



IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO. 115 OF 2018

BETWEEN

MWAVUMBO GROUP RANCH.....APPELLANT

AND

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

THENYA RAILWAYS CORPORATION.....2ND RESPONDENT

CHIEF LAND REGISTRAR.....3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

(Being an appeal from the Judgment and decree of the High Court of Kenya

Mombasa (Komingoi, J.) dated 29th November, 2017

In

ELC Petition (MSA) No. 94 of 2016)

JUDGMENT OF THE COURT

1. Mwavumbo Group Ranch (appellant) is an entity registered under the **Land (Group Representative) Act, Cap 287** of the Laws of Kenya having been registered as such on 15th July, 2015. It is also the registered proprietor of all that parcel of land known as Kwale/Mwavumbo/1 (the suit property) measuring approximately 24,908 Hectares situated in Mariakani Area of Kwale County.
2. Sometimes in the year 2014, the Government of Kenya embarked on its plans to construct modern railway infrastructure (Standard Gauge Railway (SGR)) between Mombasa and Nairobi. To that end it became necessary to acquire land that fell on the railway path. In exercise of its right of eminent domain, the Government through the National Land Commission (NLC) (1st respondent) initiated the compulsory acquisition process pursuant to **Article 40 (3)** of the Constitution of Kenya 2010, and the relevant provisions of the Land Act.
3. Having identified the land in question, the 1st respondent proceeded to gazette its intention to acquire the identified properties vide gazette Notice No. 4096 of 20th June 2014. Among the listed properties was 174,646 Hectares belonging to the appellant. This was done on behalf of Kenya Railways Corporation (KRC) (2nd Respondent), the entity tasked with constructing Railways.
4. According to the 1st respondent, having followed the procedure laid out in the Land Act, the 2nd respondent compensated the persons identified as owners of the land falling along the SGR path.
5. According to the appellant however, the land that was compulsorily acquired belonged to the Group Ranch and the appellant was not compensated for it. This prompted the appellant to complain to the 1st respondent vide its letter dated 22nd March, 2015 demanding compensation for the said portion. The 1st respondent wrote back and informed the appellant that the individual owners of the land in question had been identified and compensated. The 2nd respondent by its letter dated 6th July, 2015 also informed the appellant that the land that had been acquired had been claimed by the *“affected persons who are settled along the corridor of the Standard Gauge Railway within*

the group ranch. There is therefore no extra land that is payable to the group ranch as requested...

6. It was the refusal by the 1st and 2nd respondents to pay the appellant the compensation they were demanding that prompted the appellant to move to the Environment and Land Court (ELC) by way of Constitutional Petition **No.94 of 2016** seeking several reliefs chief among them a declaration that the petitioner was entitled to compensation for the suit property.

7. It is worth noting that there were two notices of motion and two preliminary objection filed by the 1st, 2nd, 4th, 5th, 6th and 7th respondents. In their Preliminary objection dated 21st June, 2016, the 5th, 6th and 7th respondents raised two issues. First was that the 6th respondent was the registered absolute owner of Land Parcel No. Kwale/Mwavumbo/43 and not being the registered owner thereof, the appellant could not claim compensation for it. Secondly that the certificate for that Parcel was issued in 1978, long before the appellant came into existence and before issuance of its Land Certificate on 26th March 1984

8. A notice of motion of even date filed by the same respondents raised the same issues. The motion was supported by the affidavit sworn by the 6th respondent giving a very detailed history of the parcel in question. The Preliminary objections were on the jurisdiction of the ELC to hear and determine the petition. According to counsel for the 1st, 2nd 3rd and 4th respondents, the ELC had no original jurisdiction to entertain the matter to the extent that it was challenging compulsory acquisition of land by the 1st respondent. Such claims were supposed to be addressed through the framework set out under section 112 to 120 of the Land Act 2012.

9. When the applications came up for hearing on 25th July, 2016 learned counsel for the parties informed the court that following consultation, they had agreed on withdrawal of the two applications. Consequently, the applications marked 5th May, 2016, and 21st June, 2016 were formally withdrawn. This meant that the claims against 5th, 6th and 7th respondents were withdrawn. We note that there were no replying affidavits filed in response to the petition itself, but the petitioner and the 2nd respondent filed written submissions.

10. Following the said withdrawal, what remained was the 1st and 2nd respondents' Notice of Preliminary Objection dated 23rd June, 2016 challenging the jurisdiction of the Environment and Land Court to hear and determine the dispute in question to the extent that it was challenging compulsory acquisition of land by NLC (2nd respondent), and the Petition itself. They cited the provisions of **section 112, 118, 119 and 120** of the Land Act which vests the original jurisdiction to determine disputes on ownership, value and compensation payable on the 1st respondent. The respondents posited that the petitioner (appellant herein) should not be allowed to ignore the statutory framework prescribed by Parliament under the **Land Act 2012** to baptize its claim as a constitutional one and invoke the constitutional jurisdiction of ELC.

11. It would appear from the judgment that the learned Judge decided to determine the preliminary objection and the substantive petition together. Whereas on the face of it there is nothing wrong with that approach, which is usually adopted in the interests of saving judicial time, it bears repeating that issues pertaining to jurisdiction once raised must be determined *in limine*. Even in instances where the court hears the preliminary objection and substantive petition/matter together and reserves judgment or Ruling for both, then the court must determine the issue of jurisdiction first. If the court upholds the preliminary objection and finds it lacks jurisdiction to entertain the matter, it must down its tools. It has no business delving into the merits of the rest of the petition (See **The Owners of Motor Vessel "Lilian "S" v. Caltex Oil Kenya Limited [1989] KLR 1**).

12. With respect to the learned Judge what we have here is a confused judgment where all the issues are mixed up. The learned Judge analysed all the material before her and finally concluded.

"I agree with the 2nd respondents submissions that the procedure for redress has been provided under section 112 – 120 of the Land Act, 2012. The petitioner was under an obligation to go through the said process in seeking redress... the petitioner has failed to demonstrate that it went through the framework for resolution of disputes under section 112 – 120 of the Law Act, 2012 (sic). To this extent I find the 2nd respondent's preliminary objection to be merited and the same is up held (sic) In essence this ground is enough to strike out the petition herein."

The learned Judge went further and made a finding to the effect that the matter was "an ordinary compulsory acquisition dispute and not a constitutional question." Having so found the learned Judge should have downed her tools and not proceeded to consider **prayer (b)** of the petition. Unfortunately, she did so even after finding that she was bereft of jurisdiction to deal with the matter and proceeded to make a finding to the effect that

"...what the petitioner ought to have done is to have a valuation be undertaken (sic) on the property under compulsory acquisition before filing a suit against the respondent."

This finding actually forms the basis of ground 3 of the memorandum of appeal. The learned Judge ultimately dismissed the petition after upholding the preliminary objection.

13. Aggrieved with the said findings the petitioner moved to this Court on appeal citing four grounds. Other than **ground 3** which we have alluded to above, the other grounds fault the learned Judge for finding that the petition did not raise constitutional issues for determination by ELC sitting as a constitutional court; that **sections 112 – 120** of the Land Act could only be set into motion by the 1st respondent; and for upholding the preliminary objection which according to the appellant was not based on points of law. The appellant urged us to allow the appeal with costs. Interestingly however the petitioner does not say what should happen should we allow the appeal. Should we for instance allow the petition or send the same back to ELC for hearing and determination?

14. When parties, through their respective counsel appeared before the Deputy Registrar of the Court for case management, directions were issued for parties to file written submissions. The appellant filed its submissions on 26th October, 2018 but there was no response from the respondents. When the matter came up for plenary hearing, there was no attendance by counsel for the respondents, in spite of having been

duly served with hearing notices for that date. **Mr. Odongo**, learned counsel for the appellant relied fully on his written submissions and said he would rely on the cases he had cited before the trial court.

15. Being cognizant of fact that the essence of the impugned judgment was the upholding of the preliminary objection, we shall not need to delve into the substantive merit issues raised in the petition. The only issue for our determination is whether the ELC had jurisdiction to hear the matter. Was it a constitutional issue or was it a claim strictly within the purview of **sections 112 – 120** of the Land Act 2012? From what we can decipher from the record, the appellant was basically complaining that the wrong individuals were compensated for their land. It would appear further that the appellant was complaining that even after being compensated, the same persons had remained on the land and had started encroaching on land belonging to other members. There was also an issue on the adequacy of the compensation.

16. We begin by looking at the Law. As indicated earlier the 2nd respondent did publish the Kenya Gazette Notice in respect of the Land in question pursuant to **section 107 (5) of the Land Act 2012**. It would appear from a letter from the appellant (date not clear but sometime in May) that an inquiry followed the said publication of the Gazette notice. The letter talks of meetings between 2nd Respondent and the appellant where issues of ownership of the identified properties was discussed. We also note that issues of ownership of some of the properties allegedly belonging to the appellant, but claimed by 5th, 6th and 7th respondent were discussed at a meeting convened by the 1st respondent. It cannot therefore be said that the 1st respondent failed to initiate the process of inquiring into ownership/compensation of the land in question.

17. Having initiated the process the 1st respondent opened the door for any complaints to be channeled to it pursuant to **Sections 112 – 120** of the Land Act 2012. This was not done. We agree with the learned Judge that the appellant ought to have pursued its claim through the laid down procedure under the Land Act. If the appellant's complaint was that the wrong persons had been compensated then section 116 of the Land Act should have been invoked.

18. The courts in this jurisdiction have consistently held that where the law specifies a particular mechanism for redress of grievances, that mechanism must be invoked and exhausted before a party can seek redress in the courts. (**See Narok County Council v Transmara County Council & Another, CA No. 28 of 2000, Republic v The National Environment Management Authority, CA No 84 of 2010 and Mutanga Tea & Coffee Co Ltd v Shikara Ltd & Another, CA No. 54 of 2014**). The appellant's recourse lay in the Land Act which is mandated to handle the kind of grievances the appellant had against the respondents.

19. The next issue is whether the petition raised constitutional issues to merit hearing by ELC sitting as a constitutional Court. In our view, this was not a constitutional issue. Compulsory acquisition is itself a constitutional issue as it also touches on the right to own property under **Article 40** of the Constitution of Kenya 2010, but the process of acquiring the land and the attendant issues pertaining to compensation and any disputes arising therefrom all anchored in the Land Act. The Courts have also maintained that where a party has a remedy easily available through a prescribed speedy and straightforward procedure, such a party should not obfuscate matters by making the dispute a constitutional dispute. (See **Methodist Church in Kenya Trustees Registered & Another v Jeremiah Muku & Another, CA APP. No 203 of 2008** and **Gabriel Mutava & 2 others v. The Managing Director Kenya Ports Authority & Another, Court of Appeal at Malindi, Civil Appeal no 67 of 2015** and **Samson Cheme Vuko v Nelson Kilumo & 2 others [2016] eKLR**).

In that regard we cite with approval the following finding of the Privy Council in **Harrissoon v Attorney General of Trinidad & Tobago (1980) AC 265**:

“...the notion that whenever there is a failure by an organ of the Government or public authority or public officer to comply with the law necessarily entails contravention of fundamental freedom guaranteed to the individuals by Chapter 6 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human rights or fundamental freedom is, or is likely to be contravened is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for normal proceedings for invoking judicial controls of administrative action...”

(See also **Trinidad Re Application by Bahadur [1986] LRC**

(Const.) 297).

20. The issues raised needed adducing of evidence as to how much compensation was payable; which people had been paid and for what interest in the affected land etc. These were issues that were ill suited for ventilation through a constitutional petition. They are to say the least not constitutional issues. As stated earlier, where Parliament has expressly prescribed a method or process of dispute resolution, parties must defer to it and eschew running to the constitutional or other courts for recourse. Clothing an ordinary dispute with constitutional regalia does not necessarily transform it to a constitutional dispute. We hold that the learned Judge did not err in upholding the Preliminary Objection.

21. We think we have said enough to demonstrate that this appeal lacks merit. The same is hereby dismissed with orders that each party bears its own costs, as the respondents did not file any response to the appellant's submissions nor did they attend Court for hearing.

Dated and delivered at Mombasa this 7th day of March, 2019

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR