REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome; CJ & P, Mwilu; DCJ & V-P, Ibrahim, Wanjala & Ouko, SCJJ)

PETITION NO. 1 OF 2020

—BETWEEN—

HON. ATTORNEY GENERAL.....PETITIONER

—AND—

ZINJ LIMITED.....RESPONDENT

---

*Being an appeal from the Judgment and Orders of the Court of Appeal of Kenya at Malindi (**Visram, Karanja, & Musinga, JJ.A**) in Civil Appeal No. 56 of 2018 dated 20th March 2019.*

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] The Petition before this Court is dated 21st January, 2020 and lodged on 22nd January, 2020. It is brought pursuant to the provisions of Article 163(4) (a) of the Constitution, Sections 15(2) & 17 of the Supreme Court Act No. 7 of 2011 and Rule 33 of the Supreme Court Rules, 2012 *(repealed)*. The appellant challenges the decision of the Court of Appeal (*Visram, Karanja & Musinga, JJ.A*) which partly allowed an appeal against the decision of the Environment and Land Court (*Olola, J.*) in Malindi E.L.C Petition No. 2 of 2010 on the award of damages.

B. BACKGROUND

(i) At the Environment and Land Court

[2] The respondent is the registered owner of L.R No 25528 (*hereinafter referred to as "the suit property"*) measuring 425.7 hectares situate in the Coastal Region pursuant to a Grant issued under the Registration of Titles Act, Cap 281 Laws of Kenya (*now repealed*). The respondent, being in occupation of the suit property, proceeded to carry out prawn farming, salt extraction, amongst other marine aquaculture activities.

[3] The respondent claims that in 2007, the appellant, without reference to or concurrence of the former, unilaterally issued duplicate title deeds over portions of the suit property in favour of third parties under the Registered Lands Act, Cap 300 Laws of Kenya (*now repealed*). It was the respondent's claim that the duplicate title deeds were issued during the 2007 election period, at the behest of the politicians in the area, with a view to winning votes in favour of the respective candidates. The respondent further claimed that the decision by the appellant to issue duplicate titles to third parties encouraged more squatters to encroach and settle on the suit property.

[4] It was the respondent's further claim that among other groups of people, the Department of Defence through the then Permanent Secretary to the Treasury, was granted a duplicate title over a parcel of land L.R. No. 24853 which was part of the suit property.

[5] Aggrieved, the appellant on 28th August 2015 filed a Petition before the High Court *(as amended),* claiming that the duplicate titles were issued to trespassers who had encroached on its suit property. The appellant's case was that the respondent's act of issuing titles over the suit property was illegal and amounted to unlawful compulsory acquisition and deprivation of its property. It further claimed that the respondent's actions amounted to a violation of its rights under

Article 40 (1) and (3) of the Constitution, and sought two declarations to that effect, and a consequential award of damages.

[6] In a Judgment dated and delivered on 15th March 2018, the Environment and Land Court (*Olola, J*) held that the issuance of duplicate titles over the appellant's land, in favour of third parties, amounted to unlawful compulsory acquisition, and a violation of its right to property under Article 40(3) of the Constitution. The learned Judge determined that the acreage unlawfully acquired was 51.129 ha and awarded the respondent a sum total of Kshs. 413,844,248.70/- as compensation for the land encroached and Kshs. 51,129,000/- as general damages for breach of the respondent's right to property under Article 40 of the Constitution.

(ii) At the Court of Appeal

[7] Both the appellant and respondent were aggrieved by the Judgment of the Environment and Land Court. The respondent filed an appeal before the Court of Appeal, Civil Appeal No. 56 of 2018 raising the following summarized grounds, that the learned Judge erred by:

(a) Limiting the extent of compensation 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;

(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; and

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

[8] The appellant also filed a cross appeal claiming that the learned Judge erred by:

(a) Finding the appellants liable for the alleged encroachment of the suit property by squatters and compensating the appellant for the same;

(b) Imposing punitive damages against the appellants; and

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

[9] The Court of Appeal (*Visram, Karanja & Musinga, JJ.A*) in its Judgement dated and delivered on 20th March 2019, upheld the High Court's finding that the respondent's right to property was violated, and determined that the appellant's acts amounted to compulsory acquisition of portions of the suit property. Further, the Appellate Court held that the respondent was entitled to compensation under Article 40(3) of the Constitution, on account of the compulsory acquisition. Additionally, the Court faulted the trial Judge for failing to properly exercise his discretion in the computation of damages and determined that the respondent was entitled to compensation for the entire suit property. It found that upon payment of the compensation, the respondent would be deemed to have relinquished its title to the suit property. Finally, the Court of Appeal awarded damages of Kshs. 449, 434, 800/- for the compulsory acquisition of the suit property and Kshs. 42, 570, 000/- as damages for violation of the appellant's right to property.

(iii) At the Supreme Court

[10] The appellant has now moved to this Court on grounds that the learned Judges, erred in law and in fact in:

(i) *Finding that the respondent was entitled to compensation of the suit property though the same had not been compulsorily or otherwise acquired by the appellant;*

(ii) *Failing to find that the respondent was entitled to only 28 hectares acquired by the government as shown in the survey report filed in court on 13th January 2012;*

(iii) *Finding that the respondent was entitled to compensation for the entire suit property and awarding the sum of Kshs. 2,996,232,000/- plus 15% damages under the Land Acquisition Act in the sum of Kshs. 449,434,800 and damages for Kshs. 42,570,000/- .*

(iv) *Misapplying the application (sic) of the provisions of Article 40(3)(b) of the Constitution;*

(v) *Failing to find that the respondent had not established any basis for its claim for deprivation or compensation for the whole portion of the suit property whereas the respondent had not declared any interest or taken up possession or ownership thereof;*

(vi) *Finding that the respondent's constitutional rights to the entire suit property had been violated under the doctrine of compulsory acquisition without any basis, proof and/or justification;*

(vii) *Compelling the Government to acquire the larger portion of the suit property and to pay the respondent an inordinate sum of Kshs. 2,996,232,000/- for land which the Government had no intention to acquire causing excessive loss to public funds;*

(viii) *Relying on a valuation report that was misleading and based the value of the land on the argument that the respondent was carrying an aquaculture business despite making a finding that this had not been not proved.*

[11] The appellant seeks the following reliefs:

(a) *The Judgments of the Court of Appeal delivered at Malindi on 20th March, 2019 in Civil Appeal No. 56 of 2018 Zinj Limited – vs- Hon. Attorney General and the Environment and Land Court in Petition 2 of 2010* ***Zinj Limted vs. Honourable Attorney General*** *be set aside with costs.*

(b) *The decision of the Court of Appeal at Malindi on 20th March 2019 in Civil Appeal No. 56 of 2018* ***Zinj Limited vs. Honourable Attorney General*** *and that of the Environment and Land Court in Petition 2 of 2010* ***Zinj Limited vs. Honourable Attorney General*** *be set aside*

(c) *That this Honourable court do find that the Respondent is in violation of condition number 14 of the Grant issued to the Respondent and do order for unconditional surrender of the suit property to the Government.*

(d) *Alternatively, that the Government valuer be directed to proceed and value the 28.7 hectares being the portion of the suit property acquired according to the Survey Report.*

C. PARTIES RESPECTIVE SUBMISSIONS

(i) The Appellant's Submissions

[12] The appellant's written submissions are dated 20th February 2020 and filed on 21st February 2020. On jurisdiction, the appellant argues that the appeal is filed

as of right, and that this Court has jurisdiction to hear and determine the appeal, as the petition raises questions involving the interpretation and application of Article 40(3) of the Constitution. In this regard, the appellant cites this Court's decision in ***Manchester Outfitters (Suiting Division) Ltd (now known as King Wollen Mills Ltd) & Another vs. Standard Chartered Financial Services Ltd & 2 Others,*** Petition No. 6 of 2016, [2019] eKLR to support this submission.

[13] On whether the issuance of duplicate titles over the suit property amounted to compulsory acquisition, the appellant argues that both the trial court and appellate court erred in the application of the doctrine, by failing to identify the public purpose for which the suit property was acquired. As such, it is contended that, the conditions precedent for compulsory acquisition as set out under Article 40(3) of the Constitution were never met.

[14] The appellant further submits that based on the Survey Report of 12th January 2012, which report was relied upon by the trial Court, the Government only acquired 28.659 hectares of the suit property pursuant to due process as stipulated under Sections 3, 4 and 6 of the Land Acquisition Act (*repealed*). It is the appellant's further submission that the land was so acquired to settle the squatters under the arrangement of Ngomeni Settlement Scheme.

[15] It is the appellant's case that the respondent is only entitled to compensation for the portion of land (28.659 Ha) that the Government acquired through compulsory acquisition, and not the entire suit property. It contends that there is no legal basis for condemning the Government with punitive damages for the un-acquired portion of land. The award by the Court of Appeal against the Government, for the undisturbed portion of land, urges the appellant, would lead to an unjustifiable loss of public funds. The appellant urges that the respondent was actually utilizing the remaining suit property for prawn farming. In support of this argument, the appellant makes reference to the respondent's application for

change of user, from exclusive salt extraction, to an expanded user which would accommodate aqua-culture farming.

[16] With regard to the Judgment of the Environment and Land Court, the appellant argues that the trial Court erred in finding that the respondent, was entitled to compensation for 51 hectares of the suit property, despite the Report indicating that the encroachment by the Government had only affected 28 hectares or thereabouts.

[17] The appellant further submits that Condition 14 of the Grant stipulates that the land would revert to the Government unconditionally, should the proprietor fail to utilize it in line with the purpose for which the land was granted. Accordingly, the appellant submits that the portion which was not affected by the encroachment should now automatically revert to the Government since the respondent claims that it is unable to utilize it.

(v) Respondent's Submissions

[18] The respondent's submissions are dated 22nd April 2021 and filed on 23rd April 2021. The respondent proposes the following issues for determination;

> *(i) Whether the trial Court and the Court of Appeal properly interpreted and applied Article 40 (3) of the Constitution;*
>
> *(ii) Whether the Court of Appeal properly exercised its discretion in disturbing the award of damages by the trial Court.*

[19] On the issue as to whether its rights under Article 40(3) of the Constitution were violated, the respondent submits that by its own admission, the Government not only condoned the encroachment upon its land by third parties, but proceeded to issue titles in favour of the latter. The respondent further submits that the issuance of titles was done in complete disregard of the provisions of Article

40(3)(a) and (b) of the Constitution, and the mandatory procedure of acquisition set out in Sections 7, 9, 17 and 22 of the Land Acquisition Act *(repealed)*. The respondent maintains that having been unlawfully deprived of its suit property by the appellant, it was entitled to compensation under Article 23(3)(e) of the Constitution, as read with the relevant provisions of the Land Acquisition Act *(repealed)*.

[20] Regarding the acreage of the unlawfully acquired portion of the suit property, the respondent submits that the appellant did not avail any evidence at the trial court, to support its claim that only 28 hectares had been encroached upon. It is the respondent's case that the illegal acquisition of parts of the land, was not a one-off event. Rather, its contends that the acquisition took place in phases and at different times. It is the respondent's case that while it agrees with the trial court's finding of fact, that the portion of the suit property that been unlawfully acquired, was 51 hectares, the award of damages ought to have extended to the entire suit property. In justification, the respondent argues that the encroachment upon and consequent acquisition of the 51 hectares had rendered the whole suit property un-utilizable.

[21] In response to the appellant's contention that the suit property should revert to it under Condition 14 of the Grant, the respondent submits that such an argument is a monumental afterthought as it was never canvassed at the trial court. In conclusion, it urges the Court to uphold the Judgment and Orders of the Court of Appeal in their entirety.

D. ISSUES FOR DETERMINATION

[22] In our view, after considering the respective cases of the parties, and the submissions (both written and oral) in support thereof, there are three issues the determination of which disposes of this Appeal. These are:

(i) Whether the issuance of titles over a portion of the suit property in favour of third parties by the Government violated the respondent's right to property contrary to Article 40 (3) (a) and (b) of the Constitution.

(ii) If the answer to the above is in the affirmative, whether the respondent was entitled to an award of damages as compensation consequent upon such violation

(iii) If the answer to the above is in the affirmative, whether the compensation ought to have extended to the whole of the suit property or whether it should be limited to that portion over which titles were issued in favour of third parties.

E. ANALYSIS

(i) On the violation of Article 40 (3) (a) and (b) of the Constitution

[23] It was the respondent's case, that the Government unlawfully, and in total disregard of the Constitution, the applicable law, and the strictures of due process, issued titles over a portion of its property in favour of third parties. This was done pursuant to a Notice published by the Ministry of Lands on 24th January 2011 in the Nation Newspapers wherein, it invited all persons claiming an in interest in

what it named ***Ngomeni Settlement Scheme,*** but which was in reality, part of the suit property, to communicate their respective claims.

[24] The appellant on the other hand, maintains that the issuance of titles over the said portion of the suit property, was legal and that due process was followed. It is the appellant's submission that through the Notice, the respondent, just like other members of the public, was given an opportunity to communicate his interest in the land but failed to do so. As such, submits the appellant, what followed was a compulsory acquisition of 28 hectares, for the purpose of settling the squatters who had encroached on the land.

[25] Article 40 (3) of the Constitution provides that-

> ***"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.***

[26] The fact that the respondent was the registered proprietor of the suit property, has never been called into question, or challenged by the appellant.

Indeed, during the proceedings at both the trial and appellate Courts, the ownership status of the suit property was never in doubt. It remains an uncontroverted fact that the respondent acquired the suit property pursuant to a Grant of Lease by the Government. By the time the cause of action arose, the lease in favour of the respondent was still intact.

[27] The main controversy, revolves around the legality or otherwise, of the manner in which the Government, went about acquiring portions of the suit property, and conferring title over the same, in favour of third parties. The only way the Government could lawfully deprive the respondent of part or all of its property, was through a compulsory acquisition, in conformity with the provisions of Article 40 (3) of the Constitution, and the procedure stipulated in the Land Acquisition Act (*now repealed)* which was the applicable law at the time. Towards this end, can it be said that the Government acquired the portion of the suit property compulsorily? The facts on record do not that way point. Being the custodian of the Land Register, and the guarantor of titles emanating there-from, the Government was acutely aware that the suit property was privately owned by the respondent.

[28] It follows that any compulsory acquisition process, ought to have commenced with a requisite Notice to the respondent, and any other persons claiming an interest in the land. The public purpose for which the land was to be acquired, ought to have been clearly stated. Most critically, the resultant acquisition ought to have been attended with prompt payment in full, of a just compensation to the respondent. There is nothing on the record to show, that any of these mandatory processes, was followed before a portion of the suit property was acquired. This being the case. and despite the appellant's protestations to the contrary, we must reach the conclusion, in agreement with the Trial Court, that the issuance of titles over a portion of the suit property, in favour of third parties was unlawful, un-procedural, and an egregious violation of the respondent's right to property. We therefore have no doubt, that the issuance of titles to third parties over a portion

of the suit property, amounted to a violation of Article 40 (3) (a) and (b) of the Constitution.

(ii) On the award of Damages

[29] 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.

[30] Having determined that the respondent's right to property had been violated by the Government, the Trial Court, and later the Appellate Court, made orders for compensation in favour of the respondent. Both Courts granted special and general damages. As we have arrived at a similar conclusion, we see no reason to interfere with the findings of the two superior Courts in this regard. We take note of the appellant's submission to the effect that in arriving at the quantum of special damages, the Trial Court placed reliance upon a Valuation Report by a private valuer. Such Report, in the view of the appellant, was not only unreliable, but could very likely have been tailored to support the respondent's claim. However, in answer to this Court's question as to whether, the appellant had tabled in court, a Government Valuation Report to counter the contents of the impugned one, Counsel for the appellant stated that no such Report was ever tabled at the Trial

Court. The main basis upon which special damages can be granted for the deprivation of property, is the market value of the said property. In case of general damages, a court of law exercises discretion guided by the circumstances of each case. In granting special damages, the Trial Judge was guided by the Valuation Report tabled by the respondent. In the absence of a contrary report on record, we have no basis upon which to interfere with the award. Even if there had been one such other report, our jurisdiction to interfere would still have been largely circumscribed, unless the award had clearly ignored the fundamental principles of valuation as demonstrated by the counter-report.

(iii) On the Extent of Damages

[31] It was the appellant's case, that the Court of Appeal erred in its holding that the award of damages, should extend to the whole of the suit property, and not just to the portion over which the Government had issued titles. In opposition to the appellant's submission, the respondent counters that the Government's unlawful acquisition of parts of its land, had not only deprived it of the same, but had rendered the un-acquired portion un-utilizable. The Appellate Court in agreement with the respondent, held that the Government, ought to be deemed to have compulsorily acquired the whole, and not just part of the land. The Court then proceeded to award damages to the respondent based on the principles of compensation as stipulated in the Land Acquisition Act (*now repealed)*. The holding and consequential orders by the Court of Appeal had the effect of increasing the quantum of damages awarded by the Trial Court, from Kshs. 464,973,248.70 to Kshs. 492,004,800.00.

[32] We have already held that the Government's action of issuing titles over a portion of the respondent's land, amounted to a violation of its right to property. In addition, we have held that such action could not be regarded as "a compulsory acquisition" as it was done contrary to the Constitution and the law. The

acquisition was "compulsory" only because the Government used its coercive powers to deprive the respondent of its property in disregard of the Constitution. However, such governmental action cannot be regarded as "a compulsory acquisition" as known to law. It was simply a brazen and an unlawful deprivation of the respondent's right to property, for which just recompense was awarded by the Trial Court.

[33] Having so held, we find difficulty in vindicating the Appellate Court's conclusion, to the effect that, the Government had compulsorily acquired the land. Following our determination to the contrary, it becomes clear that the principles governing compensation for compulsorily acquired land, could not be applicable to the suit land, as the same had not been so acquired. The most appropriate remedy in our view, was an award of damages, as held by the Trial Court and partially upheld by the Court of Appeal. By the same token, we find further difficulty, in voicing our approval of the Appellate Court's decision to award compensation, not just with regard to a portion of the land, but for the whole of the suit property including the "un-acquired" portion. Nor can we justify, an award of damages that extends to that part of the land that had neither been compulsorily, nor unlawfully acquired. The respondent's contention that the unlawful acquisition of a portion of its land, had resulted in the diminution of the value of the whole of the suit property, is a matter of fact, which ought to have been authoritatively established at the Trial Court. But even if the said fact had been established at the Trial Court, the same would not have constituted "a constructive compulsory acquisition", a legal tenet unknown to our law.

[34] Consequent, upon the forgoing analysis, we make the following Orders:

F. ORDERS

(i) The Appeal dated 21st January, 2020 partially succeeds.

(ii) We set aside the award of special and general damages in the sum of Kshs. 492,004,800.00 by the Court of Appeal.

(iii) The Judgment of the Environment and Lands Court leading to the Award of special and general damages to the tune of Kshs. 464,973,248.70 is hereby affirmed.

(iv) The Award of Compensation relating to the "un-acquired" portion of the suit property by the Court of Appeal, is hereby set aside.

(v) That portion of the suit property, over which no titles were issued by the Government, in favour of third parties, shall remain vested in the respondent, in accordance with the Grant it holds in its favour.

G. COSTS

Each Party shall bear its own Costs.

It is so Ordered.

DATED and **DELIVERED** at **NAIROBI** this **3rd Day** of December **2021.**

…… ……

M. K. KOOME
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

P. M. MWILU
DEPUTY CHIEF JUSTICE & VICE-
PRESIDENT OF THE SUPREME COURT

…… ……

M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

S. C. WANJALA
JUSTICE OF THE SUPREME COURT

……

W. OUKO
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA