



BOM, Tambach Teachers Training College v Cheplaiti (Environment & Land Case 6 of 2022) [2023] KEELC 20481 (KLR) (26 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20481 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT & LAND CASE 6 OF 2022
L WAITHAKA, J
SEPTEMBER 26, 2023**

BETWEEN

THE BOM, TAMBACH TEACHERS TRAINING COLLEGE PLAINTIFF

AND

FRANCIS CHEPLAITI DEFENDANT

JUDGMENT

1. By a Plaint dated 24th January, 2018 and filed on 24th January 2018, the plaintiff instituted this suit seeking judgment against the defendant for:-
 - a. A declaration that the parcel of land known as Kapterik 2579 measuring 0.7 acres together with the house thereon as well as all the developments thereon subsequently undertaken by the plaintiff belong to and is the property of the plaintiff college, Tambach Teachers Training College.
 - b. An order of mandatory injunction to compel the defendant to surrender the title documents of parcel number Kapterik 2579 and to execute all requisite documents of transfer in favour of the plaintiff college;
 - b. An order of permanent injunction to restrain the defendant by himself, his agents, and/or servants or anyone whatsoever purporting to act on his behalf from trespassing into, crossing over, leasing, renting, selling or transferring the parcel of land known as Kapterik 2579 together with the developments or in any other way interfering with the plaintiff's staff or employees' use and enjoyment of land and premises on land parcel number Kapterik 2579
 - b. Damages
 - b. Costs of the suit and interest.



2. The suit is premised on the grounds that the parcel of land known as Kapterik 2579 (hereinafter referred to as the suit property) was compulsorily acquired by the Government; that plaintiff is the legal owner of the suit property and the developments thereon.
3. It is the plaintiff's case that the suit property was legally and procedurally valued for purposes of ascertaining its equivalent compensation and the persons affected relocated and settled, the defendant being one of the people who were compensated and relocated. In this regard, it is contended that the defendant was compensated with plot No. 41 Sergoit Crown Land measuring 48 acres. The defendant is said to have taken possession of the plot he was compensated with.
4. It is pleaded that after the suit property was compulsorily acquired, the plaintiff took possession of it and effected massive development therein.
5. The plaintiff complains that the defendant without any colour of right, developed a habit of maliciously interfering with the plaintiff's rightful use and enjoyment of the suit property and the developments effected thereon thereby occasioning the plaintiff loss and prejudice.
6. Terming the defendant's activities in the suit property trespass to land, the plaintiff instituted this suit seeking the reliefs listed herein above.
7. Upon being served with the suit papers, the defendant filed a statement of defence and a counterclaim, dated 27th April, 2018 denying the allegations levelled against him.
8. In the counterclaim, the defendant acknowledges that vide gazette notices Nos. 4260 and 4261 of 4th October 1985 the Government made inquiry on parcels of land adjoining Tambach Teachers College for purpose of compulsorily acquiring them but contends that the gazette notice only affected 0.5 of the suit land and not the whole of it and the developments therein.
9. Explaining that his family and he have been in use and occupation of the developments in the suit property, erected in 0.2ha of the suit property since 1986, the defendant claims that he is the lawful owner of a portion of the suit property measuring 0.2 ha and the developments therein.
10. By way of counterclaim, the defendant seeks judgment against the plaintiff for:-
 - i. A permanent injunction restraining the plaintiff, its agents and/or servants from invading, encroaching, trespassing, interfering, constructing or in any other way dealing with his parcel of land known as Elgeyo/Marakwet/Kapterik/2579.
 - ii. Costs of the suit
 - iii. Any other relief the court may deem fit and just to grant.

Evidence

Plaintiff's Case

11. When the suit came up for hearing Nathaniel Kibet Chepkener, who testified as P.W.1, relied on his statement recorded on 1st March, 2018 after it was adopted as his evidence in chief. He informed the court that he was the Principal of the plaintiff College when the suit property was compulsorily acquired by the Government.
12. Concerning the circumstances leading to compulsory acquisition of the suit property, among other properties in the college's neighborhood, he stated that he was called by the Permanent Secretary to assist in sorting out the problems of the college, one of them being land compensation.



13. He stated that nine acres of land were to be acquired from the community and that his responsibility was to meet the District Committee to see how the Community was to be compensated. He identified the defendant as one of the people who were to be compensated.
14. He stated that the defendant was compensated for the land and the developments thereon with plot No.41 Sergoit Crown Land measuring 48 acres; that the land was valued for purposes of compensation by a valuer from Eldoret and that there was no issue concerning the acquisition of the suit property during his tenure as the Principal of the plaintiff College.
15. He maintained that the defendant was compensated in full for the 0.7 ha of land that was acquired from him and for the developments thereon. He produced gazette notices number 4260 and 4261 of 4th October, 1985 as Pexbt 3 (a) and 3(b) respectively; the notices issued under the Land Acquisition Act as Pexbt 4 (a) and 4(b); a letter he wrote to the District Land Officer as Pexbt 5 and a brief history of the college which he wrote as Pexbt 6.
16. In cross examination, he stated that he had not been shown any resolution by the Board to Institute the suit; that the verifying affidavit had been sworn by the Chief Principal of the College; that there is no document to show that the Attorney General and the National Land Commission were consulted before the suit was instituted.
17. In re-examination, he stated that he did not agree with the contents of the letters relied on by the defendant suggesting that 0.5 ha of the suit property were returned to the defendant.
18. Francis Kariuki, Government Valuer in charge of Uasin Gishu, Elgeyo Marakwet and Nandi Counties informed the court that he is aware of the dispute between the plaintiff College and the defendant over LR No.2579 registered in the name of the college; that the property was registered in the name of the college by way of compulsory acquisition which was done in 1985.
19. He gave a detailed account of the procedures and steps of the process of compulsory acquisition and in the circumstances of this case stated that all those procedures and steps were complied with in the acquisition of the suit property. He further stated that the defendant was compensated with land measuring 48 acres in Sergoit Crown Land for the 0.7 ha that were acquired from him.
20. Concerning the defendant's claim and contention that only 0.5 ha were acquired, he stated that the claim is not supported by the evidence and that the letters relied on by the defendant in support of his claim are suspect. He further stated that the letters were written by persons who were not privy to the real issues.
21. He faulted the defendant for failure to lodge his complaint, if he had any against the compulsory acquisition with the land compensation Tribunal which had mandate to deal with issues arising from compulsory acquisition of land. He produced the following documents in support of the plaintiff's case:-
 - i. Gazette notices No.4260 and 4261 as Pexbt 3(a) and 3(b) respectively;
 - ii. Valuation matrixes as Pexbt 2(a) and 2(b);
 - iii. Copy of allocation letter for compensation addressed to the defendant, dated 23rd January, 1993 as Pexbt 4;
22. Tallam, the Principal Tambach Teachers Training College, from 2020, informed the court that she is aware of the dispute between the college and the defendant over the suit property; that the suit property



- was compulsorily acquired in 1985 for expansion of the college and that despite having been fully compensated for the acquisition, the defendant is using the suit property
23. She urged the court to grant the plaintiff judgment as prayed in the plaint.
 24. In cross examination, she stated that she found the case ongoing and that the defendant occupies the whole parcel. She could not tell what the defendant uses the suit land for.

Defendants Case

25. D.W.1, David Ngetich, a Real Estate Valuer practicing in Real Appraisal Ltd, informed the court that on 9th March, 2018 under instructions of the defendant, he carried out valuation of the suit property. In doing that, he relied on survey map sheet No.2 to identify the land and was satisfied that the property exists on the ground; that the land measures approximately 0.73 acres and that part of it is occupied by the plaintiff college, about 1.23 acres; that the remainder of the land, measuring 0.5 acres is occupied by the defendant who had fenced the portion. He further informed the court that the fenced portion comprises of a dwelling house and was, at the time of compilation of the valuation report, occupied by the defendant and his son. He produced the valuation report as Dexbt 1.
26. In cross examination, he inter alia stated that he did not establish how the college came to be in occupation.
27. The defendant who testified as D.W.2 relied on his statement recorded on 24th April, 2018 after it was adopted as his evidence in chief.
28. He informed the court that in 1985, they were approached by Government as it wanted to acquire their parcels of land; that the intention to compulsorily acquire their land was notified to them vide gazette notices Nos. 4260 and 4261 of 4th October, 1985; that the Government intended to acquire 0.7 ha; that's the entire land; that the mode of compensation was monetary but they wanted acceptable land and that alternative land was available in 1992.
29. He further informed the court that between 1985 and 1992, in particular in 1986, the District Allocation Committee informed him that they were not to acquire 0.1ha and the house. The Committee did so vide a letter dated 28th November, 1986. He produced the letter as Dexbt 4.
30. In 1987 the District Surveyor wrote to him another letter saying that his house and 0.1 ha of the land was not going to be acquired. He produced the letter, dated 1st April 1987, as Dexbt 5. That enabled him to apply for Owner Occupier Allowance from his employer TSC, in 1988.
31. The Government wrote notices to vacate through the chief. He was not affected because the District Commissioner knew that they had left the house for him. He did not move out.
32. Towards the end of 1989, China Juangsu International Contractor leased his 9 roomed house from him and entered into a written agreement with him dated 1st November, 1990. The contractor used to pay him Kshs. 2000/- per month. When they left, he took over the house.
33. In 1992, the DDC requested the Government for 300 acres of land vide letter dated 17th August, 1992. The Government ordered for 600 acres at Sergoit Crown Land. He was given plot No. 77 at Sergoit Crown Land, measuring 48 acres.
34. He acknowledged that the 48 acres was compensation for 0.7 hectares including the house but stated that according to him, the compensation was equivalent to 0.5 hectares.



35. In cross examination, he stated that Dexbt 8 was not written to or copied to him and that it does not relate to any complaint he had made to the lands office. He was unable to tell the court how he got the letter.
36. He could not tell whether or not the Commissioner of Lands was consulted before the letter was written.
37. Regarding Dexbt 6, he admitted that the valuation was done after excision of the land and that he did not consult or write to the Board of Management (BOM) of the plaintiff College.
38. In re-examination, he stated that Dexbt 8, was written because he complained to the County Land Registrar Elgeyo Marakwet who told him that the complaint should be answered by the County Lands Office.
39. On Dexbt 6, he stated that the report was prepared by a qualified valuer.
40. D.W.3, Julius Kimutai Kimaiyo, Deputy County Commissioner (DCC) Keiyo North Sub County, informed the court that he had been shown a letter by the defence dated 30th June 2003 authored by David Ambani, the then District Commissioner (DC) Keiyo addressed to the District Surveyor, Keiyo. The letter refers to plot No. 2579 (the suit property). According to the letter, the DC ordered that the defendant was to retain 0.1ha to add up to 0.2ha.
41. He further stated that according to the letter, the defendant was to grow a live fence. He stated that the letter is copied to a number of offices.
42. When he received summons to attend court to produce the letter, he asked his office to trace a copy of the letter but the letter could not be found in their records.
43. Although the letter is purported to have been written by David Ambani, he stated that their records show that David Ambani served as DC Keiyo District from 4th January, 2000 to 30th January 2003; that on 30th January, 2003, SM Mwadime took over as DC and that by the time the letter was purportedly written by David Ambani, on 30th June 2003, Mwadime had already taken over. He produced an extract of service by the 2 officers (copy of Board of Service for Keiyo District) to assist the court in determination of the case.
44. He did not have the handing over report showing when Mr. Ambani exited the office and does not know Mr. Ambani's signature.
45. He observed that the letter dated 30th June, 2003 is not referenced making it difficult to trace it in their records.
46. On whether he knew the history of compulsory acquisition of the land around the plaintiff College, he stated he had heard about it but had not personally handled the matter.
47. In cross examination, he reiterated that the letter dated 30th June, 2003 does not have a reference number and acknowledged that it is not normal government practice to dispatch a letter without a reference number.
48. He stated that according to the service board from their records, by the time the letter is purported to have been written, Mwadime was the DC in office and would have been the correct DC to issue the letter. He maintained that they were unable to retrieve the letter from their records.
49. He further stated that before the new constitution, the Commissioner of Lands was the office charged with the mandate of compulsory acquisition.



50. He observed that the letter dated 30th June, 2003 is not copied to the Commissioner of lands and does not say that the Commissioner of Lands was consulted.
51. He stated that the letter suggests a portion of land had been acquired.
52. Based on Pexbt 2(b) he stated that the suit property, measuring 0.7 ha is registered in the name of the defendant and that as per the valuation matrix was acquired.
53. He further stated that according to the valuation matrix what is stated in the letter dated 30th June, 2003 is not correct.
54. He further stated that the person who had the correct information about compulsory acquisition was the Commissioner of Lands and not the DC.
55. In re-examination, he stated that he was unable to trace the letter dated 30th June, 2003 because after some time old files are taken to the archives and the letter had no reference.
56. He confirmed that David Ambani was a DC in Keiyo and admitted that before the new constitution, the DC's of respective areas could issue allotment letters.
57. Regarding Pexbt 2b which shows the entire parcel was acquired, he stated that he is not aware of the procedure to be followed if there is no adequate compensation.
58. At close of hearing, parties filed submissions, which I have read and considered.

Submissions

Plaintiffs submissions_

59. In the plaintiff's submissions filed on 29th June, 2023 an overview of the parties' pleaded case and evidence adduced before court is given and the following issues identified as the issues for the court's determination:-
 - i. Whether this court has jurisdiction to entertain the defendant's counterclaim;
 - ii. Whether the suit property was compulsorily acquired, if so, whether whole or part of the suit property was compulsorily acquired;
 - iii. What principles underlie valuation of land for purposes of compulsory acquisition;
 - iv. Was the defendant promptly, adequately and justly compensated;
 - v. What reliefs ought to be granted, in the circumstances?
60. Concerning the 1st issue, an overview of the defendant's pleaded case and evidence adduced in support thereof is given and submitted that the issues raised in the defendant's counterclaim ought to have been filed before the Land Acquisition and Compensation Tribunal established under the Land Acquisition Act(repealed) and that under that Act the jurisdiction of this court is limited to hearing an Appeal from that Tribunal.
61. The defendant having failed to move the Tribunal within the time provided by law, it is submitted that this court is bereft of jurisdiction to entertain the defendant's counterclaim. In that regard, reference is made to Section 29 of the Land Acquisition Act (repealed) and the cases of *Mitua Kiema v. National Land Commission & 2 others* (2020) e KLR; *Kenya National High Court Authority v. Shalien Masood Mughal & 5 Others* (2017) e KLR; *James Kigen & Another v. China Hanan International Cooperation Group Co. Ltd, National Land Commission & 2 other Interested Parties* (2021) e KLR.



62. With regard to the 2nd issue, based on the defendant's concession that compulsory acquisition process in respect of the suit property was commenced through gazette notices Nos. 4260 and 4261 and concluded upon compensation as per compensation matrices, it is submitted that the issue of compulsory acquisition is not in contention. It is pointed out that the defendant in his pleadings and testimony conceded that 0.50 ha out of the suit property was compulsorily acquired through gazette notices Nos. 4260 and 4261 and submitted that his prayer for permanent injunction to restrain the plaintiff from invading, encroaching, trespassing, interfering, constructing or in any way dealing with the suit property is a none starter and unsustainable.
63. According to the plaintiff, what is in contention is whether the Government through gazette notices Nos. 4260 and 4261 intended to and indeed acquired the entire suit property measuring 0.7 ha together with the improvements thereon.
64. Concerning that issue, reference is made to Sections 3, 6(2) and 7 of the Land Acquisition Act (repealed) and submitted that the intention of the Commissioner of lands, at the time of acquisition of the suit property, is to be determined on the basis of gazette notices Nos. 4260 and 4261 of 4th October 1985 and not letters written by third parties to the acquisition process.
65. Based on the information/evidence contained in the gazette notices and the compensation matrices (Pexbt 2(a) and 2(c)), it is submitted that the Government acquired the entire suit property and all the developments thereon.
66. With regard to the 3rd issue, reference is made to the provisions of Article 40(3) and Article 47 of *the Constitution* and the evidence of P.W.2 and D.W.2 which shows that all persons whose properties were listed for compulsory acquisition were invited for inquiry vide gazette notice No. 4261 and for assessment of the value of their properties and submitted that the defendant was afforded a chance to be heard and challenge the award but failed to do so.
67. Pointing out that the report relied on by the defendant in support of his claim that the suit property was undervalued was done long after the suit property was acquired, based on the valuation principles espoused in the cases of Patrick Musimba V. National Land Commission & 4 Others (2016)E KLR and Katra Jama Issa V. Attorney General & 3 Others (2018)eKLR, it is submitted that the value of the suit property made by the Government was commensurate to the market value of the suit property at the time of acquisition and was determined using the applicable legal principles.
68. As to whether the defendant was promptly, adequately and justly compensated, it is submitted that the compensation made to the defendant was fair, just and equitable and done in accordance with the applicable law.
69. On what reliefs ought to be granted, in the circumstances, it is submitted that the defendant has failed to prove his defence and counterclaim and that, as a result, his defence and counterclaim ought to be dismissed with costs to the plaintiff.
70. The plaintiff is also said to be entitled to all the reliefs sought in the plaint.

Defendants Submissions

71. In his submissions filed on 28th July 2023, the defendant has given an overview of the pleadings filed and evidence adduced in this case and submitted that the only issue arising from the pleadings and the evidence is whether the Government of Kenya compulsorily acquired the entire suit property or merely a portion thereof.



72. Concerning that issue, it inter alia submitted that it's not in dispute that the suit property was compulsorily acquired by the Government through gazette notice number 4260 and 4261 of 4th October 1985; that following the acquisition of the suit property, the Government was under a legal obligation to adequately compensate the defendant which obligation it failed to discharge leading to surrender of 0.2ha of the suit property to the defendant after the defendant complained to the authorities, District Commissioner, Keiyo and the District Surveyor, Keiyo.
73. The reversion of a portion of the suit property to the defendant is said to have been proved through letters produced by the defendant in evidence.
74. It is reiterated that the defendant has demonstrated that the Government had initially acquired 0.7ha of the suit property before surrendering back 0.2ha from the suit property to the defendant leaving 0.5ha for the plaintiff.
75. Arising from the foregoing factual situation, it is submitted that the plaintiff's attempt to forcefully evict the defendant from the suit property is illegal, null and void.

Analysis and determination

76. From the pleadings filed in this matter and the submissions filed by the defendant, it is conceded that the suit property was compulsorily acquired by the Government for expansion of the plaintiff college.
77. The only issue arising from the pleadings, evidence and the submissions is whether a portion of the acquired property was reverted to the defendant by Government as contended by the defendant. Tied to the issue of reversion of a portion of the suit property to the defendant, is the issue as to whether the right procedure was used in the alleged reversion of the suit property to the defendant.
78. Concerning that issue, the defendant relied on the letter allegedly written to him by the DC, Keiyo, dated 30th June, 2004. The authenticity of that letter and the circumstances surrounding it's writing, if it was ever written by the officer purported to have written it, was not vouched for by the defendant. Concerning the other letters relied on in support of the defendant's claim that a portion of his compulsorily acquired land was reverted to him, it is noted that defendant addressed his complaint concerning the compensation payable to him to persons who lacked power to deal with the issue presented to them. Under the Land Acquisition Act, the power to deal with issues concerning compensation arising out of compulsory acquisition fell within the mandate of the Commissioner for Lands and/or the Land Acquisition Tribunal and not the District Commissioner.
79. It is trite law that anything done without authority is a nullity. In that regard see the case of Republic v. Laikipia West District Rumuruti Division Land Disputes Tribunal & 2 Others Ex parte Joseph Mburu Kimani where it was held:-

“ Any action done without jurisdiction is in law a nullity, that is to say of no legal force. As such it could not and was not validated by its adoption by the lower court”
80. Having been acquired for public use the suit property was not available for re-allocation or for private use. In that regard see the case of Town Council of Awendo v. Nelson O Onyango & 13 Others; Abdul Malik Mohamed & 178 others (Interested Parties) (2019)e KLR where the Supreme Court stated:-

“We begin by reasserting the long held principle that land which has been compulsorily acquired, must be used for the purpose for which it was acquired. If for example, after compulsorily acquiring the land, the Government or any of its agencies, proceeds to allocate the said land to individuals or other entities, for their private benefit, in total disregard of the



public purpose, such allocation would not confer good title to the allottees. Such was the holding in *Niaz Mohammed v. Commissioner for Lands & 4 others* (1996)e KLR in which Waki J., as he then was rendered himself thus:-

“I am not persuaded by the argument that upon compulsorily acquisition of land and consequent vesting of that land in Government, then the land falls to be used by the Government in any matter it desires. There is plainly no such Carte Blanche intended in the provisions of the law...The land must be used, subsequent to the acquisition, for a lawful purpose, as I see it, the only lawful purpose is the one for which it was intended.”

81. In applying the above quoted holding to the circumstances of this case, I do find the purported reversion or re-allocation of a portion of the suit property to the defendant to have been not only unprocedural but also unlawful and null and void ab initio.
82. The upshot of the foregoing is that the plaintiff has made a case for being granted the orders sought in the plaint dated 24th January 2018 which I hereby grant it as sought.
83. Concerning the prayer for damages, considering the long period of time the plaintiff has been denied use of the suit property and the fact that the defendant has been deriving benefits from his unlawful use of the suit property in the form of Owner Occupier allowance, rent and unlawful use and occupation of the suit property, I assess damages payable to the plaintiff at two million five hundred thousand shillings (2,500,000/-). The assessed damages shall attract interest at court rate from the time of delivery of this judgment until the time of payment in full.
84. I also award the plaintiff costs of the main suit and the counterclaim.
85. Orders accordingly.

DATED, SIGNED AND DELIVERED AT ITEN THIS 26TH DAY OF SEPTEMBER, 2023

L. N. WAITHAKA

JUDGE

Judgment delivered virtually in the presence of:-

No appearance for the plaintiff

No appearance for the defendants Court Assistant - Christine

