value as per the Regulations in the Schedule to the repealed Land Acquisition Act comes to Kshs 449,434,800.***

***b) Damages for violation of the appellant's right to property shall be computed at the rate of Kshs.100,000 per acre which translates to Kshs.42,570,000.***

Due to the partial success of the appeal, the respondents shall meet half of the costs of this appeal as well as the suit in the ELC.

**Dated and delivered at Malindi this 20<sup>th</sup> day of March, 2019.**

**ALNASHIR VISRAM**

.....

**JUDGE OF APPEAL**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**D. K. MUSINGA**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**