



Tonini Holdings Limited v Kenya Urban Roads Authority & another (Environment & Land Case 005 of 2022) [2023] KEELC 18975 (KLR) (25 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18975 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 005 OF 2022**

**JA MOGENI, J
JULY 25, 2023**

BETWEEN

TONINI HOLDINGS LIMITED PLAINTIFF

AND

KENYA URBAN ROADS AUTHORITY 1ST DEFENDANT

THE NATIONAL LAND COMMISSION 2ND DEFENDANT

JUDGMENT

1. By a plaint dated 14/12/2021 the Plaintiff – Tonini Holdings Limited – moved the Court as the registered owner of LR No Bed 11088/3 seeking relief against the 1st Defendant – The Kenya Urban Roads Authority - for payment of an award that that was made after a delay of one year for Kshs 11,731, 300 but this money did not include interest of Kshs 4,610, 064 nor the cost of construction of the hostels that was underway at the time of acquisition which is pegged at Kshs 105,463, 367. Thus terming the process as unlawful appropriation of his property by the defendants the plaintiff prays for the following against the defendant both jointly and severally:
 - a. Kshs 4,610,064
 - b. Kshs 105,463,367
 - c. Interest on (a) above at court rates from 27.3.2012 until payment in full
 - d. Interest on (b) above at the prevailing commercial rate of 14% pa from 12.6.2013 until payment in full
 - e. Costs of the suit
 - f. Any other or further relief the court may deem fit in the interest of justice.



2. Both the 1st and 2nd defendants filed their statements of defence. The 1st defendant's statement of defence is dated 21/03/2022 and the 2nd defendant's statement of defence is dated 16/03/2022. Further the 2nd defendant chose not to call any witnesses but to rely on the witnesses and evidence produced by the 1st defendant.
3. The plaintiff pleaded that he was at all material times he sit the registered owner of the land parcel LR No 11088/3 (the suit land) which was through gazette notices 2240 and 2241/03 of 2/3/2010 and gazette notice number 5611 of 27/05/2011 compulsorily acquired for construction of the Northern bypass.
4. The acquisition was under the [Land Acquisition Act](#), CAP 295, Laws of Kenya and the plaintiff was awarded Kshs 111,731 on 20/07/2011 which was paid on 27/03/2012 but the plaintiff states that there was a delay of 251 days before payment and is claiming an interest of Kshs 4,610,064. The plaintiff pleads that he presented a claim of Kshs 105,463,367 as costs incurred by the plaintiff who at the time of compulsory acquisition commenced construction of hostels on the suit land.
5. The 1st defendant filed statement of defence dated 21/03/2023 where they admit that the plaintiff is the registered owner of LR 11088/3 but this ceased following the compulsory acquisition by the government of the suit property for construction of the Northern Bypass. They aver that the plaintiff is neither entitled to interest nor any costs as particularized at paragraph 9 stating that the claims ought to have been lodged at the inquiry stage for consideration.
6. The 1st defendant avers that the plaintiff was awarded Kshs 111,731,300 which was duly acknowledged and accepted without any condition or reservation as compensation for compulsory acquisition of its land. The 1st defendant therefore denies that the amount was transmitted to the plaintiff long after the 1st defendant had taken possession of the suti property.
7. The 1st defendant via their Defense statement dated 2103/2022 stated that the process of acquisition was done with strict adherence to the prescribed governing law, the Land Acquisition Act and the Plaintiff was then compensated in full and final settlement and that the Plaintiff's claims which has been brought before court should have been lodged at the enquiry stage for factorization during evaluation.
8. Further that the plaintiff's claim for interest was only payable in instances where the award was not paid before the taking of possession before the award but the plaintiff has admitted that the defendant took possession before the award was made. The plaintiff accepted and acknowledged the Kshs 111,731,3000 paid out as an award and not as part payment without any condition nor reservations.
9. The 2nd Defendant also filed a Defense dated 16/03/2022 stating that the compulsory acquisition process was conducted in accordance with all the relevant laws. It was the defence of the 2nd defendant that it is not privy to the details of the inquiries and acquisition as it did not take part in the processes of acquisition and therefore the plaintiff cannot attribute any liability to it.
10. The 2nd defendant averred that on 20/07/2011 the award of Kshs 11,731,300 was awarded and accepted by the plaintiff which was admitted in full as per the Land Acquisition Act. The defendant relied on the cases of [Fivestar Agencies Ltd v National Land Commission](#) (2014) eKLR quoting Section 23 of the [Interpretation and General Provisions Act](#), Cap 2 and the repealed [Land Acquisition Act](#). Further the 2nd defendant contended that the Ministry of Lands commenced and conducted the acquisition and therefore the 2nd defendant played a very minimal role in the process.



11. The 2nd defendant filed a defence dated 16/03/2022 and denied all allegation raised by the plaintiff stating the plaint raises no reasonable cause of action against the 2nd defendant. Further that the 2nd defendant played no role in the acquisition of the suit property since it was done before the commission came into and so the Commission bears no responsibility for the alleged delay in payment of compensation or any other claim.

Plaintiff's Case

12. PW1 , Stephen Mwangi Njuguna testified before the court on 27/03/2023 and confirmed having made a witness statement on 14/12/2021 which he identified and confirmed its contents which he adopted and requested that it be taken as forming part of his evidence in chief. The witness also recalled having filed a list of documents on the even date which had 25 documents produced as Exhibit PW1-25 setting out the claim being made by the plaintiff as per the plaint. Briefly the witness confirmed that the plaintiff was paid in 2011 a compensation of Kshs 111,731,000 after compulsory acquisition. He testified that he was paid for the value of the land that was acquired which according to him the value of the house, the grave and the infrastructure that was on the suit property.
13. He stated that he was not paid for the of the proposal for preparation of the construction of the hostels. It was his testimony that he presented the documents to the valuers in Ruiru and he raised the issue of costs to the professionals.
14. He testified that he accepted the award though they had not factored the cost of the professionals. That he accepted the award through they had not factored the cost of the processional. He testified that the compensation for the costs was by word of mouth and that he had no written document that could prove that the defendant agreed to compensate the processional cost. He stated that the award was made on 20/07/2011 but the payment was made on 27/03/2012.
15. PW2- Paul Mutahi Warigi adopted his witness statement dated 24/02/2023 and stated that he signed a consultancy on 11/04/2007 which he stated that he will rely on and produced it as PW2-Exhibit 26. He testified that they were engaged by Tonini Holdings in 2007 to come up with drawings with United States International University – USIU hostels. They stated that they got all approvals including the approval of USIU. He testified that the cost of their engagement was 4% of the project cost which is Kshs 996,613,848 and their fees was Kshs 33,248,74.
16. He testified that before they could go on site the government made a road to pass through the 5 acres of the suit property and so his client, PW1 went to court to seek compensation for the land and loss of business. It was his testimony that the government paid for the land but not the suit property. He stated that they were paid 90% of the fees but not for the construction. In cross-examination he testified that he was not able to confirm whether the cost of the project was presented before the award committee. With this the Plaintiff closed its case.

Defense Case.

17. DW1 Paul Owino Odak , testified that he works as the Assistant Director in charge of survey with KURA (the 1st defendant). He produced his witness statement dated 24/05/2022. He testified that he was not there at the inquiry stage of the project and therefore he was not in a position to confirm whether the project costs were raised at that stage. He testified that the award was made in June 2011 and was paid in March 2012. He stated that the award indicated land and improvement and that he was not aware that the plaintiff wanted to construct USIU student hostels.



18. It was his testimony that if the issue of costs of professionals would have been presented it would have been considered because from the record, the cost of the award does not mention professional fees. He stated that in the awards there are 3 categories made which are (i) land, (ii) improvements on the land if commercial property and (iii) loss if business. With that the 1st defendant closed their case.

19. The 2nd defendant did not call any witnesses.

Analysis and Determination

20. The plaintiff filed their submissions dated 6th May 2014 and the 1st and 2nd defendants filed theirs on 22/04/2023 and 2/05/2023 respectively.

21. The issue that commends itself for consideration to me is whether the plaintiff is entitled to the orders sought in the plaint.

22. The plaintiff has stated that the defendant failed to consider the interest and the sums incurred by the plaintiff during the compensation of the award made on 20/07/2021 and paid in full on 27/03/2012 after the process of compulsory acquisition which commenced on 2/03/2011.

23. It is not in dispute that the plaintiff was awarded Kshs 11,731,300 by the 1st defendant. What is in dispute is that the award did not consider the interest since the plaintiff was not paid the award immediately following the acquisition and the extra claims of the proposed project having paid the contractor. The plaintiff alleges that on or before July 2009 the agents, employees and or servant of the 1st defendant entered into the plaintiff's parcel of land and started placing beacons and marks on the property claiming to mark the route for the proposed Northern Bypass. This is the reason the plaintiff filed Nairobi JR Case Number 72 of 2009.

24. The plaintiff has alleged a delay of 251 days before the award payment was done, the defendants have not controverted this allegation of the delay except the 1st defendant who states that the plaintiff is not entitled to any payment for the alleged delay.

25. I note that the 1st defendant has not denied that they took possession before the compensation their contention is that the plaintiff is not entitled to the compensation despite taking possession before payment of the award. Now Section 16 of the *Land Acquisition Act* (repealed) stipulates that in the event that the acquiring entity takes up possession of the acquired property before making full payment of the compensation award to the owner of the property or properties, interest shall be added to this amount at a rate not less than 6% per annum from the time when possession was taken until payment in full.

26. It is instructive that despite the 251 days' delay, when the 1st defendant made the payment to the plaintiff they made full payment and not partial meaning that the interest can only be claimed on the 251 days which saw the full payment made on 27/03/2012 from 20/07/2011 when there was an offer and acceptance between the plaintiff and the defendant. The plaintiff has submitted that the interest should have been paid when the award was made but since the delay subsists then the amount of Kshs 4,610,064 should accrue interest at court rate until the day the money is paid to the plaintiff.

27. I am aware that Section 16(1) of the *Land Acquisition Act* Cap 295 (Repealed) relates to a claim relating to, or connected with compulsory acquisition of land and under the said Section, interest shall not be less than six percent per annum from the time (emphasis mine) of taking possession until payment or payment into court, where payment of compensation awarded is not paid or paid into court on or before the taking of possession of the land. The interest provided for in the said section (now repealed) is that it should not be less than 6%.



28. It was submitted by the plaintiff that the reason for claiming interest at court rates on the Kshs 4,610,064 which is the interest statutorily provided is because it was not paid when the award was made. This is supposed to be paid at the time the land is compulsorily acquired and the same is taken possession of. The payment of compensation award is the condition precedent to the institution of suit otherwise the applicant herein would have no legal right to claim interest if there was no taking of possession of the property in the manner stipulated in the Land Acquisition Act(Repealed) namely Section 19(1),(3) and (4) of the Land Acquisition Act.
29. It is only after taking possession of the land that the land vests in the Government absolutely free from encumbrances. In the Indian case of State of Jharkhand & others v Ambay Cements & another on 17 November 2004 the Supreme Court of India held that it is the cardinal rule of the interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way.
30. The 1st defendant contends that the plaintiff has not submitted proof that the Commissioner took possession of the suit property before paying of the award and states that a notice ought to have been issued by the Commissioner to state that they are taking possession which was to be served upon the plaintiff. It is their submission that the said notice was not produced and therefore it is not clear that the award was really paid after the commissioner took possession.
31. The plaintiff has filed a bank transfer showing clearly that the money was paid inot his account at National Bank of Kenya on 27/03/2012, the award was made on 26/07/2011 and the court order for inhibition was issued on 15/07/2009.
32. I have no reason to believe that the plaintiff was acting out of apprehension in all these processes with the evidence before me and as the 1st defendant has submitted the Land Acquisition Act (repealed) section 16 (1) and now Land Act 2012 provides for interest being paid on the amount awarded. I therefore find that the plaintiff is entitled to the interest as claimed and submitted since the plaintiff's advocate vide its letter dated 12.06.2013 raised the same claim which however was not honored.
33. On what is the interest sum due as was held in Republic v Attorney General & another Exparte Ongata Works Ltd [2016] eKLR citing Shah v Attorney General (No 3) Kampala HCC Miscellaneous 31/1969 [1970] EA 543. the interest shall accrue interest at court rates.
34. On the issue whether the plaintiff is entitled to the professional fees, I am compelled to once again examine the principles that guide compulsory acquisition of land. The applicable principles on assessment of compensation as found in the schedule to the repealed Land Acquisition Act, the said schedule provided that the following matters, and no others, shall be taken into consideration in determining the amount of compensation payable for land that is to be compulsorily acquired:
 - a. The market value of the land.
 - b. Damage 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 of residence or place of business.
 - e. Damage genuinely resulting from diminution of the profits of the land between the date of gazetteement and the date of taking actual possession.



35. “Market value” was defined in paragraph 1 of the said schedule 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. In addition, under paragraph 4 of the said schedule, a sum equal to fifteen per cent of the market value as determined in accordance with paragraph 1 is to be added by way of compensation for disturbance.
36. In the present suit, it is important to note that the award should have also included the market value this is a factor that is relevant in determining the compensation payable pursuant to the provisions of the schedule to the repealed Land Acquisition Act.
37. In *Kanini Farm Ltd v Commissioner of Lands* (1986) KLR 310 the court stated as follows:
“The market value as the basis for assessing compensation is the price which a willing seller might be expected to obtain from a willing purchaser, the purchaser may be a speculator, but a reasonable one...In determining the amount of compensation which ought to be paid the court should take into account comparable sales and awards on other acquisition of land of similar character”.
38. In *Limo v Commissioner of Lands* KLR (E&L) 175 it was also held in this regard as follows:
“In addition to the matters contained in the schedule to the Land Acquisition Act which a court should consider in assessing compensation to be paid to a person whose land has been compulsorily acquired, courts have tended to take into account the nearness of the land in question to the main town and its nearness to the road access.”
39. The provided evidence with regard to the proposed development of USIU hostels. One of the consultants who was to undertake the project PW2- Paul Mutahi Warigi gave his evidence and was cross-examined on the same. In this regard the 1st and 2nd defendants did not rebut the evidence presented that there was a proposed project and experts had already been engaged and the plaintiff had entered into an agreement with the experts. A copy of the agreement was attached and produced as part of the list of documents by the plaintiff. 20/11/2008. The approval was given before the Respondent’s notice of intended acquisition of 2/03/2010 and 27/05/2011.
40. It was held in *Katra Jama Issa v Attorney General & 3 others* [2018] eKLR that;
“...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” (emphasis added)”.
41. The *Land Value (Amendment) Act 2019* establishes the criteria for assessing value for compulsorily acquired freehold land at Section 107A(1) which states that:
“Valuation of freehold land and community land for purposes of compensation under this Act shall be based on the provisions of this Part and the land value index developed for that purpose by the Cabinet Secretary in consultation with county governments and approved by the National Assembly and the Senate.”
42. It establishes an elaborate and detailed criterion for assessing this compensation including the improvements made and increase in value of the land, damage likely to be caused during the process and the number of people living on the property. Factors to be considered in assessment of compensation



include the market value of the land, damage sustained or likely to be sustained by persons interested at the time of the Commission's taking possession of the land by reason of severing the land from his or her other land, damage sustained or likely to be sustained by persons interested at the time of the Commission's taking possession of the land by reason of the acquisition injuriously affecting his or her other property, whether moveable or immovable in any other manner or his or her actual earnings. damage genuinely resulting from diminution of the profits of the land between the date of publication in the Gazette of the notice of intention to acquire the land and the date the Commission takes possession of the land.

43. It is therefore the finding of this Court that the expenses incurred by the plaintiff for preparation for development of the USIU hostels that were to be erected on the acquired suit property ought to have been considered in the award made to the plaintiff pursuant to the principles set out in the Schedule to the repealed Land Acquisition Act.
44. On the issue of costs, I am reluctant to make a finding that would injure the public coffers since the suit property was acquired for a public purpose, therefore it is only fair that each party shall bear their own costs of the suit.
45. Consequently, I find that the plaintiff has proved its case on a balance of probability against the defendant jointly and severally for;
 - a. Kshs 4,610,064
 - b. Kshs 105,463,367
 - c. Interest on (a) above at court rates from 27.3.2012 until payment in full
 - d. Interest on (b) above at court rates from the date of this judgment until payment in full.
 - e. The land having been compulsorily acquired for public good, each party shall bear their own cost to the suit.

Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 25th Day of JULY 2023.

MOGENI J

JUDGE

In the Virtual Presence of:-

Ms. Irungu for the Plaintiff/Applicant

Ms. Masinde for the 2nd Defendant /Respondent

Ms. Nyawira for the 1st Defendant

