

26 April 2002
Reference No. 3/2001

COMESA COURT OF JUSTICE

THE REPUBLIC OF KENYA AND THE COMMISSIONER OF LANDS
v.
COASTASL ACQUACULTURE

JUDGMENT

BEFORE: LORD PRESIDENT: K. R. A. Korsah
LORD JUSTICE: J. B. Kalaile; E. L. Sakala; J. M. Ogoola; J. Mutsinzi

Citation: Kenya v. Coastasl Acquaculture, Reference No. 3/2001, Judgment
(COMESA-CJ, Apr. 26, 2002)

Represented By: APPLICANT: Valeria Onyango; Muthoni Kimani
RESPONDENT: Collins Namachanja

JUDGMENT OF THE COURT

Lord Justice KORSAH delivered the Judgment of the Court.

[1] On the 19th July, 2001, the Respondent filed in the Registry of this Court under Rule 30 of the COMESA Court Rules, an application seeking an injunction. In summary, the Respondent prayed this Court to restrain the First Applicant, its servants, agents or officers from acquiring L.R. Nos. 17600 and 17601/2 Tana River, Kilifi District:

- (a) without first making provision for the advance payment of adequate compensation and payment of damages;
- (b) "without first complying with the provision of Section 75 of the Constitution of Kenya."
- (c) "without first complying fully with the provisions of The Land Acquisition Act [Cap 295] of the Laws of Kenya."
- (d) without first making provision for the prompt payment of compensation for any intended acquisition process, being a deposit of 90% or such other percentage of the Respondent's Expert Valuation as this Honourable Court may deem fit, by payment of such percentage into a joint interest earning account in the names of the Applicant and the Respondent or such other suitable provision as this Honourable Court deems fit.
- (e) without interfering with the Respondent's said properties during the pending of this matter.

- (f) Special Damage of US\$723,669,343.00, with interest thereon, in relation to L.R Nos. 17600 and 17601/2 Tana River, Kilifi District.
- (g) General Damages for breach of contract.
- (h) General Damages for breach of duty of care.
- (i) A declaration that (it) the Respondent has a legal interest in all that land known as Ngomeni Peninsula.
- (j) A declaration that all titles issued and falling within the Respondent's land known as Ngomeni Peninsula including but not limited to the following Titles be declared null and void:

1. L.R No. 20085 Fometsa Enterprises Ltd.
2. L.R No. 20078 Baia Enterprises Ltd.
3. L.R No. 20086 Aretco Ltd.
4. L.R No. 20081 Tokole Investments Ltd.
5. L.R No. 20066 Koit Developers Ltd.
6. L.R No. 20073 Kildo Developers Ltd.
7. L.R No. 20077 Masole Ltd.
8. L.R No. 20076 Saman Developers Ltd.
9. L.R No. 20065 Kilel Developers Ltd.
10. L.R No. 20072 Metel Enterprises Ltd.
11. L.R No. 20088 Gileta Ltd.
12. L.R No. 20075 Kenete Enterprises Ltd.
13. L.R No. 20087 Linsala Enterprises Ltd.
14. L.R No. 20071 Leidero Holdings Ltd.
15. L.R No. 20082 Marimic Enterprises Ltd
16. L.R No. 20074 Somatro Holdings Ltd.

[2] The Respondent claimed in his application the following orders:

(k) An Order directed at the Registrar of Titles, Kenya to rectify the Register of Titles by cancelling, correcting, or substituting the entries relating to the properties set out in paragraph (j) above to give effect to the judgment of this Honourable Court.

(l) An Order directing the Registrar-General of Kenya to cancel all other entries and instruments in the Register pertaining to land falling within the Respondent's land known as Ngomeni Peninsula.

(m) An Order directing the Registrar-General of Kenya to issue entries in the Register as may be necessary to give effect to the Judgment or order of this Honourable Court.

[3] The Respondent prayed for other remedies which, from the view we take of this application, it is not necessary to set down.

[4] On 21st August, 2001 the Applicant herein filed a Preliminary Application under Rules 82 and 83 of the Rules of this Court, raising firstly, the issue of a lack of jurisdiction in this Court to entertain this Reference; and secondly, the locus standi of the Respondent in invoking the jurisdiction of this Court.

FACTS

[5] That the Respondent is a limited liability company incorporated under the Laws of the Republic of Kenya is not in dispute. Nor is it denied that the Respondent is the registered

proprietor of the two pieces of land known as Plot Numbers 17600 and 17601/2 both in Tana River District of Kenya. It is common cause that by Legal Notices 5689 and 5690 both dated 4 November 1993, the Commissioner of Lands of the Republic of Kenya evinced an intention to compulsorily acquire the said plots of land, and to hold an enquiry in respect of compensation to be paid therefor.

[6] The power for the compulsory acquisition of land in Kenya is conferred by Section 75 of the Constitution of Kenya which reads:

"75.(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied:

(a) the taking of possession or acquisition is necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit; and
(b) the necessity therefor is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and
(c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.

(2) Every person having an interest or right in or over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the High Court for-

(a) the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled; and

(b) the purpose of obtaining prompt payment of that compensation:

Provided that if Parliament so provides in relation to a matter referred to in paragraph (a) the right of access shall be by way of appeal (exercisable as of right at the instance of the person having the right or interest in the property) from a tribunal or authority, other than the High Court, having jurisdiction under any law to determine that matter."

[7] And the procedure regulating such acquisition is to be found in Part II of the Land Acquisition Act [Cap 295] up to and including Section 6, which provides as follows:

ACQUISITION OF LAND

6. (1) Where the Minister is satisfied that any land is required for the purpose of a public body, and that:

(a) the acquisition of the land is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of any property in such manner as to promote the public benefit; and

(b) the necessity therefor is such as to afford reasonable justification for the causing of any hardship that may result to any person interested in the land,
and so certifies in writing to the Commissioner, he may in writing direct the Commissioner to acquire the land compulsorily under this Part.

(2) On receiving a direction under subsection (1), the Commissioner shall cause a notice that the Government intends to acquire the land to be published in the Gazette, and shall serve a copy of the notice on every person who appears to him to be interested in the land."

(emphasis added)

[8] As rightly stated by Ringera J. in his judgment in Miscellaneous Civil Application No.55 of 1994 between the same parties herein:

"According to the law, as laid down in the Constitution as read together with the Act, Compulsory acquisition of land is an exceptional measure to be taken only where the Minister is satisfied that the land is required by a Public body (not individuals) for any of the purposes specified in the Constitution and that the necessity of the acquisition justifies the hardship caused to the owner. The Minister should then so certify to the Commissioner of Lands and direct him to compulsorily acquire the land. The other constitutional safeguard is the owner's right of direct access to the High Court not only to challenge the legality of the acquisition but also to question quantum of compensation payable to him and to press for prompt payment thereof." (emphasis added)

[9] In that matter Ringera J. held that Tana River Delta Wetlands for whom the Respondents plots were being compulsorily acquired was neither a public body nor a purpose specified in Section 6(1) of the Act. In the judgment which received the full approval of the Court of Appeal, the learned Judge delivered himself thus:-

"As regards the adequacy and validity of the notice published under Section 6(2) I have come to the judgment that that notice should reflect the Minister's certification to the Commissioner under Section 6(1), and must accordingly include the identity of the public body for whom the land is acquired and the public interest in respect of which it is acquired. It is only when a notice contains such information that a person affected thereby can fairly be expected to seize his right to challenge the legality of the acquisition. That is because the test of the legality of the acquisition is whether the land is required for a public body for a public benefit and such purpose is so necessary that it justifies the hardship to the owner. Those details must be contained in the notice itself for the prima facie validity of the acquisition must be judged on the content of the notice. The test must be satisfied at the outset and not with the aid of subsequent evidence. I do not understand *Re KISIMA* (supra) to hold that information subsequently gleaned from material before the court can cure the defects apparent on the face of the notice. I understand the case to hold that failure to specify the public body for whom the land is acquired and the purpose of the acquisition are the defects which persuaded the court that the applicant therein had established a prima facie case that the Commissioner of Lands lacked jurisdiction to proceed with compulsory acquisition. The learned Judge also made the additional observation that if the affidavit evidence before him was to be accepted the persons for whose benefit the land was intended to be acquired were not a public body. In the result, I find and hold that Gazette Notice number 5689 of 4th November, 1993 is defective and invalid for the reason that it did not identify the public body for whom the land was being acquired and the public purpose to be served by such acquisition. The words "Tana River Delta Wetlands" cannot but be a geographical-cum-ecological description. They are not the name of any public body or descriptive of the public purpose of the acquisition. They are accordingly incompetent to satisfy the requirements of the law. That being the position, it follows that Gazette Notice number 5690 of 4th November, 1993 notifying interested parties of the holding of an inquiry into claims for compensation was also invalid. As the jurisdiction of the Commissioner of Lands to hold the inquiry was conditional on publication of valid notices of the acquisition and of the inquiry, I must, and do conclude, that the Commissioner lacked jurisdiction to commence or continue the inquiry under Section 9(3) of the Land Acquisition Act. I am

accordingly inclined to order that prohibition do issue as prayed." (emphasis added)

[10] He granted the Order of Prohibition and Mandamus against the Commissioner of Lands' operations under the defective notices, and not against the Minister's certificate in writing to the Commissioner, that the land be compulsorily acquired.

[11] The Respondent's plaint is that on 16th June, 2000 the Commissioner of Lands published Gazette Notice Numbers 3624 and 3625 indicating the Government's intention to acquire the Respondent's same land and the Commissioner's intention to hold an inquiry on 22nd August, 2000 for the determination of claims for compensation. These Gazette Notices, Nos. 3624 and 3625, were drawn in identical terms as the previous Gazette Notices of 1993 which Ringera J. declared defective, null and void, and which decision the Court of Appeal upheld in Civil Appeal No.252 of 1996 - Commissioner of Lands v. Coastal Aquaculture Ltd.

[12] The Respondent further deposed that by way of a Letter of Allotment Ref. No. 125124/4 (this should probably read 125154/4) in June 1992, it acquired a legal interest in 2674 hectares of land in Kilifi District, commonly known as Ngomeni Peninsula, and that its legal rights in such land have been infringed and frustrated by the Second Applicant issuing title deeds to various companies and individuals within the Respondent's said allotment. In consequence whereof the Respondent has suffered special damages as particularized in Annexures 5, 6, 7 and 10 to this Reference.

[13] It cannot be gainsaid that this Court owes its origin to the Treaty establishing the Common Market for Eastern and Southern Africa, see Article 7 of the COMESA Treaty. Paragraph 4 of Article 7 of the Treaty recites that:

"The organs of the Common Market shall perform their functions and act within the limits of the powers conferred upon them by or under this Treaty."

[14] As an organ of the Treaty this Court has no power outside what is bestowed upon it by the Treaty. Article 19 of the Treaty enjoins this Court to "ensure the adherence to law in the interpretation and application of this Treaty." Since parties to the Treaty cannot agree to bind strangers to the provisions of the Treaty, the only bodies to whom the Treaty applies are the Member States, organs and institutions of COMESA, their employees and such third parties as the Treaty accords the right to bring legal action against the Common Market or its institutions.

[15] Article 23 which provides for the general jurisdiction of the Court, stipulates that the Court shall have jurisdiction to adjudicate upon all matters which may be referred to it pursuant to this Treaty. This provision relates to those persons upon whom the Treaty confers a legal right to refer matters upon which the Court has jurisdiction for adjudication by the Court. Thus, unless a party is imbued with a legal right to refer matters to this Court for adjudication in terms of the Treaty, he has no locus standi to file a Reference in this Court.

[16] References by legal and natural persons are permitted under the Treaty by Article 26, which stipulates that:

"Any person who is resident in a Member State may refer for determination by the Court the

legality of any act, regulation, directive, or decision of the Council or Member State on the grounds that such act, directive, decision or regulation is unlawful or an infringement of the provisions of this Treaty:

Provided that where the matter for determination relates to any act, regulation, directive or decision by a Member State, such person shall not refer the matter for determination under this Article unless he has first exhausted local remedies in the national courts or tribunals of the Member State." (emphasis added)

[17] Thus, the Respondent being a legal person resident in a Member State may have the requisite locus standi to refer proceedings to this Court for determination only if it has exhausted all local remedies in the national courts or tribunals of Kenya.

[18] It is not controverted that the Respondent filed a Civil Suit No.2421 of 1996 in the High Court of Kenya at Nairobi entitled Coastal Acquaculture Ltd. V Commissioner of Lands and Attorney-General, seeking damages purportedly suffered as a result of the prohibited attempts by the Applicant to compulsorily acquire the said parcels of land. The Respondent however did not prosecute that action to finality in the High Court of Kenya. The Respondent withdrew that action just before commencing these proceedings in this Court.

[19] In justification of proceeding thus, the Respondent contends that it finds itself in an unbearable situation for which the national courts are powerless to provide relief. The Respondent argues that it has invested in excess of US\$24,000,000.00 for pre-operational expenses alone, and that it has, since 1993, been unable to continue with its intended projects:- firstly, because the Applicant has frustrated the Respondent's efforts as a result of three separate compulsory acquisition attempts, none of which has been settled in a satisfactory manner in consequence of which no compensation has been paid. Despite the ever present threat and clear expression that the Respondent's property will be compulsorily acquired, the Applicants, as incredible as it may sound, have, over a period of 8 years or more, been unable to follow the simple legal procedures laid down in the Land Acquisition Act (supra) to their logical conclusion, despite repeated guidance from the High Court and the Court of Appeal of Kenya. Secondly, and as a direct result of the first, no investor, private, local or international, will invest further in the Respondent's project or any project when there is clearly in place an unfair and inequitable treatment of private investors.

[20] Much as this Court may sympathize with the Respondent regarding the frustration of his projects on the said parcels of land by the Applicants, and the resultant shyness of investor funding for the projects, the Respondent may refer a matter to this Court, and this Court can exercise jurisdiction over such reference, only if the Respondent has exhausted all its remedies in the municipal courts of the particular Member State.

[21] As pointed out earlier, all the Respondent would have been entitled to if the procedures under the Act were followed would have been compensation. The withdrawal by the Respondent of its action for damages in Civil Suit No. 2421 of 1996 (supra) does not constitute an exhaustion of the Respondent's legal remedies in the municipal courts of the Republic of Kenya such as to grant the Respondent a locus standi to commence this Reference.

[22] Finally, we are wholly in agreement with the view expressed by Ringera J. and upheld by the Court of Appeal of Kenya that once the responsible Minister certifies that the land is required for the purpose of the Land Acquisition Act:

"The acquisition can only be withdrawn as a matter of Ministerial discretion where the Minister is satisfied for any reason that it is no longer necessary or expedient to proceed with the acquisition. A Court of Law cannot direct the Minister to withdraw the acquisition save perhaps in proceedings where the legality of the acquisition is successfully challenged."

[23] In the circumstances, the matter of the compulsory acquisition of Respondent's parcels of land is still pending in the Republic of Kenya and the Respondent is precluded by the proviso to Article 26 from commencing a reference in this Court.

[24] The application to strike out the Respondent's Reference for want of locus standi is allowed. Accordingly, the Respondent's Reference to this Court is dismissed.

[25] In the circumstances of this case, we make no order as to costs. It is so ordered.

[26] Dated this 26th day of April, 2002

K. R. A. Korsah
Lord President

J. B. Kalaile
Lord Justice

E. L. Sakala
Lord Justice

J. M. Ogoola
Lord Justice

J. Mutsinzi
Lord Justice