



Kabungo (Suing as the Registered Proprietor and Trustee of 35 beneficiaries of L.R No. Aguthi/Gatitu/3447) v National Land Commission & another (Environment & Land Case 15 of 2020) [2023] KEELC 17039 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEELC 17039 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 15 OF 2020**

**JO OLOLA, J
APRIL 27, 2023**

BETWEEN

EPHRAIM GATHUMA KABUNGO (SUING AS THE REGISTERED PROPRIETOR AND TRUSTEE OF 35 BENEFICIARIES OF L.R NO. AGUTHI/GATITU/3447) PLAINTIFF

AND

THE NATIONAL LAND COMMISSION 1ST DEFENDANT

THE MINISTRY OF AGRICULTURE 2ND DEFENDANT

RULING

1. By the Notice of Motion dated and filed herein on July 6, 2022 the Ministry of Agriculture (the 2nd Defendant) prays for an order that the Court be pleased to set aside/review its ruling dated May 19, 2022.
2. The application which is supported by an affidavit sworn by the 2nd defendant's Counsel on record Paul Gisemba is premised on the grounds:
 - (i) That this court issued a Ruling on May 19, 2022 directing the 2nd defendant to deposit in court the Land title to Aguthi/Gatitu/3447 within 45 days from the date of the Ruling;
 - (ii) That the grounds for the above order is the alleged lack of compensation for compulsory acquisition of the said parcel of land;
 - (iii) That the plaintiff misled the court into issuing the said order;
 - (iv) That the said parcel of land was lawfully acquired by the Government and compensation was made;



- (v) That the Commissioner of Lands sought through HCCC No. 9 of 2009 the persons to be compensated to which Judgment was issued but that did not settle the matter to-date;
 - (vi) That due to family wrangles within the family on how the money was to be shared, the compensation amount was deposited in court and remains there to-date;
 - (vii) That the beneficiaries have further sought more compensation and alleged that what was given by the 1st defendant was inadequate;
 - (viii) That there are multiple pending suits on the above and the plaintiff chose not to disclose that to the court;
 - (ix) That should the said information have been brought to the attention of the court, the said order would not have been issued;
 - (x) That the 2nd defendant did not enter appearance on time since the Counsel handling the file was on transfer and it only learnt of its existence when the Ruling was brought to their attention; and
 - (xi) That unless the orders are granted, the 2nd defendant stands to suffer injustice.
3. The plaintiff is opposed to the application. In a replying affidavit sworn by the plaintiff's Advocate on record Wanyiri Kihoro, the Plaintiff asserts that they instituted the suit on March 9, 2020 and that the suit was served upon the 2nd defendant on July 6, 2020. Since then the plaintiff has neither been served with a Memorandum of Appearance nor a statement of defence by the defendants.
 4. The Plaintiff further avers that the defendant's application makes serious yet unfounded allegations about money which verge on the commission of a crime and which does not address the substantive matters of compulsory acquisition contained in the Plaintiff.
 5. I have carefully perused and considered the 2nd defendant's application as well as the response thereto by the plaintiff. I have similarly perused and considered the written submissions and authorities placed before me by the Learned Counsels representing the Parties herein.
 6. By the application before the court, the 2nd defendant urges the court to be pleased to review and set aside the orders issued herein on May 19, 2022. Those orders arose from the plaintiff's application dated March 9, 2020. As at the time the application came up for hearing, neither the 1st nor the 2nd defendant had entered appearance herein or responded to the same.
 7. Having considered the issues raised in the plaintiff's application, this court was persuaded that the plaintiff's land parcel number Aguthi/Gatitu/3447 had been acquired compulsorily by the Government and that in violation of the plaintiff's rights, no compensation had to-date been made to the plaintiffs. On that basis, the court ordered the defendants to produce and surrender the said title to this court for safe custody in accordance with the plaintiff's wishes.
 8. By this present application, the 2nd defendant now contends that this court was misled into issuing the said orders as the suit property was lawfully acquired by the Government which paid compensation accordingly for the land.



9. As it were Order 45 of the *Civil Procedure Rules* upon which the application is premised lays down the jurisdiction and scope of review limiting it to the following grounds:
- (a) Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made; or
 - (b) On account of some mistake or error apparent on the face of the record; or
 - (c) For any other sufficient reason.
10. In the matter before me, Counsel for the 2nd defendant avers in the supporting affidavit that the plaintiff misled the court into issuing the order as the parcel of land was properly acquired by the Government and that compensation was made to the beneficiaries. It is the 2nd defendant's position that they were unable to present that position to the court earlier as the Counsel who was handling the file was on transfer.
11. In my considered view, the application as presented was rather unserious. While Counsel for the applicant avers that the land was property acquired and that compensation was made to the beneficiaries before being deposited in court, there was absolutely no evidence annexed in support of that contention. In their submissions before the court, Counsel invited this court to call for Nyeri High Court Civil Case No 9 of 2009; *Commissioner of Lands v The Heirs of the Late Wambugu Mathangani* and to interrogate the issues therein.
12. I was unprepared to go that direction and was indeed on the verge of dismissing the application as it certainly did not meet the threshold for review. As it turned out however, another file Nyeri ELCA No 1 of 2017; *Ephraim Kariuki Wambugu v The Commissioner of Lands* was equally pending on my desk for preparation of Judgment.
13. From a perusal of the said ELCA No 1 of 2017, it was apparent that the plaintiff/respondent herein was the appellant in the said matter. It was further clear from a perusal thereof that in the said Appeal, the plaintiff/respondent was contesting the sum of Kshs.145,550,000/- awarded to the beneficiaries of the Estate of Wambugu Mathangani by the Commissioner of Lands on December 16, 2007. That compensation was in relation to the parcel of land – Aguthi/Gatitu/3447 which is the same suit property herein.
14. Arising from the foregoing, I was persuaded that the plaintiff had indeed misled the court that the said parcel of land had been wrongfully acquired and that no compensation had been made therefore.
15. In the premises I am persuaded that there was no basis for the orders issued by the court on May 19, 2022. The same are hereby set aside forthwith.
16. Each Party shall bear their own costs.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THIS 27TH APRIL, 2023.**

In the presence of:

No appearance for the Applicant

Mr. Wanyiri Kihoro for the Respondent

Court assistant - Kendi



J. O. OLOLA
JUDGE

