



Simba Corporation Limited v Kenya Urban Roads Authority & 4 others (Environment & Land Petition 602 of 2016) [2023] KEELC 16496 (KLR) (21 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16496 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND PETITION 602 OF 2016

MD MWANGI, J

MARCH 21, 2023

IN THE MATTER OF: ARTICLES 2, 3, 10(1) & (2) OF THE CONSTITUTION OF KENYA

**IN THE MATTER OF: ARTICLES 19, 20, 21, 22,
23 & 40 OF THE CONSTITUTION OF KENYA**

IN THE MATTER OF: THE (REPEALED) LAND ACQUISITION ACT

-AND-

**IN THE MATTER OF: COMPULSORY ACQUISITION OF L.R. NO.
209/10876 WITHOUT PROMPT PAYMENT OF JUST COMPENSATION.**

BETWEEN

SIMBA CORPORATION LIMITED PETITIONER

AND

KENYA URBAN ROADS AUTHORITY 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

MINISTRY OF TRANSPORT & INFRASTRUCTURE 3RD RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY 4TH RESPONDENT

THE ATTORNEY GENERAL 5TH RESPONDENT



JUDGMENT

Background

1. The Petitioner in this matter, Simba Corporation Ltd, by way of a petition dated June 7, 2016 amended on January 25, 2018 prays for:
 - a) A declaration to issue that the Respondents' Compulsory acquisition of the Petitioner's property known as LR No 209/10876 was undertaken contrary to the provisions of the Constitution and the law.
 - b) Kshs 213,510,620/- as prayed for in paragraph 2D of the petition.
 - c) In the alternative to the above, Kshs 341,455,326.00 as prayed in paragraph 24E of the petition.
 - d) Interest on the prayers above as may be awarded by the court at court rates from June 30, 2015 to the date of payment in full.
 - e) General damages for flagrant breaches of the constitution and the Law in the process of compulsory acquisition.
 - f) Such orders, writs and directions as the court may consider appropriate for the purpose of enforcing or securing the enforcement of Article 40 of the Constitution.
 - g) The costs of the petition.
2. The response to the petition was by way of two replying affidavits. The 1st replying affidavit was sworn by Abdulkadir Ibrahim Jatani on June 20, 2016 and the 2nd by Brian Ikol on June 27, 2016.
3. Subsequently, the Petitioner filed two supplementary affidavits; one by Derek Upstone sworn on June 28, 2016 and the 2nd one by Rita Mwangi sworn on June 30, 2016.

The Petitioner's case

4. The Petitioner's case is that it was the registered owner of the property known as LR No 209/10876 (hereinafter referred to as 'the suit property') which housed the Petitioner's 'pre-delivery' inspection centre which is a vital element of its sales and distribution channel and therefore integral to its business.
5. By Gazette Notices No 5608 and 5609 of May 10, 2011 under the Land Acquisition Act (now repealed), the Commissioner of Lands listed the suit property for purposes of the construction of the Eastern Bypass- Mombasa Road - North Airport Road Project.
6. Consequently, the Petitioner was awarded a sum of Kshs 636,489,380/- as compensation of the suit property vide the Award dated September 2, 2011. The award was based on the market value of the suit property and the improvement thereon.
7. The Petitioner averred that the Respondents for no justifiable reason failed to pay the award promptly. The Respondents further, and despite enquiries and reminders by the Petitioner, did not communicate to the Petitioner when the said compensation would actually be paid or when acquisition of the suit property would happen.



8. The Petitioner therefore pleaded that it, as a consequence of the Respondents' violation of its constitutional rights, suffered losses in terms of halting improvements and operations on the suit property where their pre-delivery inspection centre for vehicles was located.
9. The Petitioner confirmed that the compensation of Kshs 636,489,380/- was eventually paid on June 9, 2015, nearly 4 years after the award. The Petitioner's position was that the inordinate delay in the payment of the award prejudiced it and had a negative effect on its business and caused it losses.
10. The Petitioner further contented that the award was based on the value assigned the suit property in 2011 while the value of the suit property had actually appreciated by the year 2015 to Kshs 885,000,000/-. The Petitioner had unilaterally commissioned a private valuer who assigned the value of Kshs 885,000,000/-.
11. The Petitioner therefore seeks payment of the difference in value between the '2011 value' and the '2015 value'; in the alternative, interest on the award together with general damages, interest and costs of the petition. That in a nutshell is the Petitioner's case.

The Respondents' case

12. Through the affidavit of Abdulkadir Ibrahim Jatani, the Respondents stated that all the critical milestones and processes appurtenant to the compulsory acquisition of the suit property were fully complied with. The only issue was the delay in the payment of the compensation which was caused by cash flow challenges at the National Treasury.
13. The deponent further states that whilst awaiting settlement of the award, they kept close contact with the Petitioner's Principal personnel and kept them informed of the prevailing cash flow challenges at the National Treasury. The facts and reasons for the delay were timeously shared with the Petitioner.
14. During the waiting period, the deponent explained that the Petitioner maintained possession of the suit property without any interference from the Respondents until the payments were made. The Petitioner accepted and received the full payment.
15. The deponent termed the Petitioner's claim as lacking in merit. The Respondents' case was that the Petitioner's claim had no basis and can only serve to 'obfuscate, aggrandize and unjustly enrich the Petitioner contrary to public interest, policy and law.
16. The affidavit of Brian Ikol augmented that of Abdulkadir Ibrahim Jatani. It termed the Petitioner's case as an afterthought. On the issue whether interest is payable, the deponent averred that it is only payable after the taking of physical possession of the land compulsorily acquired.

Evidence from the oral hearing

17. The Petitioner presented its witness in court, one Andrew Nandi, the Petitioner's Legal and Compliance Manager for cross-examination. He adopted the affidavit sworn by his predecessor, Rita Mwangi on June 7, 2016 and the supplementary one sworn on September 29, 2016, as well as that of Derek Upstone sworn on June 28, 2016.
18. In cross-examination by Mr. Motari, State Counsel, the witness, PW1, confirmed that the Petitioner was duly paid the compensation awarded and accepted it without any objections.
19. Questioned about the Logistics Centre that was supposedly on the suit property, the witness confirmed that he had not brought any audited accounts to confirm if the Centre was making profits or not. The Petitioner, according to the witness only started relocating from Centre on or about September



- 2016 after it got suitable premises to relocate to. Upto that time, the Petitioner was still using the suit property to run its business.
20. PW1 confirmed that the Petitioner had on June 7, 2016 filed an application before this court. The court made an order that the Petitioner deposits the entire amount of money paid to it in court but it did not comply. The application was compromised and the Petitioner agreed to move out of the suit property. A consent was recorded to that effect.
 21. PW1 testified that the Petitioner was challenging the constitutionality of the award despite receiving the money.
 22. The witness confirmed that he was familiar with the provisions of section 25 of the repealed Land Acquisition Act. He stated that in this case the said provision would not apply since the Petitioner was compensated before government took possession of the suit property.
 23. The Petitioner had not provided audited accounts to prove the alleged loss it had suffered as a business. The witness did not provide any figure for the alleged loss.
 24. In regard to the value of the suit property as at 2015, the Petitioner was relying on the valuation conducted after they had already received the money.
 25. Under the Constitution, payment of compensation is supposed to be prompt though no specific timelines have been set either in the Constitution or the applicable Law then.
 26. In re-examination, PW1 confirmed that due process was followed after gazettelement. The only issue that the Petitioner had was the delay in the payment of the compensation.
 27. The Petitioner conducted the valuation after payment of the award because the value of the property had changed.
 28. By the consent of the parties, the affidavits of Brian Ikol and Abdikadir Ibrahim Jatani were adopted as the evidence for the Respondents.

Court's Directions

29. At the close of the hearing, the court directed parties to file written submissions. The Petitioner, the 1st, 3rd, 4th and 5th Respondents filed their submissions. The 2nd Respondent did not file submissions.

Submissions by the Petitioner

30. In its submissions, the Petitioner identified 3 issues for determination namely;
 - a) Whether the compulsory acquisition of the suit property was undertaken contrary to the provisions of the Constitution and the Law.
 - b) Whether the Respondents should pay the Petitioner the difference in the value of the suit property from 2011 to 2015 or in the alternative the interest from the date of the award to the date of payment of the same.
 - c) Whether the Respondents should pay general damages to the Petitioner for breach of the relevant provisions of the Constitution and the Law.
31. On the 1st issue, the Petitioner made reference to Article 40 (3) (b) of the Constitution and the Land Acquisition Act, cap 295 (now repealed). The Petitioner submitted that its right to compensation had



accrued prior to the repeal of the Land Acquisition Act, Cap 295, (hereinafter referred to as ‘the Act’) therefore it is the applicable law in this instance.

32. Further, the Petitioner submitted that under section 29 of the Act, it had the right to access this court by way of an appeal of the decision of the Land Acquisition Compensation Tribunal. However, the Petitioner argues that after the promulgation of the constitution, 2010, and the repeal of the Land Acquisition Act, by the Land Act, 2012, the Tribunal was disbanded and the Petitioner lacked an administrative forum to voice its concerns regarding the delayed payment of the award. The Petitioner therefore submits that it rightfully approached this court by way of a constitutional petition for violation of its rights.
33. The Petitioner cited what it termed as ‘inconsistencies and uncertainties’ in the process of gazettment. At the first instance, the intention to compulsorily acquire was first gazetted vide gazette Notices No 16756 and 16757 which were later withdrawn vide gazette notice No 3560. The notices according to the Petitioner had omitted a majority of the property owners’ names including the Petitioner’s name. Even the description of the intended project was wrong. The notices had referred to it as JKIA – Museum Gigiri Road Project instead of Eastern Bypass Mombasa Road – North Airport road.
34. The Petitioner further contended that, contrary to section 4 of the Act, the Commissioner also failed to competently survey the suit property and conduct exercises necessary to ascertain whether the suit property was suitable for the purpose of acquisition. The Petitioner averred that before issuance of the award, it had unsuccessfully engaged in talks with the commissioner to reroute the project and or adapt the plans in a manner that would cause minimal adverse impact to the Petitioner’s business. As a result, the Petitioner’s business experienced grave and adverse implications that hampered its profitability.
35. After the issuance of the award, the Petitioner submits that it was inconvenienced by the Respondents’ time frames on acquisition and lack of proper communication. The suit property housed the Petitioner’s Pre-delivery Inspection Centre, which was vital in their sale and distribution of vehicles.
36. The Petitioner asserts that the Respondents violated the provisions of section 8 of the Act read together with Article 40 (3) (b) (i) of the constitution which provides for full compensation to be paid promptly where land is acquired compulsorily.
37. The Petitioner made reference to the decision in the case of Patrick Musimba v National Land Commission & 4 others [2016] eKLR, where the court emphatically stated that,

“.....no person shall be deprived of his property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation.”
38. The Petitioner further submits that the commissioner, as per section 9 of the Act, made an enquiry into the value of the subject property and improvements thereon based on the factors arising in 2011 and not 2015 when the award was paid. This, the Petitioner argues was irregular and not in accordance with the principles set out in the schedule of the Act.
39. It’s the Petitioner’s case that the compensation should have been based on the market value of suit property in 2016 when the Respondent took up possession of the suit property and not 2011 when the award was issued.
40. The Petitioner further submits that contrary to section 19 of the Act, the Respondents failed to take up possession of the suit property within 60 days of the award putting the Petitioner in constant uncertainty as regards the continuity of their operations on the suit property or an alternative property to be purchased from the proceeds of the award thus causing the petitioner losses and damages.



41. The Respondents allegedly issued the Petitioner a short notice to take up possession of the suit property, after payment of the award considering the major operations of the Petitioner's business conducted on the suit property.
42. The Petitioner reiterates that the suit property's value appreciated during the 'waiting period' therefore rendering the award offered in 2011 less than the value of the suit property at the time of the Respondents' taking possession. The Petitioner therefore contends that the Respondents should have reviewed the award issued in 2011 in view of the fact of taking possession later in 2015.
43. The Petitioner asserts that the Petitioner's excuse of lack of funds as the reason for the delay was never communicated to them. In any event, the Petitioner avers that the Respondents should issue awards of compensation upon confirmation of availability of funds.
44. On the 2nd issue, the Petitioner submitted that the market value of the suit property as at June 30, 2015 was Kshs 885 million in accordance with the valuation report submitted. The Petitioner seeks payment of the difference in value of the suit property from 2011 to 2015 or in the alternative interest on the award from the date of issuance till payment.
45. Finally, on the 3rd issue, the Petitioner submitted that it is entitled to compensation by way of general damages for violation of its constitutional right to payment of just and prompt compensation upon compulsory acquisition of its land.

Submissions on behalf of the 1st, 3rd, 4th& 5th Respondents

46. On their part, the 1st, 3rd, 4th and 5th Respondents identified 4 issues for determination namely;
 - i. Whether the Petition is frivolous, vexatious and an abuse of the court process and in violation of section 76 (1) of the Kenya Roads Authority Act.
 - ii. Whether the process of compulsory acquisition was unconstitutional.
 - iii. Whether the petitioner is entitled to interest that allegedly accrued on the award as from 2011 to 2015.
 - iv. Costs of the petition.
47. The Respondents submitted that the process of acquisition of the subject land was constitutional and fully complied with the provisions of the *Land Acquisition Act* (repealed). They denied violating the provisions of the *Constitution* and the Law.
48. The Respondents insist that the land was acquired for a public purpose and was compulsorily acquired in accordance with the provisions of the *Constitution* and the *Land Acquisition Act* (repealed). All the necessary procedures were adhered to, to the letter.
49. The Respondents denied that the Petitioner was deprived of its rights over the suit property. They averred that the Petitioner enjoyed uninterrupted and 'rent free' stay on the land yet it had relinquished its rights upon accepting the award. The Petitioner enjoyed the stay from 2011 all the way to the year 2015. Even after making the payments to the Petitioner, the Respondents still issued the Petitioner a Notice of intention to take possession.



50. The Respondents make reference to section 25 of the *Land Acquisition Act* which provided that; -
- “where possession is taken of the land under this part, full compensation shall be paid, promptly to all persons interested in the land.”
51. It was the Respondents’ submissions that there were no specific timelines provided under the law within which compensation was to be done upon taking possession of the land. The Respondents stated that the National Treasury was the provider of the funds and the delay therefore was beyond the control of the Respondents. As soon as the money was availed, they made prompt and full payment to the Petitioner. That was only the time that they make the steps to take physical possession of the suit property.
52. On the claim for interest, the Respondents made reference to section 16 of the *Act* which provided that: -
- “where the amount of any compensation awarded is not paid or paid into court on or before the taking of possession of the land, the commissioner shall pay interest on the amount awarded at such rate as may be prescribed which shall not be less than 6% p.a from the time of taking possession until the time of payment or payment into court.”
53. The Respondents submitted that interest would only accrue after the taking up of physical possession of the property compulsorily acquired. In this case, the Respondents pointed out that the process of actualization of possession of the suit property had not taken place before the payment was made. The Respondents emphasize that the Petitioner enjoyed uninterrupted, ‘rent free’ stay and continued running its business on the suit property.
54. It is the Respondents’ submissions that the petitioner did not provide any statement of account of the loss allegedly incurred arising from the acquisition and within the acquisition period.
55. The Respondents cited the case of *Fort Properties Ltd v Attorney General & 2 others* [2021] eKLR, where the court expressed the opinion that the claimant was entitled to ‘interest on the compensation award for the suit property..... with effect from the date when the 2nd Respondent.....entered upon the suit property’. The emphasis is on the phrase,
- ‘with effect from the date when the Respondent entered upon the suit property.’
56. The 2nd Respondent, National Land Commission did not file submissions.

Issues For Determination

57. Both sides have identified their set of issues, but there is convergence on two issues; the 1st one being whether the process of acquisition was unconstitutional and the second one is whether the Petitioner is entitled to interest from the date of pronouncement of the award and actual payment of the same. Having considered pleadings, the evidence adduced orally and by affidavits as well as the respective submissions filed by the parties, the issues for determination in this court’s opinion are: -
- a) Whether the compulsory acquisition of the suit property was undertaken contrary to the provisions of the *Constitution* and the law.
 - b) Whether the Petitioner is entitled to interest from the date of the pronouncement of the award to the date of actual payment or alternatively the difference in value of the suit property from the 2011 assessment and the 2015 assessment.



- c) Whether the Petitioner is entitled to general damages for the alleged breach of the Constitution and the Law by the Respondents.
- d) What orders should be made in respect of the costs of the petition?

Analysis and Determination.

A. Whether the Compulsory Acquisition of the suit property was contrary to the provisions of the Constitution and the Law.

- 58. Both parties are in concurrence that the applicable law as at the time of the award the subject matter of this suit was the Land Acquisition Act, Cap 295 Laws of Kenya (now repealed). It is also not disputed that, the award of Kshs 636,489,380/- was dated September 2, 2011.
- 59. The Act established a Tribunal under the provisions of Section 29 thereof, known as the Land Acquisition Compensation Tribunal. Any person dissatisfied with the award of the Commissioner for Lands was supposed to appeal to this Tribunal as the first port of call in respect of the determination of his interest or right in or over land, the amount of compensation awarded to him under section 10 (of the Act), or the amount of compensation paid or offered to him under section 5,9,23,25 or 26 of the Act.
- 60. Appeal from the decision of the Tribunal was to the High Court on either of the 3 grounds under subsection (10) namely;
 - a) The decision of the tribunal was contrary to law or to some usage having the force of law.
 - b) The decision failed to determine some material issue of law or usage having the force of law; or
 - c) Substantial error or defect in the procedure provided by or under this Act has produced error or defect in the decision of the case upon the merits.
- 61. A second appeal lay to the Court of Appeal but on a question of law only.
- 62. The Act was repealed by the Land Act, No 6 of 2012 whose date of commencement was 2nd May 2012. I am clear in my mind that what is before me is not such an appeal contemplated under Section 29 (10) of the Act. I make this clarification because the Petitioner has in its submissions alluded to the disbandment of the Tribunal by repeal of the Act as one of its reasons for approaching this court by way of a constitutional petition. The Act however, was repealed eight (8) months after the issuance of the award in favour of the Petitioner. If the Petitioner had been dissatisfied with the determination of its interest or right in or over the suit property, or the amount of compensation awarded, it had the time and opportunity to file an appeal before the Tribunal. It didn't do so.
- 63. The Petitioner further in its submissions referred to what is termed as inconsistencies and irregularities before issuance of the award. I must be clear and categorical that those are issues that the Petitioner would have raised before the Tribunal which was well in place at the time of issuance of the award by the Commissioner.
- 64. The attempt by the Petitioner to introduce issues which ought to have been dealt by the Tribunal as per the law and moreso at the stage of submissions is just but an afterthought and an abuse of the process of court. It is not only an attempt on the part of the Petitioner to introduce new issues unprocedurally but also a belated attempt to change cause and to travel beyond its pleadings.



65. The complaint disclosed in the Petitioner’s amended petition and which the court must address is that of delay in the payment of the award.
66. 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, 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 5; 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
- i(i) Allows any person who has an interest in, or right over, that property a right to access a court of law.
67. The governing law as at the time of the award was the now repealed Land Acquisition Act. The Act prescribed the processes and procedures to be followed in compulsory acquisition of land.
68. The court in making its determination must be guided by the provisions of the Act.
69. The Respondents have resolutely submitted that they complied with all the laid down procedures under that Act. The Respondents aver that they;Gave notice of intent to acquire the land.Published the notice in the gazette.Made full inquiry into the value of the land and determined that value in accordance with the principles set out.Prepared a written awardServed a notice of the award and offer of compensation which the Petitioner accepted without objection.Paid full compensation before taking up possession.Served a notice of intent to take up possession awaiting to take possession of the land and the title to the land to be vested in the government.
70. In its amended petition, the Petitioner pleads that the Respondents decision to belatedly take possession of the property after the belated payment was designed to deprive the Petitioner of the statutory remedy of interest under the Repealed Land Acquisition Act.
71. The Petitioner as already explained earlier brought before the court a witness, one Andrew Nandi, its manager Legal and Compliance on request by the Attorney General for cross-examination. In cross-examination, the witness confirmed that the Petitioner accepted the award and signed acknowledgment on September 2, 2011. The Petitioner did not have any objections to the award. The award was paid on June 10, 2015 – a sum of Kshs 636,489,380/=.
72. The Petitioner had filed an earlier application in this court to bar the Respondents from taking over the suit property. The court gave the condition that the Petitioner deposits the entire sum of money paid to it in court. The Petitioner however, did not comply with that condition. The Petitioner opted to retain the money paid to it by the Respondents.
73. The witness further confirmed that the Petitioner remained in possession of the suit property until they were paid the award. He affirmed that they received the award before ceding possession of the suit property to the respondents. All through, they had exclusive possession of the suit property and continued running their business within the suit property without any interference whatsoever from



the Respondents. He indeed conceded that the provision of the repealed Land Acquisition Act, would not apply in this case.

74. My finding is that from the evidence presented before this court, the Petitioner has not proved that the compulsory acquisition of the suit property herein was done contrary to the provisions of Article 40 (3) of the Constitution. The acquisition herein as clearly explained by the Respondents was in accordance with the provisions of the Constitution and was for a public purpose or in public interest. It was carried out in terms of the provisions of the repealed Land Acquisition Act, the Act of Parliament then in force.
75. In as much as there was delay in the payment of the award, the court appreciates that the Petitioner remained in possession of the suit property until after the payment of the award. The Land Acquisition Act at section 25 thereof contemplated prompt and full payment after possession of the Land.
76. The holding in the case of Patrick Musimba v NLC & 4 others 2016] eKLR is of relevance in this case. In the said case, the Learned Judges held that: -

“In our view, a closer reading of Article 40(3) of the constitution would reveal that the constitution did not only intend to have the land owner who is divested of his property compensated or restituted for the loss of his property but sought to ensure that the public treasury from which compensation money is drawn is protected against improvidence. Just as the owner must be compensated so too must the public coffers not be looted. It is that line of thought that, under Article 40(3), forms the basis for “prompt payment in full, of just compensation to the person” deprived of his property through compulsory acquisition.”

77. The Petitioner received his just compensation for the acquisition of the suit property.

B. Whether the Petitioner is entitled to interest.

78. Under section 16 of the repealed Land Acquisition Act, interest was payable where: -

“the amount of any compensation awarded is not paid or paid into court on or before the taking of possession of the land.”

79. Interest then would become payable on the amount awarded ‘at such rate as may be prescribed which shall not be less than 6% P.A from the time of taking possession until time of payment or payment into court.’
80. I reiterate that, in this case, it is clear from the evidence presented before the court, that the Respondents only took possession of the suit property after the full amount of the award was paid to the Petitioner. Therefore, the Petitioner would not be entitled to interest.
81. The Petitioner has made alternative prayer of payment of the difference in value of the suit property from 2011 to 2015. As I stated earlier, what is before me is not an appeal. The award of September 2, 2011 has not been overturned. I find no basis for this prayer by the Petitioner.
82. As the Petitioner witness admitted in court, the petitioner did not reject the award. The Petitioner has already received the money awarded and raised no objections. How then does the Petitioner turn back and claim that the award was not fair? The Petitioner cannot have its cake and eat it as well. The Claim by the Petitioner has no basis whatsoever.



C. Whether the Petitioner is entitled to general damages.

83. Having found that there was no breach of the provisions of the Constitution and the Law, the prayer for general damages fails.

D. What orders should be made to costs.

84. The law as regards costs is that costs shall follow the cause. I find no reason to deviate from this general rule. Accordingly, the petitioner's petition having failed, the costs are awarded to the respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MARCH 2023

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Kemunto holding brief for Kago for the Petitioner.

No appearance for the Respondents.

Court Assistant – Yvette.

M.D. MWANGI

JUDGE

