



Muriithi v National Land Commission & another; Githinji & another (Third party) (Environment & Land Case 784 of 2013) [2023] KEELC 20856 (KLR) (19 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20856 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 784 OF 2013
OA ANGOTE, J
OCTOBER 19, 2023**

BETWEEN

PETER NJIRU MURIITHI PLAINTIFF

AND

THE NATIONAL LAND COMMISSION 1ST DEFENDANT

THE HONOURABLE ATTORNEY GENERAL 2ND DEFENDANT

AND

FRANCIS NG'ANGA' GITHINJI THIRD PARTY

ESTHER NDATA GITHINJI THIRD PARTY

JUDGMENT

1. Vide an Amended Plaintiff dated 13th October, 2015, the Plaintiff instituted this suit against the Defendants severally and jointly seeking the following reliefs;
 - a. Kshs 80,000,000 being the value of Land Reference No Dagoretti/ Mutuini/74.
 - b. General and special damages.
 - c. Costs; and
 - d. Interest.
2. It is the Plaintiff's case that he was at all material times the lawfully registered proprietor of a parcel of land known as Dagoretti/ Mutuini/740 measuring 0.83 Hectares (hereinafter the suit property); that the suit property was originally part of Dagoretti/Mutuini/556 before its sub-division resulting into



- two parcels, the suit property and Dagoretti/Mutuini/741 and that sometime in 2010, he conducted a search on the suit property as he intended to sell the same.
3. It was averred in the Plaintiff that he was advised that a restriction had been imposed on the title by the Chief Land Registrar forbidding any dealings in the land until 0.3552Ha of the same was surrendered to the Government of Kenya and that the aforesaid portion was taken without compensation, reasonable justification and contrary to the procedure for compulsory acquisition as laid out in Section 107 of the Land Act to pave way for the construction of the Southern Bypass.
 4. It was averred by the Plaintiff that the Defendants' actions aforesaid have occasioned him loss and damage and denied him the liberty to deal with his property as he desires; that the Defendants are guilty of malice and lack of reasonable and probable cause, the particulars of which include: acquiring his property without following due procedure, trespassing, destroying and wasting his property in particular destroying the fence and the beacons and denying him the liberty to deal with his property.
 5. According to the Plaintiff, sometime in 2014, he learned through Gazette Notice of 28th November, 2014 that the remaining piece of his land had purportedly been acquired; that the same was undertaken without following the proper procedure for compulsory acquisition set out in Section 107 of the Land Act and without him having been paid any compensation.
 6. He averred that at all material times, the 1st Defendant was under the control of the 2nd Defendant in the performance of their duties; that as a result of the Defendants' actions aforesaid, he has suffered loss and damage and the particulars of special damages include loss of use of affected part of his land and loss due to waste and destruction of land.
 7. The 1st Defendant filed a Defence on 2nd November, 2016 in which it denied the assertions as set out in the Plaintiff stating that at the time of the acquisition of the 0.3552Ha from parcel number Dagoretti/Mutuini/740, the sub-division that split parcel number Dagoretti/Mutuini/556 into Dagoretti/Mutuini/740 and 741 was not reflected on the map as it was not amended.
 8. The 1st Defendant averred that subsequently, when it was time to carry out compensation, it dealt with the land as though it was undivided and paid the sum owed to the original owner of parcel number Dagoretti/Mutuini/556; that when the assigned valuer learned that the sub-division had happened and the wrong party had been paid, the 1st Defendant commenced the process of recovering the sum of money from the party wrongfully paid and that the 1st Defendant shall to that end be filing a Third Party notice against the party who was wrongly compensated.
 9. The 1st Defendant, while admitting that it earmarked the rest of parcel number Dagoretti/Mutuini/740 for acquisition through a Gazette Notice dated 28th November, 2014, denied any alleged impropriety. The 1st Defendant maintained that the proper procedures were followed with regard to acquisition of the suit property and that when it was carrying out the process of further acquisition of the suit property, the Plaintiff did not make it to the inquiries stage which is when the rightful owner is ascertained and as such, the rightful owner could not be ascertained at the time.
 10. It was averred by the Defendant that it went ahead and carried out valuation of the land and made an award which the Plaintiff did not accept nor reject and that the compensation can only be paid once an award has been accepted.
 11. Simultaneously with the Defence, the 1st Defendant issued a Third Party Notice, as against the Third Parties claiming full indemnity therefrom. It is the 1st Defendant's case that the records indicate that the Third Parties were paid full compensation for the acquisition of a portion of the property previously known as parcel number Dagoretti/ Mutuini/556.



12. According to the 1st Defendant, at the time 0.3552 Ha portion of parcel of land number Dagoretti/Mutuini/740 was compulsorily acquired for the construction of the Southern Bypass, the sub-division of the land that created parcel number Dagoretti/Mutuini/556 and parcel number Number Dagoretti Mutuini/741 were not reflected in the map and that the 1st Defendant dealt with it as an original un-subdivided share.
13. It was averred that it was not until the award of Kshs 4, 310,900 was made to the Third Parties that it realized it had made a mistake, and that it seeks from the Third Parties, a refund of a portion of the sum paid being Kshs 1, 155, 888/= together with interest for two years (334, 770) totaling Kshs 1, 450,660 and that as a result thereof, the Third Parties are the proper parties to meet the Plaintiff's claim as regards to the acquisition of the suit property.
14. The Third Parties filed a Defence to the Third Party Notice in which they stated that they are the Administrators of the Estate of the late Daniel Githinji Mutuini who was the registered proprietor of parcel of land known as Dagoretti/Mutuini/741 previously known as Dagoretti/Mutuini/556 and that the sub-division of parcel number Dagoretti/Mutuini/556 was effected in the early 80's and the same resulted into two parcels, namely Dagoretti/Mutuini/741 owned by the deceased and Dagoretti/Mutuini/740 owned by the Plaintiff.
15. It was averred by the Third Parties that the two parcels of land have had distinct titles since the early eighties; that on 28th March, 2008, they received a notice of possession informing them that the Government had compulsorily acquired 1.350Ha from Dagoretti/Mutuini/556; that the notice further required them to surrender their land title deeds to the Commissioner of Lands for purposes of amendment and that they duly surrendered their title deed.
16. It was averred by the Third Parties that parcel number Dagoretti/ Mutuini/556 was not in existence having been long sub-divided; that they surrendered their title deed for Dagorreti/Mutuini/741 which was subjected to verification; that they received a letter informing them that they were to receive compensation of Kshs 5,893, 400 and that from this sum they would receive Kshs 4,310,900 while Deliverance Church, which had erected a structure on the parcel, would received Kshs 1, 567, 500.
17. It is the Third Parties' case that at all times relevant to the suit, the Plaintiff was the registered owner of parcel number Dagoretti/Mutuini/740, a fact that was brought to the attention of the relevant authorities at the time of the verification of the title documents and that the 1st Defendant requested for a refund of Kshs 1, 450, 660 purportedly erroneously paid to them.
18. They asserted that they are not proper parties to meet the Plaintiff's claim as they were never in any form of agency contract with the Plaintiff in regard to the dealings of Dagoretti/Mutuini/740; that the Plaintiff's claim as against the Defendant is Kshs 80,000,000 for 0.3552Ha while they received Kshs 4, 310,900 for more than 1 Ha and that the Plaintiff's demand is highly disproportional to what is claimed.

Hearing and Evidence

19. The Plaintiff, as PW1, adopted his witness statement dated 29th October, 2019 as his evidence in chief and the bundle of documents of an even date as PExhb1. It was his testimony that he seeks to be compensated for the compulsory acquisition of his land; that parcel 740 is a sub-division of parcel 556 and that the sub-division was undertaken in 1989.
20. PW1 testified that before then, the parcel was owned by him and Njoroge; that in 2006, the Government acquired his land; that he informed the surveyor about the sub-division in the year 2005; that he was never served with any notice by the Ministry of Lands nor with any award by the



- Government; that he was never paid for his land; that the portion that remained from his parcel 740 was acquired in 2014 and that they never paid him because they wanted him to withdraw the suit which he declined.
21. During cross-examination, it was his testimony that he has not been paid for either the 1st or 2nd acquisition; that NLC informed him that they had paid his neighbours, the descendants of his former partner; that this is as regards the first acquisition but they have never discussed the second acquisition and that they told him they valued the land in 2004.
 22. It was the evidence of PW1 that the valuation report adduced is with respect to the second acquisition which he was informed about in 2014; that the valuation was done when the matter was already in Court; that it shows the date of inspection as 27th November, 2014 and that he is aware of the Gazette Notice that they used to acquire the land for the second time.
 23. PW1 testified that the gazette notice for acquisition of the suit property is dated 28th November, 2014; that they called him earlier for a meeting and they told him to go and see the Chief; that at the Chief's office, they asked him to withdraw this suit; that they told him that the original road was being expanded; that his partner owned parcel 741 and that he doesn't know if it was affected and how much was paid to him.
 24. On re-examination, he stated that he was never formally informed about the first acquisition; that he was equally never served with any notice regarding the second acquisition; that the 2014 valuation report is for purposes of his claim which is for parcel 740 all of which has been acquired and that they never informed him in writing that they had paid his neighbours.
 25. It was averred by PW1 that he went to the lands office and informed them that parcel 556 does not exist it having been sub divided in 1989; that ownership documents should have been adduced; that he was never consulted and that after he learned about this, he went and inquired from his neighbor who informed him about the payment for parcels number 740 and not 741
 26. DW1 was Jocelyn Makena, the Director of Valuation and Taxation at the National Land Commission, the 1st Defendant. She adopted her witness statement dated 26th October, 2022 as her evidence in chief. She produced the supplementary list of documents dated 26th October, 2022 as DEXB1 and the original list of documents dated 12th November, 2019 as DExhb 2.
 27. In brief, her statement was that the suit land was partially acquired vide Gazette Notice No 3788 of 26th May, 2006; that the records held by the Ministry of Lands and Physical Planning during this acquisition(0.3552 hectares) did not indicate that parcel number Dagoretti/Mutuini/556 had been sub-divided resulting in the creation of the suit property and parcel 741 and that due to the above mishap, when inquiries were conducted and an award offered, it was made to Esther Nduta Githinji and Francis Ng'ang'a Githinji who accepted the same as the Administrators of the Estate of the Late Daniel Githinji Munyugi, the proprietor of parcel number Dagoretti/Mutuini/556.
 28. It was the evidence of DW1 that they accepted, received and acknowledged receipt of the compensation of parcel number Dagoretti/Mutuini/556; that when the RIM was amended and records updated, it was established that the original piece of land had been sub-divided and steps were taken to begin recovery of some of the compensation that was paid to the Third Parties for Dagoretti/ Mutuini/556 that was rightfully owed to the Plaintiff.
 29. According to DW1, vide a letter dated 17th March, 2014, the Third Parties were informed that an erroneous payment had been made and that out of the compensation paid for Dagoretti/Mutuini/556, a fraction was owed to the proprietor of Dagoretti/Mutuini/740, a portion of which had been acquired



and were requested to refund Kshs 1, 155,888/= and interest of 15% (Kshs 334,770/=) for two years as per the Land Act making the total sum to be refunded o be Kshs 1, 450,660/=.

30. DW1 stated that in response, Mr Francis Ng'ang'a Githinji, wrote a letter acknowledging receipt of the compensation funds in respect of Dagoretti/Mutuini/556 and proposed a repayment plan and that in view of the foregoing, the Third Parties are the correct parties to satisfy the Plaintiff's claim. DW1 stated that as regards the remainder of parcel of land Dagoretti/Mutuini/740, 0.546 Ha was initially marked for acquisition and was valued at Kshs 3, 102, 700 and later on a corrigendum was published in Gazette Notice no 8566 of 28th November, 2014 for the acquisition of 0.4057 Ha which was valued at Kshs 22, 881,227.
31. It was averred that the aforesaid notice named the Plaintiff as the proprietor of the suit land as well as giving the date, time and place of the inquiry hearings of claims by persons to be compensated; that the Plaintiff did not, either by himself or through a representative attend the hearings and that subsequently, the Commission was unable to contact him and offer him the award.
32. According to DW2, the 1st Defendant still holds the award to date; that as regards the valuation presented by the Plaintiff, dated the 9th February, 2015, the same should have been brought at the inquiry stage; that further, the valuation report states under its general remarks that it is hard to tell the exact extent of the plot; that the valuation report does not provide a breakdown showing the acquired areas and as a result of the foregoing, the Court cannot rely on the same.
33. On cross-examination, it was her evidence that she is aware of the law pertaining to compulsory acquisition and the Commissioner of Lands was responsible for acquisition of land; that NLC has now taken up the responsibilities of the Comissioner of Lands; that there were two acquisitions in 2006 and 2014; that in 2006, the relevant law was the Land Acquisition Act but she could not recall the procedure thereunder and that the Commissioner of Lands ought to have gazzetted the notice of intention of acquisition of the suit land.
34. Dw2 was Charles Ngetich, a Lands Registrar working with the Ministry of Lands stationed at Ardhi House. He adopted his witness statement dated 24th March, 2022. Briefly, it was his evidence that the government procedurally acquired the contested portion of Dagoretti/Mutuni/740 and are subsequently not trespassers and that the government acquired 1.354o hectares of parcel of land Dagoretti/Mutuni 556 for road expansion.
35. It was the evidence of DW2 that on 26th May, 2006, the then Commissioner of Lands caused to be published in the Kenya Gazzette, Gazzete Notice No 3788 of its intention to acquire land in pursuance of Section 6(2) of the repealed Land Acquisition Act for purposes of the construction of the Nairobi Southern By-pass and that at the time of mapping the acquisition, only Dagoretti/Mutuni/556 was effected onto the Registry Index Map and was captured in the land acquisition drawings.
36. According to DW2, upon publication of the Gazette Notice No 3788, the interested persons were invited for hearings of claims of compensation; that on 3rd January, 2008, the Chief Engineer roads, on the advice of the Commissioner of Lands, upon completion of inspections, inquiries, valuations and issuances of awards, forwarded cheques for payment schedules to the Commissioner of Lands.
37. It was the evidence of DW2 that Kshs 1, 567, 500 was forwarded to Deliverance Church being compensation for improvements of Dagoretti/Mutuni/556 whereas Kshs 4, 310,900 was paid to the Administrators of the Estate of the Late Githinji Munyugi, that is Esther Nduta Githinji and Francis Nduta Githinji, being compensation for the land and that the aforesaid Administrators received the entire sum knowing that it was for the whole portion of Dagoretti/Mutuni/556 which had been sub-divided vide cheque number 9794.



38. It was stated that upon amendment of the RIM, it was found that about 0.3552 out of Dagorreti/Mutuni/740 was acquired for road construction; that once the cheque was released to Esther Nduta Githinji and Francis Nga'nga Githinji, the Commissioner of Lands released the entire compensation payable for the 1.3450 hectares acquired and that it is clear that the government paid the entire sum without delay at the time of acquisition and the Plaintiff should pursue the Third Parties for any claim.
39. DW3 was Francis Nga'nga Githinji. He adopted his witness statement dated 24th November, 2021. It was his evidence that the late Daniel Githinji Munyugi was the registered proprietor of Dagoretti/Mutuini/741 whose title was issued in 1989 and that the government later compulsorily acquired part of the property.
40. DW3 testified that Gazette Notice referred to parcel 556 owed by the Plaintiff and the late Daniel Munyugi and that 1.3540Ha was to be acquired; that the aforesaid title number was no longer in existence having been sub-divided in the early eighties and two title deeds issued for Dagoretti/Mutuini/740 & 741 and that at all times, it was made clear that their land was parcel number 741.

Submissions

41. The Plaintiff, through his Counsel, submitted that what is in issue is not the Plaintiff's proprietorship of the suit property, but whether the compulsory acquisition of his property by the Commissioner for Lands in 2006 and the National Land Commission in 2014 was lawful.
42. Counsel submitted that Article 40 of the Constitution protects the rights to property; that Article 40(3) is unequivocal that the State cannot deprive a person of their property other than by acquisition of land or interest in the land for a public purpose or in the public interest and that the compulsory acquisition must be carried out in accordance with the Constitution and the relevant Act of Parliament and requires prompt payment in full, and just compensation.
43. It was submitted that when the first portion of the Plaintiff's property was acquired in 2006, the relevant statutory framework for compulsory acquisition was the Land Acquisition Act which set out the mandatory requirements of compulsory acquisition and that upon repeal of the Land Acquisition Act, this statutory framework for compulsory acquisition was retained in Part VIII of the Land Act No 6 of 2012.
44. It was Counsel's submission that in this case, the evidence leaves no doubt that the Commissioner for Lands and the National Land Commission did not follow the laid down statutory procedure in acquiring portions of the Plaintiff's property in 2006 and in 2014 respectively and that the acquisitions were completely flawed, illegal and unlawful.
45. In particular, it was submitted, there were no preliminary notices, notices to the Plaintiff either of intent to acquire or as regards the inquiries; nor notices of the awards.
46. It was submitted that the compulsory acquisition of the Plaintiff's property was effectively completed in 2010 when KENHA occupied the Plaintiff's land and began constructing the Bypass thereon and that the Defendants' allegations that monies to the Third Parties paid on 28th March 2008 included their compensation is not viable because as the custodian of land records, the Commissioner of Lands is deemed to be aware of the subdivision process.
47. Counsel submitted that the Plaintiff is entitled to the orders sought; that as stated by the Court in Kanini Farm Ltd v Commissioner of Lands [1984] eKLR, and affirmed by the Supreme Court in Attorney General v Zinj Limited(supra), it is settled law that compensation for compulsory acquisition of land should be based on market value of the property.



48. Counsel submitted that the Plaintiff has produced a valuation report showing the market value of the property as Kshs 80,000,000; that the Defendants did not produce any independent valuations to challenge the Plaintiff's report and that their only attempt to contest the valuation was that the beacons could not be identified, a spurious argument because the beacons were damaged by the Defendants' agents for whom the land was acquired and who remained in possession of the property between 2010 and 2014.
49. Counsel submitted that the Plaintiff is entitled to both general and special damages taking into account the harm he has suffered as a result of the illegal acquisition of his property without prompt and just payment and considering the amount of time he has been deprived of his property being 17 years.
50. As regards special damages, it was submitted, the same should be assessed at Kshs 12, 000,000 being the statutory addition on the market value of the suit property which is valued at Kshs. 80,000,000 and that the Plaintiff is entitled to damages amounting to 15% of the market value of the property as compensation for the disturbance created by the acquisition of his land to which the Plaintiff was entitled to pursuant to the existing law at the time of the institution of this suit.
51. The 1st Defendant's counsel submitted that by way of Gazzete Notice 3788 dated 26th May, 2006, the Commissioner of Lands published a Notice of Intention to acquire 1.354oHa from Dagorreti/Mutuini/556 with the registered owner shown as Peter Njiru/Githinji Munyugi.
52. Counsel submitted that after inquiries were conducted, an award of Kshs 4, 310,900/= was offered and accepted by Esther Nduta Githinji and Francis Nga'nga; that whereas the Third Party's witness gave evidence in Court that he had never seen the title to parcel number 556, they nonetheless gave no explanation as to why they were paid for the parcel number 556.
53. It was submitted that the RIM did not reflect the sub-division of parcel number 556 to 741 and 742; and that this, together with all the evidence adduced, shows that the Third Parties were erroneously paid compensation which was to be paid to the Plaintiff.
54. It was submitted that the Plaintiff's valuation does not represent a reliable accurate value of the land; that the report ideally should have been presented before the Commissioner of Lands when it was conducting inquiries; and that further, the report states under its general remarks that it is a bit hard to tell the exact extent of the plot because of the newly constructed southern by-pass and the valuation report does not provide a breakdown showing the acquired area adopted in the valuation of land.
55. It was submitted by the 1st Defendant's advocate that the 1st Defendant on the other hand produced valuation workings for the Nairobi Southern By-pass; that nonetheless, if a new valuation was to be done, it would have to be done in strict adherence to the Land Act, the Land Value Index(Amendment Act) and the Land (Assessment of just compensation) Act.
56. The Third Party's Counsel submitted that three facts are undisputed, to wit; the Plaintiff is the registered owner of land parcel number Dagoretti/Mutuini/740 while the late Daniel Githinji Munyugi was the proprietor of land parcel number Dagoretti/Mutuini/741; that both parcels were compulsorily acquired by the government and that both parcels emanated from the subdivision of parcel number Dagoretti/Mutuini/556.
57. He submitted that title to parcel number 556 did not exist at the time of acquisition and payments; that the Plaintiff's title was issued in January 1989 whereas the Gazette Notice in respect to the acquisition is dated 26th May 2006, over 17 years after the subdivision of land parcel 556; that it being undisputed that land parcel Dagorreti/Mutuini/556 did not exist, it is impossible to acquire and compensate for a non-



existing property and that the Third Parties were compensated for their property which is Dagoretti/Mutuini /741.

Analysis and Determination

58. Having carefully considered the pleadings, testimonies and submissions by the parties herein, the following arise as the issues for determination;
- i. Whether the Defendants breached statutory requirements in the compulsory acquisition of the suit property; and if so,
 - ii. What remedies is the Plaintiff entitled to?
59. The Plaintiff instituted this suit seeking inter-alia, Kshs 80,000,000 being the alleged value of parcel of land number Dagoretti/Mutuini/740; general damages; costs and interests. It is the Plaintiff's case that he has at all material times been the registered proprietor of parcel of Land Known as Dagoretti/Mutuini/740; that in 2006 and 2014, the 1st Defendant compulsorily acquired his property and that in both instances, the acquisitions were done without due process and without compensation.
60. In support of his claim, the Plaintiff adduced into evidence a copy of Gazette Notice No 3788 of 26th May, 2006, a copy of Title deed for Dagoretti/Mutuini/740; copies of correspondence from Kenya National Highway Authority Director Generals to himself dated 22nd March, 2011 and his letter to the Commissioner of Lands dated 23rd March, 2011.
61. The Plaintiff also produced a copy of the Mutation form of Title Dagoretti/Mutuini/740; a copy of demand letter to KENHA and Commissioner of Lands; a copy of award in respect of part of parcel number 556; a copy of official search in respect of Dagoretti/Mutuini/740 dated 22nd February, 2014; a copy of a letter from the NLC to the Third Parties dated 17th March, 2014; a Gazette Notice No 8565 dated 28th November, 2014 and a valuation report in respect of Dagoretti/Mutuini/740 dated 9th February, 2015.
62. The 1st Defendant admitted having compulsorily acquired the Plaintiff's property, parcel number 741. It is their case that they acquired the same in two phases; that as regards the first phase of acquisition in respect of 0.3552Ha, at the time of the acquisition, the sub-division that created parcel 741, was not reflected in the map and subsequently they dealt with the property as though it was not sub-divided, paying the compensation to the registered owner of parcel number 556.
63. It was the 1st Defendant's case that as regards the second phase of the acquisition, they were unable to trace the Plaintiff because he did not make it to the inquiry stage of the compensation process; that they went ahead and carried out valuation of the land and made an award which the Plaintiff did not accept or reject and that in any event, they are holding the compensation sum in their account.
64. The 1st Defendant adduced into evidence a copy of the acknowledgement form signed by the Third Parties; a copy of the letter dated 17th March, 2014 from NLC to the Third Parties and the response thereto; Gazette Notice No 8566 of 28th November, 2014; the letter from DG-KENHA to Francis Githinji dated 19th September, 2014, payment schedule dated 25th April, 2007; the Award dated 20th December, 2013 made to Peter Muriithi; Valuation Workings for the Southern Bypass and Gazette Notice 5866 of 27th November, 2014
65. The Third Parties assert that they are the owners of parcel number Dagoretti/Mutuini/741, a sub-division of L.R Dagoretti/Mutuini/ 556; that they received a notice of possession dated 28th March,



- 2008 informing them that the Government had compulsorily acquired 1.350Ha from parcel number 556 and that as the same was not in existence, they surrendered their title in respect of parcel 741.
66. It was the evidence of the Third Parties that they were paid monies in respect of the portion that was acquired from their parcel and are not proper parties to answer the Plaintiff's claim as against the Defendants.
67. The Third Parties adduced into evidence a copy of the Title Deed for L.R Dagoretti/Mutuini/741; a copy of the letter from Chief Mutuini location dated 3rd October, 2006; a copy of undated handwritten letter from Francis Nganga to the Assistant Commissioner of Lands; a letter from NLC dated 17th March, 2014, a copy of an undated letter from Francis Nganga and Esther Nduta Githinji and an Award letter dated 15th November, 2006.
68. The right to property is a fundamental and constitutionally guaranteed right. This protection as recognized in the retired Constitution was carried over under Article 40 of the Constitution of Kenya, 2010. Article 40 (1) provides as follows:
- “Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-
- i. of any description; and
 - ii. in any part of Kenya.
69. Whereas Article 40 (3) provides as follows;
- “The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-
- i. Results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
 - ii. Is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that-
 - iii. Requires prompt payment in full, of just compensation to the person; and
 - iv. Allows any person who has an interest in, or right over, that property a right of access to a court of law.”
70. It is apparent from the foregoing that whereas Article 40 aforesaid enshrines the right to property, it also recognizes the state's authority for compulsory land acquisition, subject to strict legal safeguards and the requirement that such acquisition genuinely serves the public interest. This balance between individual property rights and the public good is a crucial aspect of the constitutional framework.
71. Top of Form
72. The law in respect of compulsory acquisition was first codified in the Land Acquisition Act (repealed), and thereafter the Land Act 2012. Both laws remain applicable and deal with acquisitions undertaken within their respective regimes.
73. The dispute herein revolves around two acquisitions undertaken in 2008 and 2014. These respectively fall under the Land Acquisition Act and the Land Act, 2012. The Court will first outline the procedures as set out under the two regimes relevant to the matter at hand.



74. Under the Land Acquisition Act, Part II thereof, under the head (Procedure for Compulsory Acquisition) of the Act dealt with preliminaries to acquisition. Section 3 and 6 called for the publication of a notice in the Gazette and the delivery of a copy of the notice to any person, with interest in the land, which land was identified for acquisition.
75. Section 8 provided for just, prompt compensation to all persons interested in the land while Section 9 outlined the inquiry process to be undertaken not earlier than 30 days and not later than twelve months after the publication of the notice of intention to acquire.
76. Under this Act, the Commissioner of Lands was mandated to publish in the Gazette at least fifteen days before the inquiry, a notice of the inquiry, and serve the same to every person who appeared to him to be interested or who claims to be interested in the land, which notice called on the aforesaid persons interested in the land to provide a written claim to the compensation.
77. During the inquiry hearing, the Commissioner of Lands was required to make full inquiry into and determine the persons interested in the land; make full inquiry into the value of the land, and determine that value in accordance with the principles set out in the Schedule; and determine, in accordance with the principles set out in the Schedule, what compensation is payable to each of the persons whom he has determined to be interested in the land.
78. Section 10 provided that upon the conclusion of the inquiry, the Commissioner would prepare a written Award, awarding a separate Award of compensation to each person determined to be interested in the land. Section 10(4) provided that where the property was owned by two or more persons as tenants in common, the award would state the amount of compensation awarded in respect of that interest; and the shares in which it is payable to those persons.
79. Section 11, stated that on making an Award, the Commissioner would serve on each person whom he determined to be interested in the land a notice of the Award and offer of compensation.
80. Under the [Land Act](#) 2012, the National Land Commission is mandated to conduct the process of acquisition and the award of compensation. The Act provisions largely mirror those in the Land Acquisition Act. Section 107 of the Act provides for the publishing of a preliminary notice of acquisition in the Gazette and delivery of the same to the Registrar and every person interested in the land.
81. Section 111 re-affirms that once acquisition has been done, just compensation shall be paid promptly in full to all persons whose interests in the land have been determined whereas Section 112 of the [Land Act](#) restates the provisions of Section 9 of the Land Acquisition Act with respect to the conduct of an inquiry as to compensation. Similarly, Section 113 of the [Land Act](#) sets out the substantive law as to Award of compensation as captured in Section 10 of the Land Acquisition Act. Section 114 provides for a notice of award after the making of the Award.
82. Under Section 115, where the award is not given on account of the grounds set thereunder, to wit; no competent person to receive the award, rejection or dispute regarding the award, then the payment shall be made into a special compensation account held by NLC and which NLC shall pay interest on the amount awarded at the prevailing bank rates from the time of taking possession until the time of payment and such Award is not subject to taxation.



83. The Courts have affirmed that the elaborate process of compulsory acquisition set out in the law must be adhered to. In *Commissioner of Lands & Another v Coastal Aquaculture Limited* [1997] eKLR the Court of Appeal was unequivocal in this respect stating thus;

“In Kenya where the statutory power to compulsorily acquire a person's land against his will is first derived from the carefully worded provisions of the *Constitution* itself; where land is a most sensitive issue; and where in effect, the land in question has already been compulsorily acquired, though not taken possession of, by the time the interested party is notified so as to make his claim for compensation, there is all the more reason to ensure that all procedures related to compulsory acquisition must not only, be strictly pursued, but must also, appear to be so on the face of the inquiry.”

84. To begin with, it is undisputed that the Plaintiff and the Third Parties are the owners of parcels Dagoretti/Mutuini/740 and 741 respectively. The Third Parties, in this regard, are the Administrators of the Estate of the Late Daniel Githinji Munyugi, the registered proprietor of parcel 741.

85. It is equally undisputed that the aforesaid parcels were created sometime in the year 1989 after the sub-division of Dagoretti/Mutuini/556. The contention revolves around the manner of compulsory acquisition undertaken by the 1st Defendant.

86. The Plaintiff takes the position that the 1st Defendant compulsorily acquired his property and has not compensated him. The 1st Defendant concedes to this position, stating that the payment for acquisition of the first portion of the Plaintiff's property was erroneously made to Third Parties and still holds the funds in respect of the acquisition of the second portion.

87. The evidence before this Court shows that vide a Gazette Notice No 3788, dated the 26th May, 2006, the Commissioner of Lands published its intent to acquire 1.3540Ha of Mutuini/Sub location/556 belonging to Peter Muriithi/Githinji Munyugi for purposes of constructing the Southern By-pass. Vide the Gazette Notice No 3789, the Commissioner of Lands gave notice for the inquiry process in this respect which was to be undertaken on 27th July, 2006.

88. The Third Parties admittedly attended the inquiries and were compensated the sum of Kshs 5,878,400. In undertaking this acquisition, the 1st Defendant claims that they realized that out of the 1.3540, 0.3552Ha belonged to the Plaintiff and for which they had paid the Third Parties.

89. Indeed, this admission of having mis-identified the property and subsequently paying the Third Parties for the Plaintiff's parcel of land together with the Plaintiff's unrebutted evidence that he was totally unaware of and had no input as regards the acquisition of his portion of the aforesaid property leaves no question as to the propriety of the process. It was unprocedural.

90. The 1st Defendant undertook a second acquisition of the remainder of the Plaintiffs property in 2014. This too, the Plaintiff maintains was unprocedural. In this respect, the only evidence before this Court is the Gazette Notice No 8566 of 2014 dated the 28th November, 2014. This notice is an addendum indicating that the 1st Defendant intends to acquire parcel 0.4057 Ha of parcel 740 belonging to the Plaintiff.

91. No evidence has been adduced as regards any notices pursuant to Sections 107 Or 112 of the *Land Act*. Indeed, this position was affirmed by DW1 on cross-examination. Having failed to prove service of any of the requisite notices on the Plaintiff, to wit, notice of intent to inquire the property and the notice as regards the inquiries, the 1st Defendant cannot be heard to blame the Plaintiff for having not attended



- the inquiry process and subsequently their being unable to trace him to offer him a compensation award.
92. In view of the foregoing, this court finds that the manner in which the suit property was acquired was un-procedural, unlawful and was a violation of the Plaintiff's right to property.
93. It is not disputed that the Plaintiff is entitled to compensation for the acquisition of his property. The 1st Defendant states that it has the compensation funds in respect of the second acquisition and only awaits the Plaintiff's formal acceptance on the award. The only issue in this respect is the quantum of the compensation which will be discussed under the next head.
94. As regards the first acquisition, the 1st Defendant calls on the Third Parties to settle the same. It is their evidence that at the time of acquisition of the property, the records did not reflect the sub-division of parcel number 556 into parcels 740 and 741; that subsequently, out of the 1.3540 Ha acquired, 0.3552 Ha was from the Plaintiff's parcel number 740 and the value of the said portion is Kshs 1, 450, 660 which is due to the Plaintiff from the Third Parties.
95. It is concerning and quite problematic that the 1st Defendant's predecessor would undertake acquisition in respect of a non-existent parcel of land. Considering that the property was non-existent for more than 15 years prior to its alleged acquisition, the excuse that the records were not updated is not feasible considering that the Commissioner of Lands was the custodian of the land records.
96. Even if there was a genuine mistake as alluded to by the Defendants, there is no explanation as to why the Plaintiff, indicated to be a co-owner of the property, was not part of the process. The entire process points to gross negligence on the part of the Defendants.
97. So are the Third Parties liable to pay the Plaintiff? From the evidence adduced, the 1st Defendant claims from the Third Parties the sum of Kshs 1, 450,660. It has been shown through correspondence that the Third Parties were informed that they received compensation with respect of parcel number 556, knowing well that this property does not exist. The Third Parties should not have accepted any compensation until the question of the mis-identification of the property was rectified.
98. By doing so, they cannot now claim that the compensation was strictly in regard to their property parcel number 741. Nonetheless, the Plaintiff claims from the 1st Defendant Kshs 80,000,000 being the value of the entire property and have produced a valuation in this respect.
99. In doing so, they contest the valuation given to the parcel acquired in the first acquisition. Subsequently, the Third Parties cannot be called upon to answer the Plaintiff's claim in this regard. The 1st Defendant is at liberty to seek from the Third Parties any monies they deem to have resulted from an overpayment. Section 15 of the *Land Acquisition Act* stated as such in this respect;
- “ 15. Where a person has received any money by way of compensation awarded for an interest in the land being acquired, either in error or before it has been established that some other person is rightfully entitled to the interest, the Commissioner may, by notice in writing served on that person, require that person to refund to the Commissioner the amount received, and the amount shall be a debt due from that person to the Commissioner.”
100. Under both the *Land Acquisition Act* and the *Land Act*, the Commissioner of Lands, now the National Land Commission, is charged with the responsibility of calculating the compensation due to a person whose land is compulsorily acquired.



101. Under the repealed *Land Acquisition Act*, the applicable principles on assessment of compensation were found in the schedule to the 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: the market value of the land; damage sustained by severing part of the land from another land; damage sustained by reason of the acquisition injuriously affecting the land owner's other property, whether immovable or movable or his actual earnings; reasonable expenses incidental to change of residence or place of business; and damage genuinely resulting from diminution of the profits of the land between the date of gazettelement and the date of taking actual possession.
102. "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.
103. The *Land (Assessment of Just Compensation) Rules, 2017*, also sets out the factors to be considered in assessment of compensation. Section 6 provides that the Commission shall add a sum equal to fifteen per cent of the market value to the amount of compensation as compensation for disturbance. In the case of *Patrick Musimba v National Land Commission & 4 Others* [2016] eKLR, the Court dealing with the question of compensation stated thus;

"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 though 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."



104. 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.”
105. It has been stated that value, is a matter of fact, The Court of Appeal in *Chief Land Registrar & 4 Others v Nathan Tirop Koech & 4 Others* [2018] eKLR stated thus;
- “In the instant matter, the issue encompasses valuation of the suit property. The word 'value' means intrinsic worth, cost or price for sale of a thing/property. (See *Union of India v Bombay Tyre International Ltd.*, [1984] 1 S.C.C. 467 and *Gurbachan Singh v ShivalakRubber Industries*, A.I.R. 1996 S.C. 3057). Valuation is a question of fact and the value of property should be determined fairly and reasonably. However, the correct principle of valuation applicable to a given case is a question of law.”
106. The Court further stated;
- “In our view, valuation is basically a question of fact and this Court will be reluctant to interfere with the finding on such a question of fact if it is based on relevant material that is on record. We are cognizant that valuation is a technical and complex matter appropriately left to the wisdom of the experts...A court has duty to exercise an independent mind and determine if the valuation report is reasonable. The court is to undertake analysis and determine the accuracy, quality and appropriateness of the report, and ascertain relevance of data used, enquiries made and suitability of methods and techniques employed, and finally, the court is to determine whether the analysis, opinions and conclusions in the valuation report are reasonable.”
107. In the present case, the Defendants states that the first portion of land acquired was equivalent to Kshs 1, 450,660 while the second acquisition was worth Kshs 23, 881,227. The Plaintiff has vide its valuation report sets the Market Value of the entire property at Kshs 80,000,000.
108. Considering the valuation report by Centenary Valuers Limited adduced by the Plaintiff, it is noted that it took into account among others the area compulsorily acquired and plot description. Under general remarks its states that “currently, it is very hard to tell the exact extent of the plot because of the newly constructed by-pass”.
109. The Defendant has provided valuation workings for the parcel acquired in the second acquisition. It captures the specific parameters as set out in the *Land (Just Compensation) Rules*. Critically, it has comparables, all of which indicate that plots in the same area have been valued at Kshs 20,000,000 per acre.
110. Whereas the Plaintiff adduced his own report, he did not materially rebut the 1st Defendant’s valuation workings. In view of the foregoing, the Court will rely on the valuation workings by the 1st Defendant.
111. Vide their acquisition in 2014, the 1st Defendants acquired the entirety of the Plaintiffs property. The Court will therefore base the value of the entire property at Kshs 20 million per acre as set out in the 1st Defendants valuation workings. The Plaintiff’s property was 0.83Ha, which converts into 2.05



acres. The property is therefore worth Kshs 41,019,500. Add 15% statutory allowance, which is Kshs 6, 152,925 bringing the total to Kshs 47, 172, 425.

112. In the Ugandan case of *Jephtar & Sons Construction & Engineering Works Ltd v The Attorney General* HCT-00-CV-CS-0699-2006, the Court held that;

“...Compensatory damages, also called actual damages, are typically broken down into two broad categories: General and Special... General damages are given for losses that the law will presume are natural and probable consequence of a wrong. The general principle is that they are awarded to compensate the plaintiff, not as punishment to the defendant... The principle that emerges from numerous authorities, notably *Sietco v Noble Builders (U) Ltd* SCCA No 31 of 1995 is that where a person is entitled to a liquidated amount or specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing the suit...”

113. The Supreme Court in *Attorney General v Zinj Limited* (Petition 1 of 2020) [2021] KESC 23 (KLR) (Civ) (3 December 2021) (Judgment) stated thus;

“It is a trite principle of law, that any injury or loss suffered by a person either through a tortious act, omission or breach of contract, attracts redress in a court of law. The redress includes an award of damages to the extent possible as may be determined by the court. The question regarding the type, extent, and quantum of damages to be awarded, has long been settled through a long line of decisions from the courts....

The main basis upon which special damages can be granted for the deprivation of property, is the market value of the said property. In case of general damages, a court of law exercises discretion guided by the circumstances of each case....”

114. While the Plaintiff has sought for general damages, he has not guided the Court on the quantum in this respect. The court declines to award general damages.

115. In conclusion, the Court is satisfied that the Plaintiff has proved his case against the 1st Defendant on a balance of probabilities. Judgment is therefore entered for the Plaintiff against the 1st Defendant in the following terms:

a. Compensation for the suit property;

i. Market Value Kshs 41,019,500

ii. Add 15% Kshs 6, 152,925/=

Total Kshs 47, 172, 425/=

b. Simple Interest at bank rates from January, 2014 untill payment in full

c. Costs of the suit.

DATE, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 19TH DAY OF OCTOBER, 2023

O. A. ANGOTE

JUDGE

In the presence of;

No appearance for Plaintiff



No appearance for Defendant

