



**Engen Kenya Limited (Now known as Vivo Marketing Kenya Limited)
v National Land Commission (Environment and Land Appeal
E010 of 2021) [2023] KEELC 18281 (KLR) (19 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18281 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E010 OF 2021
CA OCHIENG, J
JUNE 19, 2023**

BETWEEN

ENGEN KENYA LIMITED (NOW KNOWN AS VIVO MARKETING KENYA LIMITED) APPELLANT

AND

NATIONAL LAND COMMISSION RESPONDENT

(Being an Appeal from an Award of Compensation by the National Land Commission dated 8th January, 2021 by Mburu F. K., Director of Valuation and Taxation, National Land Commission, pursuant to Section 113(1) of the Land Act 2012 for acquisition of the Property Land Reference Number 337/3838 for the construction of second Carriageway of Athi-River, Machakos Turnoff Road (A019) Project)

JUDGMENT

1. By a Memorandum of Appeal dated the 16th March, 2021, the Appellant appeals against the Award of Compensation by the Respondent dated the 8th January, 2021. The Appeal is premised on the following grounds:-
 1. The Respondent had no jurisdiction to conduct an inquiry and issue an Award in the sum of Kenya Shillings Two Million Four Hundred (Kshs 2,400,000.00) there having been a concluded inquiry in respect of the property and an Award having been made on 23rd January, 2018 for Kenya Shillings One Hundred and Twenty-Nine Million Seven Hundred and Sixty Thousand Six Hundred and Seventy-Six (Kshs 129,760,767.00);
 2. That the Award as drawn is in respect of a non-juristic person and thus the subject to manipulation and illegal transfer of the sums thereunder;



3. The Respondent Award dated 23rd January, 2018 was in favour of the Appellant and was in respect to “loss of business”;
4. The Respondent did not issue any notice to the Appellant under Section 110 of the Land Act, 2012 before undertaking and concluding the inquiry that culminated in the issuance of the Award dated 8th January, 2021;
5. The Respondent acted in excess of powers donated to it under Section 113(2) of the Land Act, 2012 in making the Award dated 8th January, 2021;
6. The decision of 8th January, 2021 is solely aimed at insulating the Respondent from discharging its duty to the Applicant under Section 113 of the Land Act 2012 having taken possession of the property in 2018 after the acceptance of the Award dated 23rd January, 2018;
7. The decision was made in breach of the mandatory provisions of Sections 111 and 112 of the Land Act, 2012 and the provisions of the Fair Administrative Act, The Respondent gave an award based on its own opinion which was not backed by any known and reasoned valuation and which resulted in the drastic undervaluation of the Property.
8. Such other grounds and reasons to be adduced at the hearing hereof.

It is proposed to ask this court for order that:

1. This Appeal be allowed with costs.
 2. The Award of Compensation by the National Land Commission dated 8th January, 2021 by Mburu F. K, Director of Valuation & Taxation, National Land Commission, pursuant to Section 113 (1) of the Land Act 2012 for acquisition of the Property Reference Number 337/3838 (hereinafter ‘the Property’) for construction of second Carriageway of Athi-River - Machakos Turnoff Road (A 019) Project set aside.
 3. The Respondent be compelled to pay to the Appellant the sum of Kenya Shillings One Hundred and Twenty-Nine Million Seven Hundred and Sixty Thousand Six Hundred and Seventy-Six (Kshs 129,760,767.00) being the sums due to it under the Award dated 23rd January, 2018 together with interest thereon from 24th January, 2018 until payment in full.
 4. Such other or further relief deemed fit in favour of the Appellant.
- 2 In opposition to the Appeal, the Respondent filed a Replying Affidavit sworn by Jacob Lemasika Kipa, its Chief Valuation and Taxation Officer where he explains that in the course of carrying out its statutory duties, the Respondent was instructed by KENHA to commence compulsory acquisition for the construction of the second carriage way of the Athi River - Machakos Turnoff Section of Nairobi - Mombasa Road (A 109). He explains that the Respondent carried out the necessary compulsory acquisition process related to the suit land culminating in the offer of an award of Kshs 129,760,767.00. He states that before the Commission could commence payment of the compensation sum, it received a letter from the Ethics and Anti-Corruption Commission (EACC) dated 16th August, 2019 indicating that it was carrying out an inquiry into alleged cases of fraud emanating from the process of compulsory acquisition and compensation. He contends that to address issues raised by EACC, the Respondent undertook re-inspection of the affected parcels and re-evaluation of the awards offered, including the Appellant’s; to examine and address the allegations of overvaluation(s). Further, from the said exercise, it was noted that some of the parcels of land were grossly overvalued since the provisions of the Land Act and Land Act Regulations 2017 were not adhered to when calculating the awards. He reiterates that



the review of the valuations revealed that some of the previous awards including the one offered to the Appellant did not meet the basic requirement and spirit of just compensation. Further, the Appellant and other project affected persons could not be in possession of legal awards since the Respondent had confirmed that they had resulted from an erroneous process mired with irregularities and or professional negligence. He insists that Section 107(8) of the Land Act provides that in determining the damage resulting from diminution of profits, the commission requires proof of the existence of profits including evidence of tax returns, which was communicated to the Appellant vide letter dated the 26th August, 2022. He argues that the Respondent was not able to confirm that the initial award was offered to the Appellant after compliance with the aforementioned statutory provisions. He avers that the projected affected persons impacted by the aforementioned inconsistencies, were invited to collect new awards in order to regularize the process to ensure conformity with the law after a series of public engagements and barazas that were held at the Chief Office in Mavoko. Further, following the aforementioned engagements, the Commission offered the Appellant a new Award of Kshs 2,400,000 to cater for alternative accommodation since the Appellant's claim were unsupported. He further argues that the Appellant has not adduced any evidence to show that it attempted to engage the Commission on the issue of the new award that it was offered. Further, it has also not adduced evidence as required under Section 107(8) of the Land Act to substantiate the claim of loss of business to justify the payment of the initial award. He reaffirms that the Appellant is not the proprietor of the suit land and was merely operating a business on it on a lease from the Lessor whose title to the suit land was held invalid by Justice Angote in ELC Petition 60 of 2018 Tinek Limited & Another V National Land Commission & Others. Further, that the Respondent's revisions of the Award offered to the Appellant was done in order to ensure the preservation and proper use of public funds. Further, it is willing to further revise the Award if the Appellant provides it with documentation stipulated in Section 107(8) of the Land Act.

- 3 The Respondent further filed a Notice of Preliminary Objection dated the 23rd November, 2022 premised on the following grounds:-
 1. The Appeal goes against the provisions of Section 16A of the Environment and Land Court Act being filed out of time.
 2. A Preliminary Objection may be raised at any time during proceedings before Judgment.
- 4 The Appellant filed a Supplementary Affidavit sworn by Naomi Njeri Assumani, its Company Secretary where she reiterates the averments in her Verifying Affidavit. She argues that the Award made by the Respondent on 23rd January, 2018 was in respect to a specific claim being loss of business over a duly registered lease held over land reference number 337/3838. She insists that the Appellant accepted the Award and it is the Respondent's obligation to pay. Further, there has been no Appeal against the said Award and the Respondent is estopped from failing to honour it. She avers that the project that was subject of the acquisition was concluded but the Appellant remains uncompensated. She denies that VIVO ever received the letter dated the 26th August, 2022. She confirms that the Appellant handed over vacant possession of the property to the Respondent. She avers that the Award the Respondent seeks to honour is one not the subject of any claim as it is issued to a non-juristic person; the purpose thereof is for land and improvement which is a claim that is strange to the Appellant. Further, that the letter dated the 16th August, 2019 is not addressed to the Appellant and neither does it cite it. She reiterates that the Appellant was never involved in any decision to review any Award. She states that the Appellant seeks to stop any payment of monies under an Award issued under the guise of Engen Service Station on 8th January, 2021, as it never sought it. Further, the Appellant's claim is for sums due to it as a registered Lessee of the suit property, a right recognized by the Respondent in issuing the now binding Award dated the 23rd January, 2018.



Submissions

- 5 The Appellant in its submissions provides a background of the dispute herein and contends that the Respondent had no jurisdiction to conduct an inquiry and issue an Award in the sum of Kshs 2,400,000. It argues that the Award dated the 23rd January, 2018 was never subject to Appeal and was duly accepted by the Appellant and hence perfected. Further, that the Respondent became *functus officio* once it issued the Award dated the 23rd January, 2018. It contends that the Award of 8th January, 2021 is issued to a non-juristic person and hence ought to be set aside. It reiterates that the Respondent ought to have paid the Appellant for loss of business for the amount indicated in the Award dated the 23rd January, 2018. Further, that it is entitled to just and prompt compensation as per the provisions of the Article 40 of *the Constitution* and Section 111 of the *Land Act*. It avers that no notice was issued to it under Section 110 of the *Land Act* before the impugned Award of 8th January, 2021. It reiterates that it was not granted an opportunity to participate in an inquiry nor a hearing before the impugned Award of 8th January, 2021 was made, and this culminated in its right to property being undervalued. It insists that the process of revising the earlier Award did not adhere to the provisions of the *Land Act*. On the notice of Preliminary Objection, it argued that it filed the instant Appeal within the required timeline. To support its averments it relied on the following decisions: *Raila Odinga & 2 Others V Independent Electoral & Boundaries Commission & 3 Others* (2013) eKLR; *Universities Academic Staff Union V Kenyatta University & Another* (2017) eKLR; *The Forthball Bakery Supply Co. V Fredrick Muigai Wangoe* (1959) EA 474; *Kenya Power & Lighting Company Limited V Benzene Holdings Limited t/a Wyco Paints* (2016) eKLR; *Kanini Farm Ltd v Commissioner of Lands* KLR (E& L) 120 at p. 124; *James Shikwati Shikuku v County Government of Kakamega & 3 Others* (2019) eKLR; *R V Non-Governmental Coordination Board ex parte Evans Foundation* (2017) eKLR; *Martin John Whitehead & Another V Industrial Court & Others* (2016) eKLR; *Ravaspaul Kyalo Mutisya v National Land Commission* (2022) eKLR; *Attorney General V Zinj* (2021) KESC 23 (KLR) and *Springdew Properties Ltd V National Land Commission* (2020) eKLR.
- 6 The Respondent in its submissions provides a background of the dispute herein and contended that the main issue for determination is whether the Appellant is entitled to the initial Award of Kshs 129,760,767. It argues that the title to the disputed land was held to be invalid by Justice Angote in ELC Petition 60 of 2018: *Tinek Limited & Another V National Land Commission & Others*. It insists that the Appellant did not furnish it with the necessary documents to ensure that the loss of business was properly calculated and suitable Award offered. Further, since the Appellant was non responsive, in accordance with its standard operating procedure, it prepared an Award of Kshs 2,400,000. It reiterates that it is willing to further assess and offer a New Award to the Appellant as soon as it avails documents required under Section 107 and 107A(8) of the *Land Act*. On the Preliminary Objection, it submitted that the Appellant filed this Appeal outside the requisite time.

Analysis and Determination

- 7 I have considered the Memorandum of Appeal, Record of Appeal, Notice of Preliminary Objection, respective Affidavits and rivalling submissions and the following are the issues for determination:- Whether the instant Appeal was filed within time. Whether the Award dated the 8th January, 2021 for Kshs 2,400,000 should be set aside and the Appellant paid Kshs 129,760,767 as per the initial Award dated the 23rd January, 2018. Whether the Appeal is merited.
- 8 I will deal with the issues jointly.
- 10 The Appellant was a Lessee on land parcel number LR No. 337/3838. The Respondent on behalf of KENHA compulsorily acquired the said parcel of land to construct the second carriage way of the



Athi River-Machakos Turnoff section of Nairobi-Mombasa Road. After the acquisition of the said parcel of land, the Respondent initially issued the Appellant with an Award dated the 28th January, 2018 for Kshs 129,760,767 but before the same could be paid, EACC intervened culminating in the Respondent's reduction of the Award to Kshs 2,400,000 which forms the fulcrum of this Appeal. The Appellant contends that the second Award should be set aside as it never participated in its review and rejected it. Further, that it should be paid as per the initial Award as it never appealed against it. It argued that the Respondent never issued it with any notice when the Award was reviewed and acted in excess of its powers as stipulated in Section 113(2) of the *Land Act* in making the Award of 8th January, 2021. Further, that the Respondent breached the provisions of the *Fair Administrative Action Act* as well as Sections 111 and 112 of the *Land Act*. The Respondent insisted that the Appellant failed to provide proof of business to enable them calculate the revised Award. The Respondent insists that the Appeal was filed out of time. I note the Appellant was presented with the revised Award dated 28th January, 2021 and communicated the rejection of the same on 22nd February, 2021, after which it filed its Memorandum of Appeal on 19th March, 2021. The ELC Act provides that an Appeal should be filed within thirty (30) days from the date of the decision. Since the Appellant had communicated its objection in February, 2021 to the revised Award as per the law, and thereafter filed the instant Appeal within the period of thirty (30) days, I hence find that it indeed filed the Appeal within time.

11 On whether the Award dated the 8th January, 2021 for Kshs 2,400,000 should be set aside and the Appellant paid Kshs 129,760,767 as per the initial Award dated the 23rd January, 2018. The Appellant seeks to set aside the revised Award of Kshs 2,400,000 and argues that the initial Award was for compensation for loss of business as it has a registered Lease on the suit land. Further, that the second Award of 8th January, 2021 has been issued to non-juristic person.

12 Section 113 of the *Land Act* provides that:-

- (1) Upon the conclusion of the inquiry, the Commission shall prepare a written award, in which the Commission shall make a separate award of compensation for every person whom the Commission has determined to have an interest in the land. (2) Subject to Article 40(2) of *the Constitution* and Section 122 and 128 of this Act, an award— (a) shall be final and conclusive evidence of— (i) the size of the land to be acquired; (ii) the value, in the opinion of the Commission, of the land; (iii) the amount of the compensation payable, whether the persons interested in the land have or have not appeared at the inquiry; and (b) shall not be invalidated by reason only of a discrepancy which may thereafter be found to exist between the area specified in the award and the actual area of the land.
- (3) If an interest in land is held by two or more persons as co-tenants, the award shall state — (a) the amount of compensation awarded in respect of that interest; and (b) the shares in which it is payable to those persons.
- (4) Every award shall be filed in the office of the Commission.”

13 While Section 107 of the *Evidence Act* stipulates that:-

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

14 I note the Land Value Amendment Act 2019 established the Land Acquisition Tribunal and Section 133A of the said Act stipulates thus:-

The Tribunal has jurisdiction to hear and determine appeals from the decision of, the Commission in matters relating to the process of compulsory acquisition of land. (2) A person dissatisfied with the



decision of the Commission. May, within thirty days, apply to the Tribunal in the prescribed manner.
(3) Within sixty days after the, filing of an application under this Part, the Tribunal shall hear and determine the Application.”

15 Further, Section 133C (6) of the said Land Value Amendment Act 2019 provides that:-

Despite the provisions of, Sections 127, 128 and 14 (5), a matter relating to compulsory acquisition of land or creation of wayleaves, easements and public right of way, shall, in the first instance, be referred to the Tribunal.”

16 The above legal provisions in essence means that disputes emanating from compulsory acquisition should in the first instance be referred to the Land Acquisition Tribunal which has power to confirm, vary or quash the decision of the National Land Commission. Further, the Act stipulates that in the event that a party is dissatisfied with the Tribunal’s decision, they can lodge an Appeal to ELC on a question of law. This Court takes judicial notice that the Land Acquisition Tribunal has since been established but is not yet fully operational. Be that as it may, I note the Respondent has admitted both in its Replying Affidavit and submissions that it is ready to reconsider the Award so long as the Appellant submits the requisite statement of accounts and proof of profits. It further emerged that in the case of *Tinek Limited & another v National Land Commission & 4 others; Khalif Kurie Heris Engen & 2 others (Interested Parties)* [2020] eKLR Justice Angote dealt with the issue of the mother title where the Appellant’s Lease was anchored and held that:-

Having found the titles for LR No. 337/1645 and the subsequent sub-divisions to be void, it follows that the Petitioners and the 1st and 2nd Interested Parties are not entitled to either the suit land or compensation. Indeed, it would be remiss of me to leave the titles for LR No. 337/1645 and LR No. 337/3821 - 3838 on public record..... The Petitioners’ title to Land Reference number 337/1645 and the subsequent titles namely: LR. Nos. 337/3821-3838 (both inclusive) are hereby declared null and void and are cancelled forthwith.”

17 Based on the facts as presented while relying on the legal provisions I have cited including quoted decisions, noting that the issue of compensation in respect to the suit land was raised in the aforementioned decision, it is my considered view that the Appellant’s argument that it has a valid lease hence should be compensated for the Award of 28th January, 2018, cannot be deemed feasible as the title on which the lease was anchored was cancelled. I further note that Justice Angote actually declared that the Appellant who was the 2nd Interested Party in the Tinek suit was not entitled to compensation. On whether the revised Award should be set aside. I note in this Appeal, the Appellant despite insisting that it should be compensated for loss of business has not provided evidence of the statements of income as required under Section 107 and 108 of the *Evidence Act*.

18 In *Patrick Musimba v National Land Commission & 4 others* [2016] eKLR 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. As was stated by Scott L.J, in relation to compulsory acquisition, in the case of *Horn-v-Sunderland Corporation [1941] 2 KB 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 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 when the word “just” is applied as 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 Appeal to the market value of the land.”

19 Section 107 of the *Evidence Act* places the burden of proof on the Appellant to prove its profits to enable the court determine the amount of just compensation it is entitled to. From the documents presented in this Appeal, the Appellant only attached the Lease Agreement, two Awards and photographs of the acquired suit property but not the statement of account indicating profits. In the foregoing, I find that the Appellant has failed to discharge his burden of proof in adducing evidence to confirm its profits and enable the court make a determination on loss of business. Insofar as it insists that it should be compensated with the first Award, to my mind I note the said Award was revised hence cannot be deemed to be valid. The Respondent has admitted that it only awarded the Appellant funds for alternative accommodation but it is ready to assess the Award once the Appellant furnishes it with statement of accounts and profits. To my mind, I am of the view that the Appellant should present its evidence before the Land Acquisition Tribunal to enable the Respondent assess and provide just compensation for the loss of business as agreed.

20 It is against the foregoing that I find this Appeal unmerited and will proceed to strike it out.

21 I will not make any order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 19TH DAY OF JUNE, 2023

CHRISTINE OCHIENG

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

