



**Wambugu v National Land Commission (Environment and Land Appeal
1 of 2017) [2023] KEELC 16981 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16981 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL 1 OF 2017
JO OLOLA, J
APRIL 27, 2023
FORMERLY NAIROBI ELCA NO. 99 OF 2015**

BETWEEN

EPHRAIM KARIUKI WAMBUGU APPELLANT

AND

NATIONAL LAND COMMISSION RESPONDENT

JUDGMENT

Background

1. This is an appeal against the decision of the then commissioner of lands, the predecessor to the respondent herein, to award the owners and beneficiaries of the parcel of land known as Aguthi/Gatitu/3347 the sum of Kshs 145.6 million as compensation for the compulsory acquisition of the said property under the [Land Acquisition Act](#) (now repealed).
2. The appellant brings the appeal in his capacity as the chairman of the trustees of the Wambugu Mathangani family and a beneficiary of the said property in his own right. The suit property, commonly known as Wambugu Farm measures approximately 54.55 Ha. and is said to be bound on the East and North sides by the Nyeri/Nairobi highway, the old Nyeri/Nairobi Road in the South and the Thuta River to the West.
3. The appellant has appealed against the decision of the respondent's predecessor, the commissioner of lands on compensation payable for the said parcel of land which was compulsorily acquired for use as a Farmers' Training Centre by the Ministry of Agriculture. The appellant is aggrieved with the award of the commissioner of lands dated December 16, 2007 wherein the owners and beneficiaries of the land were awarded the sum of Kshs 145,595,750/= as total compensation for the land and the improvements thereon.



4. The respondent is currently the constitutional agency charged with compulsory acquisition and compensation of private land. Its predecessor in title had on February 23, 2007 issued gazette notice No 1466 dated January 12, 2007 giving notice that the government intended to acquire the suit property for the construction of what was termed as Wambugu Farmers Training Centre.
5. The appellant is seeking orders that the award of Kshs 145,595,750/- be set aside, and that it be substituted with either the sum of Kshs 427,550,000/- or Kshs 439,780,000/- as contained in the two valuation reports prepared by two valuers that were hired by the appellant.

The Appellant's Case

6. The appellant's case is set out in his memorandum of appeal dated May 16, 2008 as filed herein on May 19, 2008, an affidavit of verification sworn by the appellant on the said May 16, 2008, a witness statement by the appellant dated February 22, 2022, as well as an expert witness statement of the appellant's counsel Hon Wanyiri Kihoro dated the same day.
7. It is the appellant's case that the land known as Wambugu Farm is mainly flat with red loamy soils, the whole of it being productive and abutting the Thuta River. The appellant asserts that the land is easily accessible as the same is bound on the East and North sides by the Nyeri/Nairobi Highway (B5), the old Nyeri/Nairobi Road in the South and Thuta River to the West. The appellant further avers that the land is situated within 3 km of the Nyeri Town Central Business District and 150 km from Nairobi.
8. It is further the appellant's case that the land which at the time of the acquisition was rented by the respondent for the same purpose it was being acquired, had been used as a farmers training facility over a long period of time. It is further his case that part of the land which had been unutilized had been subject to various subtenants who had been paying rent to the beneficiaries over a period of time.
9. Accordingly it is the appellant's case that the award in the sum of Kshs 145,595,750/- is not acceptable and that the same constitutes an under-valuation of the property. In particular the appellant asserts that the decision:
 - (i) has been made when the property has a registered encumbrance such that his portion, like that of other beneficiaries, cannot conclusively be paid out promptly as stipulated in the Act;
 - (ii) is not demonstrably based on the itemized "written claim of compensation" which was made available at the inquiry by the proprietors and beneficiaries of the land and excludes some of their property;
 - (iii) (is improper) due to the respondent's failure to pay out the award "promptly" as stipulated in the Act and its refusal to pay interest on the market value of the land and/or ground rent as it uses and lets the property;
 - (iv) (is improper) as the respondent has taken more land than is required for the public purpose stated.
10. In support of his case the appellant has attached:
 - (a) A valuation report prepared by Ms Terracentre Management Valuers, Estate Agents, Land Property Consultants dated April 12, 2007;
 - (b) A valuation report by Ms Wilson Valuers and Estate Agents also dated April 12, 2007;
 - (c) The gazette notice No 1466 dated January 12, 2007; and
 - (d) The award by the commissioner of lands dated December 16, 2007.



11. The respondents were served with both the memorandum of appeal and the record of appeal. On June 29, 2022, their representative pleaded for time to enter appearance. This court granted them 14 days to do so. Again when the matter came up on September 19, 2022, the respondents sought to be granted time to file submissions. From the record however, the respondent commission neither entered appearance nor did it file any submissions in regard to the appeal.

The Issues And Determination

12. From the material placed before the court, there was no dispute that on February 23, 2007, the respondent's predecessor in title published the Kenya gazette notice No 1466 dated January 12, 2007 in respect of land that was to be acquired for the construction of what was referred to as Wambugu Farmers Training Centre.
13. By another gazette notice No 1467 dated the same January 12, 2007 and published on the same day, the respondent's predecessor notified the public that inquiries for the hearing of claims to compensation by people interested in the land were to be held on Thursday April 12, 2007 at the District Commissioner's office at Nyeri starting at 9.30 am. The said notice urged all those interested in the affected land to deliver a written claim to compensation to the commissioner of lands, not later than the date set for the inquiry.
14. It was apparent from the material placed before me that upon receipt of the notice, the appellant and other beneficiaries of the land sought to have the date scheduled for the inquiry moved forward. By a letter from their then Advocate Murimi & Company Advocates dated March 26, 2007, they complained of the inclusion of the name of one George K. Wambugu as one of the registered owners of the land in the two gazette notices and urged the commissioner of lands to show the correct proprietors and to re-advertise the intention to acquire the land and reschedule the inquiry to May 14, 2007.
15. That request to postpone the date was however rejected by the Commissioner of Lands who by a letter dated April 4, 2007 responded that the inquiry would proceed as scheduled on April 12, 2007. It was also apparent from another letter dated August 30, 2007 from the Commissioner of Lands that the inquiry indeed went on as scheduled and that a six member committee was appointed and mandated to handle matters concerning the acquisition of the land. It was however not clear from the letter what the exact mandate of the committee was.
16. While the award of compensation in the sum of Kshs 145,595,750/- was made on December 16, 2007, the same does not appear to have been immediately communicated to the appellant and other beneficiaries. By a letter dated February 27, 2008 Hon Wanyiri Kihoro, in his position as the family advocate and valuer sought to know from the Commissioner of Lands the status of the acquisition.
17. When the family finally learnt of the award they did *vide* a letter dated March 21, 2008 issue a demand notice to the honourable the Attorney General on behalf of the Commissioner of Lands and the Ministry of Agriculture, of their intention to sue for the following relief.
 1. That for the stated purpose of building a farmers training centre the amount of land the Commissioner is proposing to take is excessive and therefore he is in abuse of the CAA (sic) and section 75 of the Constitution and that the, if need be, should only take such amount of and as could reasonably be required for the purposes of building a farmers' school after vigorous physical planning;
 2. That the Commissioner makes an award based on the market value of the land and other ingredients of the (Land Acquisition Act), to the proprietors/Trustee/beneficiaries in



accordance with the provisions of the Act after all the encumbrances on the property are discharged;

3. That the Commissioner of Lands pay market rent for the use of the land in the meantime, from the date of the entry; and
 4. An order for costs and any other relief in favour of the plaintiffs.
18. There was no doubt that the above demand notice was received by the honourable the Attorney General. By a letter dated April 10, 2008 copied to the Wambugu Family Trustees, the Attorney General notified the Permanent Secretary Ministry of Lands of the said demand urging the Ministry to immediately investigate the claim(s) and submit instructions to enable the Attorney General to respond to the claim.
 19. Some two months after the letter of demand and having failed to get any response to their queries, the appellant lodged this appeal on May 18, 2008.
 20. As it were, the appellant did not place any material before this court which could lead to a conclusion that the amount of land the commissioner had compulsorily acquired was in excess of what was reasonably required for the purposes of building a Farmers Training School. Similarly, while the appellant appeared to insinuate in some of their representations that the size of the land compulsorily acquired was in excess of the gazetted 54.55 ha. nothing was placed before the court to back the claim.
 21. In regard to the contention that the award ought to have been based on the market value of the land, it was apparent that the process of acquisition of the suit property having commenced in the year 2007, the applicable law as correctly stated by the appellant was the *Land Acquisition Act*, (cap 295, now repealed). Section 8 of the said Act provided that where land was acquired compulsorily under the Act, full compensation was to be paid promptly to all persons interested in the land.
 22. Furthermore, under section 9(3) of the repealed Act, the Commissioner of Lands was required to make a full inquiry as to which persons were interested in the land that was to be acquired, the value of the land and what compensation is payable to each of the persons whom he has determined to be interested in the land. That compensation was to be determined in accordance with the principles set out in the schedule to the Act.
 23. Paragraph 2 of the said schedule was couched in mandatory terms and provided that the following matters, and no others, shall be taken into consideration in determining the amount of compensation –
 - (a) Market value;
 - (b) Damages sustained by severing part of the land from another land;
 - (c) Damage sustained by reason of the acquisition injuriously affecting the land owner's other property, whether immovable or movable or his actual earnings.
 - (d) Reasonable expenses incidental to change or residence or place of business; and
 - (e) Damage genuinely resulting from diminution of the profits of the land between the date of gazettment and the date of taking actual possession.
 24. As to what constitutes "market value", paragraph 1 of the said schedule defined it to mean the market value of the land as at the date of publication in the gazette of the notice of intention to acquire the land.
 25. In the matter herein, the appellant has challenged the criteria used by the respondent in assessing the compensation that was due. It is his case the award given is a gross undervaluation, that the



same is arbitrary and that no reasons are provided for the same and/or the factors taken into consideration before arriving at the amount awarded. Given the elaborate criteria provided under the Land Acquisition Act aforesaid, I think it was imperative that the respondent gives reasons and/or the criteria used in arriving at the assessed award. In this, instance the appellant's request for answers were met by a deafening silence from the respondent.

26. Having failed to respond to the demands made by the appellant on the assessment of the award, it remains unclear how the Commissioner of Lands arrived at the sum of Kshs 145,595,750/- as reasonable compensation for the suit property. From their own letter dated August 30, 2017, addressed to the appellant and other Wambugu family members, it is apparent that the appellant and the family provided the respondent with two valuation reports during the inquiry held on April 12, 2007. At paragraph 2 of the said letter, the respondent urged the family to, *inter alia* confirm the fact that;
 - (i) It has since been established that Mr Wanyiri Kihoro was not registered by the valuers registration board as at the time of his purporting to do a valuation for you. As such, the same is rejected and therefore you may confirm that I should in the circumstances use the alternative valuation of Mugi Property consultants for your submitted claim to a compensation as at the inquiry date.”
27. While the appellant agrees that they submitted two valuation reports to the commissioner of lands for assessment, they do not agree to the name of the second valuer termed by the respondent as Mugi Property Consultants. According to the appellant, they submitted two valuation reports for the suit property. While the first report valued the land and the improvements thereon at Kshs 427,550,000/-, the second report put the value at Kshs 439,780,000/-. According to the appellant, the valuation reports which they tendered to the respondent are the two contained at pages 80 to 102 and pages 108 to 122 of the record of appeal.
28. I have looked at the record and was unable to find the valuation report said to have been submitted by the entity known as Mugi Property Consultants. The first report running from pages 80 to 102 is prepared by messrs Terracentre Management valuers, Estate Agents, Land and Property Consultants. It was apparent that this report, which puts the value of the property at Kshs 427,550,000/- is the one that was rejected by the respondent for it is signed on behalf of the valuers by Hon Wanyiri Kihoro.
29. The second valuation report which the appellant states he relied on is prepared by messrs Wilson Valuers and Estate Agents. The report signed on behalf of the valuers by one Wilson G. Mbuthia puts the value of the property together with the improvements thereon at Kshs 439,780,000/-.
30. As it were the respondent failed to respond to this appeal and the appellant's contention that the above two valuation reports are the ones that were submitted for consideration remains uncontroverted. In the absence of the response, it was unclear if the respondent carried out its own independent valuation to arrive at the fair market value of the suit premises and what if any was the value of the property assessed by the said Mugi Property Consultants.
31. Having rejected the first valuation report on account that the signatory thereof was not registered by the valuers registration board, the respondent's predecessor was left only with the second report which placed the value of the land as well as the improvements thereon at Kshs 439,780,000/-. By this appeal, the respondent was given the chance to come and give reasons why they did not uphold this valuation and/or to give the criterion upon which they arrived at their own award of Kshs 145,595,750/-. The respondents however chose to stay away.



32. Having failed to give reasons and the justification for the award dated December 16, 2007, I am persuaded that the assessment by the respondent was arbitrary and that the compensation awarded does not amount to a just compensation as envisaged in law and the said award is hereby set aside.
33. Having set aside the award, I have equally taken some time to consider the valuation report as prepared by Messrs Wilson Valuers and Estate Agents dated April 5, 2007. The Report gives the value of the land as Kshs 325,000,000/= and the value of the improvements thereon at a net of Kshs 114,780,000/-.
34. It was clear from a perusal of page 11 of the report that the global sum of Kshs 325,000,000/- as the value of the land was arrived at from a purported comparison of land sales in the area which put the value of ¼ acre in the area in the year 2007 at Kshs 650,000/-. There was no evidence of any such sales and/or the purchase prices annexed to the report however, and this court was highly doubtful that that was the purchase price as at the time. Those costings appear highly exaggerated and I would substitute therefore a sum of Kshs 400,000/- for a quarter of an acre which in my view would be reasonable compensation for the parcel of land said to be divisible into 500 ¼ acres.
35. It was also apparent to me from the history of this parcel of land that the same was acquired from the Wambugu Family way back in the year 1957 and that the same had since been in use by the now defunct Nyeri county council for agricultural training purposes until the year 1992 when the same was surrendered and leased to the Ministry of Agriculture.
36. That being the case, it was apparent that virtually all the buildings and improvements made on the land whose value the valuation report puts at Kshs.114,780,000/- were put up by either the County Council and/or the National Government over the years and the appellant's contribution was but nominal. As was succinctly stated in matters of compulsory acquisition of land in *Patrick Musimba v National Land Commission & 4 others* (2016) eKLR:

“... 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 it also 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. As was stated by Scott L. J, in relation to compulsory acquisition, in the case of *Horn v Sunderland Corporation* (1941) 2KB 26, 40: “The word “compensation “ almost of itself carries the corollary that the loss to the seller must be completely made up to him, on the ground that unless he receives a price that fully equaled his pecuniary detriment, the compensation would not be equivalent to the compulsory sacrifice.” Effectively, Lord Scott’s statement gave rise to the unabated proposition that the compensation of compulsorily acquired property be quantified in accordance with the principle of equivalence. A person is entitled to compensation for losses fairly attributed to the taking of his land but not to any greater amount as “fair compensation requires that he should be paid for the value of the land due to him, not its value generally, or its value to the acquiring authority.” [See *Director of Buildings and Lands v Shun Fung Wouworks Ltd* (1995 AC 111, 125)].

We see no reason why the same approach should not be adopted locally. The Constitution decrees “just compensation” which must be paid promptly and in full. The *Constitution* dictates that the compensation be equitable and lawful ... According to *Black’s Law Dictionary* 9th Ed Page 881, the word “just” means “legally right; lawful; equitable.” In our



view, the only equitable compensation for compulsory acquisition of land should be one which equates restitution. Once the property is acquired and there is direct loss by reason of the acquisition, the owner is entitled to be paid the equivalent. One must receive a price equal to his pecuniary detriment; he is not to receive less or more. This can be achieved to the satisfaction of the owner of land by applying the market value of the land.”

37. In the premises herein, I was persuaded that the appellant was only entitled to a nominal value of the improvements made on the suit land. Accordingly, I allow the appeal and make the following orders:
- (a) The award of Kshs 145,595,750/- dated December 16, 2007 is hereby set aside;
 - (b) The respondent is hereby directed to award and pay to the appellant the sum of Kshs 200,000,000/- as just compensation for the suit land;
 - (c) The respondent is hereby directed to award and pay to the appellant the sum of Kshs 30,000,000/- as just compensation for the buildings and improvements made on the suit land;
 - (d) Interest on the cumulative award to accrue at court rates from December 16, 2007 when the award was made until payment in full; and
 - (e) The appellant shall also have the costs of this appeal.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 27TH DAY OF APRIL, 2023.

In the presence of:

Mr. Wanyiri Kihoro for the Appellant

No appearance for the Respondent

Court assistant – Kendi

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J. O. OLOLA

JUDGE

