



Nguku Product Twenty Ten Limited v National Land Commission (Environment & Land Petition 25 of 2020) [2023] KEELC 21858 (KLR) (30 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21858 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND PETITION 25 OF 2020
CA OCHIENG, J
NOVEMBER 30, 2023**

BETWEEN
NGUKU PRODUCT TWENTY TEN LIMITED PETITIONER
AND
THE NATIONAL LAND COMMISSION RESPONDENT

JUDGMENT

1. Through a Petition dated the 1st October 2020 and amended on 16th June 2022, the Petitioner sought for the following orders against the Respondents: -
 1. A declaration do issue that the Respondent has violated Articles 10, 21, 22, 23, 40, 47, 64 and 67 (3) as read together with section 125 of the Land Act and Article 248 (1) and (2)(b) as read together with Articles 249(2)(b) of the Constitution.
 2. A declaration do issue that the awards issued to the Petitioners are conclusive and final as provided under Article 40(3) of the Constitution as read together with Section 113 (2) of the Land Act.
 3. An order do issue compelling the Respondents to pay the Petitioner a total of Kenya Shillings Seventy Seven Million, Four Hundred and Seventy Eight Thousand, Six Hundred and Fifty Nine (Kshs. 77,478,659/=)
 4. Interest be awarded to the Petitioner at commercial rate of 14% from the date of the award, January 2018 till payment in full.
 5. A declaration do issue that the purported new awards are illegal, unlawful and unconstitutional thus null and void and the same be and is hereby quashed.



6. A declaration do issue that the Respondent being an independent commission cannot take directions and be controlled by the Ethics and Anti-Corruption Commission over the issuance of Awards and payment of the compensation thereof.
 7. Costs of the Petition be awarded to the Petitioners; and
 8. Any other relief this Honourable Court deems fit to grant in the circumstances.
2. The Petition was supported by the affidavit of Joseph Nyamai Mwangangi.
 3. The Respondent opposed the instant Petition by filing a replying affidavit sworn by one Austin Odhiambo, its Senior Valuation & Taxation Officer where he deposes that the Respondent was acting on the instructions of Kenya National Highways Authorities (KeNHA) and that the Respondent together with KeNHA had undertaken inspection of the ground with a view to determine the amount to be awarded as compensation, of which the Petitioner's Award was valued at Kshs.92, 478,659.00. He explains that Petitioner had been paid Kshs.15,000,000/= but before they could process and release the remainder of the amount, they received a letter from the Ethics and Anti-Corruption Commission (EACC) which indicated that the EACC was carrying out an inquiry into alleged cases of fraud emanating from the process of compensation including compulsory acquisition and recommended that they stop any further payments until the project was verified as well as a re-valuation of the properties conducted. He contends that KeNHA also informed the Respondent vide a letter dated the 30th July 2019 that it had revised the road designs including omission of service roads and review of the main road alignment with minimal land acquisition. He states that the aforementioned letters from the EACC and KeNHA had informed the Respondent's decision for re-valuation of the suit properties intended for acquisition to ensure that proper acquisition was done and that public funds were not misappropriated. He insists that at all material times, the persons affected by the project, including the Petitioner, were duly notified of these developments through various meeting with officials of the Respondent, KeNHA and the representatives from the Provincial administration. He explains that the project affected persons were notified of the intended re-valuation and that a consultative meeting was held on 29th June 2021 at Chumvi interchange to further discuss the issue. Further, that the project affected persons confirmed they would attend the meeting vide a letter dated the 29th June 2021. He reaffirms that the suit land was re- valued at Kshs.38,461,591.00 for 0.8203 hectares compulsorily acquired from Athi River/Athi River Block 1/31 (suit land). Further, this is clear that the said land had been grossly overvalued and that paying compensation as per the initial Award would be a misuse of public funds. He further avers that the Award offered to the Petitioner by the Respondent after the re -evaluation took into consideration the valuation report presented by the Petitioner as well as the provisions of Part VIII of the *Land Act*.
 4. The Petition was canvassed by way of written submissions.

Submissions

Petitioner's Submissions

5. The Petitioner in its submissions provided a background of this matter and contended that it should be paid the outstanding compensation of Kshs. 77,478,659 together with interest at commercial rate from the date of issuance of the Award until payment in full. It argued that it is the registered proprietor of the suit land and the core of compulsory acquisition is prompt payment of just compensation. It referred to the various legal provisions governing compulsory acquisition of land and insisted that the



Respondent has unlawfully and without any written explanation withheld outstanding compensation, four (4) years after issuance of the Award. It claimed the Respondent took possession of the suit land in 2018 before payment of the full compensation as required by law. It further submitted that the purported new Award is unlawful as the Respondent did not have any locus standi to revise the initial one. It also submitted that no written explanation was provided for the revised Award which was already part paid. It reiterated that the Respondent is an independent Commission and EACC has no mandate in auditing its actions including compulsory acquisition. Further, there is no regulatory framework mandating EACC to interfere with operations of the Respondent and therefore their involvement in the revision of the Award is null and void. It sought for costs of the Petition. To buttress its averments, it relied on the following decisions: Patrick Musimba V National Land Commission & 4 Others (2016) eKLR; HCC Petition 38/2011 – Torino Enterprises Ltd Vs Permanent Secretary, Ministry of State of Defence; HCC Petition 187/ 2013 – Christabel Akinyi Onyango V Kenya Airports Authority and Five Star Agencies Ltd V National Land Commission (2014) eKLR; Advisory Opinion Reference No. 2 of 2014 – In the matter of the National Land Commission (2015) eKLR; In the matter of the Interim Independent Electoral Commission (2011) eKLR; Okiya Omtatah & Another V Attorney General & 7 Others (2013) eKLR and Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others (2014) eKLR.

Respondent's Submissions

6. The Respondent in its submissions reiterated its averments as per the replying affidavit and provided a background of the dispute herein. It argued that by dint of section 16A of the [Environment and Land Court Act](#), this Court has jurisdiction to deal with Appeals from subordinate courts and local tribunals, hence the Petitioner should have filed an Appeal first, instead of proceeding by way of Petition. It contended that the amended Petition was filed on 20th June, 2022 long after the new Award was offered and the Petitioner has not provided any sufficient reason why it took long to do so. It insisted that the Amended Petition is hence not properly before court. To support its averments, it relied on sections 111 (A), 117 (2) and 119 of the Land (Amended) Act including the following decisions: Pentagon Communication Ltd Vs National Land Commission (2022) eKLR and David M. Mereka V Kenya Council of Catholic Bishops & Another (2019) eKLR.

Analysis and Determination

7. Upon consideration of the Amended Petition, the respective affidavits, annexures and submissions, the following are the issues for determination: Whether the Petitioner is entitled to be paid a total of Kshs. 77,478,659 including 14% interest from January, 2018 until payment in full as just compensation for its acquired land. Whether the Petition is merited. Who bears the costs of the Petition?
8. It is not in dispute that the Petitioner is the registered proprietor of land parcel number ATHI RIVER/ ATHI RIVER BLOCK 1/31 (suit land) which portion was compulsorily acquired for construction of the second carriageway Athi River Machakos Turnoff section off Mombasa Road. The Petitioner's claim is premised on the argument that its constitutional right to just and prompt compensation for compulsorily acquired land has been violated by the Respondent. The Respondent has admitted that it compulsorily acquired the suit land and paid part of the compensation award but had to revise the initial Award.
9. From a perusal of the documents presented by the respective parties, I note the Respondent initially issued an Award to the Petitioner on 23rd January 2018 for Kshs. 92,478,659.00 but managed to pay Kshs. 15,000,000/= leaving a balance of Kshs. 77,478,659.00. The initial Award was revised to Ksh. 38,461,591.00, but the Petitioner rejected it. The Petitioner insists that the purported re-assessment



carried out by the Respondent in respect to the suit land without its involvement could destroy the topographical and natural terrain including developments of its properties with a view to devaluing it, to its detriment. It outlined several constitutional and statutory provisions which safeguard rights to land, the duty of the state in safeguarding land rights and the right to fair administrative actions. It highlighted several violations, infringement and/or threats to its constitutional rights which have been committed by the Respondent.

10. The Respondent in its replying affidavit presented documents confirming that the road design was revised by KeNHA culminating in a revised schedule of land acquisition in July, 2019.
11. I will proceed to highlight various legal provisions governing compulsory acquisition herebelow:
12. Article 40(3) of *the Constitution* provides that:
 - (3) 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—
 - (a) 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
 - (b) 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—
 - (i) requires prompt payment in full, of just compensation to the person; and
 - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.”
13. While Section 113 of the *Land Act* provides that: -
 - (1) Upon the conclusion of the inquiry, the Commission shall prepare a written award, in which the Commission shall make a separate award of compensation for every person whom the Commission has determined to have an interest in the land. (2) Subject to Article 40(2) of *the Constitution* and Section 122 and 128 of this Act, an award—
 - (a) shall be final and conclusive evidence of—
 - i. the size of the land to be acquired;
 - ii. the value, in the opinion of the Commission, of the land;
 - iii. the amount of the compensation payable, whether the persons interested in the land have or have not appeared at the inquiry; and
 - (b) shall not be invalidated by reason only of a discrepancy which may thereafter be found to exist between the area specified in the award and the actual area of the land.
 - (3) If an interest in land is held by two or more persons as co-tenants, the award shall state — (a) the amount of compensation awarded in respect of that interest; and (b) the shares in which it is payable to those persons.
 - (4) Every award shall be filed in the office of the Commission.”



14. Further, Section 119 of the *Land Act* (Amended) provides condition for payment of compensation and stipulates thus:

‘Payment of compensation shall be made only upon the exercise of due diligence which shall include final survey and the determination of the acreage, boundaries, ownership and value’.

15. The Petitioner has not disputed that the road design was revised by KeNHA. I note as per the letter dated the 30th July, 2019, which KeNHA sent to the Respondent, the Director General stated thus:

‘...we have revised road designs at Athi River for immediate implementation, including omission of service roads and review of the main road alignment with minimal land acquisition. We have also reviewed land acquisition requirements at Daystar interchange to leave out some land earlier proposed for acquisition.....we forward a revised schedule and acquisition plans for the project covering Athi River and Daystar interchanges. Please revise Gazette Notice Nos. 9536 of 2017, 11424 of 2017, 11104 of 2018 and 1693 of 2019; and furnish us with a revised schedule of compensation’

16. From this excerpt, it is evident that the road design was revised and portions of land earlier acquired, left out. Insofar as the Respondent had commenced paying the compensation with the initial Award, this Court takes judicial notice of the fact that it had to consider the portion of land left out. It is my considered view that since the revised road design and area to be acquired was gazetted, the Respondent indeed adhered to the legal process as indicated in the *Land Act*. Even though the Petitioner contends that it has to be paid using the initial Award, I note vide their letter dated the 29th June, 2021 they were aware of a meeting to discuss the revised Award. Further, the Respondent explained that they failed to pay the funds using the initial Award due to the EACC intervention as well as the revised road design which culminated in the re-valuation. The Petitioner argues that EACC has no mandate to interfere with the work of a constitutional commission. However, this court also takes judicial notice of the fact that EACC is mandated to conduct investigations on matters touching on use and mis-use of public funds and the Respondent explained that EACC requested for re-valuation as there were allegations of fraud, over-valuations as well as undue influence. To my mind, I find that the said reasons were plausible in warranting the re-valuation of the suit properties.

17. In the case of *Patrick Musimba v National Land Commission & 4 others* [2016] eKLR the Learned Judges held that:

‘In our view, a closer reading of Article 40(3) of *the Constitution* would reveal that *the Constitution* did not only intend to have the land owner who is divested of his property compensated or restituted for the loss of his property but sought to ensure that the public treasury from which compensation money is drawn is protected against improvidence. Just as the owner must be compensated so too must the public coffers not be looted. It is that line of thought that , under Article 40(3), forms the basis for “prompt payment in full, of just compensation to the person” deprived of his property 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.’

18. Based on the facts as presented, I note in the current scenario the Petitioner despite rejecting the revised award has not demonstrated how the suit land was under-valued as no fresh valuation report has been tendered to the contrary. I opine that just compensation as envisaged in Article 40 of *the Constitution* to project affected persons assumes the said compensation can only accrue to the portion of land acquired. However, in instances where there is reduction in the land acquired, a project affect person cannot be compensated for more land and where there is a dispute, fresh valuations have to be undertaken. In the circumstances, I opine that this cannot amount to violation as of the Petitioner’s right as claimed herein.
19. I note section 133A of the Land Value Amendment Act 2019, stipulates the jurisdiction of the Land Acquisition Tribunal and provides inter alia: “The Tribunal has jurisdiction to hear and determine appeals from the decision of, the Commission in matters relating to the process of compulsory acquisition of land. (2) A person dissatisfied with the decision of the Commission. May, within thirty days, apply to the Tribunal in the prescribed manner. (3) Within sixty days after the, filing of an application under this Part, the Tribunal shall hear and determine the Application.”
20. While section 133C (6) of the said Land Value Amendment Act 2019 provides that:- “Despite the provisions of, Sections 127, 128 and 14 (5), a matter relating to compulsory acquisition of land or creation of wayleaves, easements and public right of way, shall, in the first instance, be referred to the Tribunal.”
21. From a perusal of the aforementioned legal provisions, I note that disputes emanating from compulsory acquisition of land should in the first instance be referred to the Land Acquisition Tribunal which has power to confirm, vary or quash the decision of the National Land Commission which is the Respondent herein. Further, the Act stipulates that in the event that a party is dissatisfied with the Tribunal’s decision, they can lodge an Appeal to the Environment and Land Court. This Court takes judicial notice that the Land Acquisition Tribunal has since been established and is now fully operational and even though the same was not operational at the time the Petition was instituted, I opine that the Petitioner still has a remedy to seek redress therefrom since it is yet to be fully compensated for a portion of the acquired suit land. In the absence of a recent valuation report after the revision of road design, I opine that the assessment of the correct Award accruing to the Petitioner, for the compulsorily acquired land is best determined by the Land Acquisition Tribunal and not this court. I am of the view that if the Petitioner wanted the court to assess the said amounts, then it should have filed a civil suit. I find that the burden of proof was upon the Petitioner to present a current valuation report indicating the value of the land acquired after the revision of the Award but it it did not.



22. In the foregoing, I advise that the Petitioner should lodge an Appeal at the Land Acquisition Tribunal to enable it assess the correct compensation due to it and will grant it leave of thirty (30) days from the date hereof to do so.
23. In the circumstances, I find this Petition unmerited and will proceed to strike it out.
24. I will not make any order as to costs.

DATED SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 30TH DAY OF NOVEMBER, 2023

CHRISTINE OCHIENG

JUDGE

