



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.265 OF 2014

BETWEEN

BROADWAY ENTERPRISES LTD..... PETITIONER

AND

MINISTRY OF LAND, HOUSING ..

AND URBAN DEVELOPMENT.....1ST RESPONDENT

NATIONAL LAND COMMISSION2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

THE KENYA NATIONAL HIGHWAYS AUTHORITY....4TH RESPONDENT

RULING

Factual Background

1. By a Petition dated 12th June 2014 and premised on **Article 40** of the **Constitution** and **Sections 111, 113, 114, 115, 117** and **125** of the **Land Act, 2012** the Petitioner, Broadway Enterprises Ltd sought the following orders:

a) An order of mandamus do issue directing the 1st and 2nd Respondents to promptly pay the Petitioner the sum Kshs.90,234, 750.00 together with simple interest at 14% per annum from 17th April 2012 until payment in full in respect of the Petitioner’s 0.8866 ha of land that was compulsorily acquired from its property L.R No.13652/26.

b) A declaration that the 1st and 2nd Respondents are liable to pay simple interest at 14% per annum on account of delayed payment.

c) Costs of this suit to be assessed at the final decretal amount.

2. Before the same could be heard by this Court, parties reached an agreement that the Petitioner would

be paid Kshs.90,234,750.00 and that this Court would later determine the interest payable on that sum.

3. By a Ruling delivered on 13th November 2015, this Court determined that the 4th Respondent ought to pay the Petitioner **“interest at 6% per annum on the sum of Kshs.90,234750 from the date it took possession of the land in issue until payment of that sum in full i.e. from 14th April 2012 to 21st January 2015”**.

4. The matter ought to have then come to an end but on 24th May 2016, the record of this Court would show that a consent order was recorded between Counsel for the Petitioner and Counsel for the 1st Respondent to the effect that the 4th Respondent would pay to the Petitioner **“Kshs.13,768,934.00 being interest as ordered by this Court on 13th November 2015”** and the said sum to be paid on or before 30th June 2016. The said consent order arose out of an application dated 11th April 2016 by the Petitioner seeking Kshs.14,981,441.00 as interest.

5. In her Replying Affidavit to that Application sworn on 20th May 2016, Ms. Carolyn Cheruiyot, Advocate, who later, on 24th May 2016, participated in the recording of the Consent Order aforesaid, indicated at paragraphs 2 and 7 thereof that she was **“competent to swear [the] affidavit on behalf of the 4th Respondent”** and that on **“18th April 2016, the 4th Respondent”** wrote to us indicating that **their computation of interest amounted Kshs.13,768,934.00 on the total principal sum of Kshs.90,234,750.00 based on the dates when the payments were made and requested us to confirm the Petitioner’s bank details to enable them transfer the funds. Annexed and marked “CC2” is a copy of the letter in that regard.”**

6. On 23rd June 2016, the firm of M/s. Kiplagat & Co. Advocates was replaced as the advocates for the 4th Respondent and on 24th June 2016, an application was filed by M/s. C.M Advocates on behalf of the 4th Respondent seeking the following orders;

a) ...

b) That this honourable Court be pleased to forthwith stay execution of the orders given on 13th November 2015 and 24th May 2016 to the effect that the 4th Respondent shall pay to the Petitioner Kshs.13,768,934.00 as interest.

c) That an urgent date be set for the inter-partes hearing of this Application.

d) That this Honourable Court be pleased to review and set aside its Ruling/Orders delivered on 13th November 2015 and 24th May 2016 to the extent that the 4th Respondent/Applicant herein took possession of the suit property on 14th April 2012 thus liable to pay to the Petitioner Kshs.13,768,934.00 as interest.

7. The above is the Application under consideration.

The 4th Respondent’s Case

8. In a Supporting Affidavit sworn on 24th June 2016 by Ms Yvonne Masinde, Senior Legal Officer of the 4th Respondent and in its written submissions, it is the 4th Respondent’s case that both the Ruling and the Consent order aforesaid were made on the mistaken belief that the Respondents took possession of the property in question on 4th April 2012 while in fact no such possession has ever taken place.

9. Further, that the statutory steps to be taken when land is compulsorily acquired for public purposes are elaborate, including the making of appropriate entries in the Register of Titles, which steps were not taken in the present case and therefore the acquisition process was not completed by the time the Ruling and

Consent Order on interest were made. In addition to the above, the 4th Respondent contends that Ms. Cheruiyot had no instructions from the 4th Respondent to record the consent on interest payable and that her actions and results thereof should not be allowed to prejudice the 4th Respondent, the public interest and policy.

10. Counsel for the 4th Respondent in submissions contended that under **Section 16** of the **Land Acquisition Act**, interest is payable from the date the Commissioner of Lands takes possession of land compulsorily acquired. And that possession is explained in **Section 19** of the said **Act** to be sixty days after notice has been issued by the Commissioner of Lands and after title has vested in the Government. That the two provisions above are now repeated in **Section 120** of the **Land Act 2012** and that strict adherence to constitutional and statutory imperatives were the basis for the decision in **Commissioner of Lands and Anor v coastal Aquaculture Ltd C. A 252 of 1996** as well as **Virenda Ramj Gudka and 3 Others v AG [2014] e KLR** and **Eunice Kamau and Anor v AG and 5 Others [2013] e KLR**.

11. It was also his submission and it was a mistake or error of fact for this Court to have determined that the date of possession was 14th April 2012 when in fact notice of possession was only issued on 17th May 2016 and that interest would only be payable, if at all, upon possession being given to the Government.

12. On the Consent Order of 24th May 2016, Counsel submitted that the 4th Respondent's erstwhile advocate had no authority to record such a consent and the "without prejudice" letter annexed to the Replying Affidavit of Ms. Cheruiyot was produced without the 4th Respondent's authority. That following the decisions in **Flora Wasike v Destimo Wambeko [1988] e KLR**, and **Samson Munika v Wadube Estates ltd [2007] e KLR**, he added that the consent order ought to be set aside because it was made without instructions and/or misrepresentation on the part of the 4th Respondent's previous counsel.

13. For the above reasons, the 4th Respondent prays that the orders sought above be granted.

Petitioner's case

14. In response to the Application, the Petitioner filed a Replying Affidavit sworn on 1st August 2016 by **Niraj Shaj**, its Director. Learned Counsel for the Petitioner also filed written submissions on 2nd August 2016.

15. In summary, its case is that the Application before me is misguided because by letter dated 13th April 2016, the Head of Legal and Regulatory Affairs at the 4th Respondent's office wrote to confirm that the interest payable to the Petitioner was Kshs.13,768,934.00 and that payment would be made once the latter's bank details were provided. That the 4th Respondent cannot now renege on that proposal which was later crystalised as an order of this Court, made by consent.

16. As to the applicable law, the Petitioner has made reference to **Article 40** of the **Constitution** which requires that compensation for compulsory acquisition of land should be made promptly and that a delay of two years does not meet that imperative.

17. In any event, whether there was a misunderstanding of the applicable law or an error on the face of the record, following the decision in **National Bank Ltd v Njau [1997] e KLR**, review of an earlier decision is not a fair remedy.

18. Further, reading **Sections 111** and **115** of the **Land Act**, it is the Petitioner's case that without prompt compensation being paid, interest on the principal sum payable to the Petitioner is a right accruing to it. Reliance was placed in that regard on **Christiable Akinyi Anyango v KPA [2014] e KLR** per Majanja J.

19. The Petitioner in essence seeks dismissal of the application with costs.

Determination

20. From my reproduction of the Parties' respective cases above, it is apparent that the questions that arise for determination are:

i) Whether the Government ever took possession of the land that it compulsorily acquired from the Petitioner and

ii) Whether the Ruling of 13th November 2015 and the Consent Order of 24th May 2016 were made in error or mistake and ought to be set aside and/or reviewed.

21. In that context, on issue no.(i), I have looked at the Ruling of 13th November 2015 and submissions made prior to its delivery. The 4th Respondent's submissions dated 2nd March 2015 were to the effect that **"the process of compulsory acquisition and the actual acquisition of the subject property took place [in] April 2012"** and that **"... the interest rate of 14% sought by the Petitioner is manifestly excessive. The rate of 6% per annum would be fair and appropriate in the circumstances."** This Court agreed with the 4th Respondent's position and granted interest at the rate of 6% from 14th April 2012 when the acquisition admittedly took place.

22. I have also seen a letter dated 13th April 2016 from the Head of Legal and Regulatory Affairs of the 4th Respondent addressed to its former lawyers, **M/s Kiplagt & Company Advocates**. In the said letter, it is stated partly as follows:

"Based on the ruling in this matter which indicated that interest shall be paid from 14th April 2012 to 21st January 2015, out Finance Department has calculated the same and found that the amount due is Kshs.13,786,934.00 based ...

Kindly confirm on a without prejudice basis with the Advocates for the Plaintiff if the amount stated is in order and avail their bank details to enable transfer of funds via real time gross settlement."

23. It must also be noted that by letter dated 11th March 2016, the advocates for the Petitioner had demanded Kshs.14,981,441.00 as the interest payable but accepted the 4th Respondent's offer hence the Consent order of 24th May 2016.

24. Nowhere in all the above events was there any question or contest that interest would not be payable from April 2012, the date the 4th Respondent was deemed to have taken possession of the land in issue. It must in fact be understood that the land is part of the Thika Super Highway's expansion programme and it is a matter of public notoriety that the expansion has taken place and there is no contestation of the fact that the Petitioner is not in possession of the 0.8866 ha of land that was acquired.

25. In the circumstances, all submissions by the 4th Respondent that it has not taken possession of the land is an afterthought and recourse to both the **Land Acquisition Act** and **Land Act** is also an afterthought. Its conduct all along this litigation has been to the effect that it had taken possession in April 2012 and its new found position is made in bad faith.

26. On issue no.(ii), from my findings above, this Court made its Ruling aforesaid on account of information and submissions presented to it by the 4th Respondent and dismissed the Petitioner's submissions. In doing so, it relied on both **Section 16** of the **Land Acquisition Act** in the context of information supplied to it by the 4th Respondent as well as the authority of **Shanzu Investments Ltd v Commissioner of Lands [1993] e KLR**. To argue now that the Court misapplied the law is also a statement made in bad faith and discretion cannot be exercised in favour of a party that comes to Court with dirty hands. In effect, I see no error apparent on the face of the record nor mistake in the making of the decision.

27. Turning to the Consent Order of 24th May 2016, I have looked at the authorities supplied by the Parties in the context of the facts as set out above. Ms. Cheruiyot recorded the consent upon instructions not from herself but from the 4th Respondents as contained in the latter's letter of 13th April 2016. How can it then be said that she had no instructions to settle the matter? Where is evidence that those instructions were later withdrawn?

28. As was stated in **Samson Munikah (supra)**.

“I have given this matter anxious thought especially in view of the allegations made by the applicant. However, in this case I am of the view that I have jurisdiction to make the order asked for on the ground of other sufficient reasons. However, on the evidence I am not satisfied that the applicant entered into the consent order under duress, had that been the case I see no reason why he should have written the letter of the 26/11/2004 referred to above. This letter appears to have been written with sober reflection and no hint of duress is contained in it. Indeed the applicant approved the court order with minor amendments. That being the case I do not see how it can be said Mr. Asinuli entered into the consent order without knowledge of it. The applicant must I am afraid accept the court order as it is and make an effort to pay it. In the result this application is dismissed with costs to the respondent.”

29. That is the law in our realm as I understand it and applying those principles to the present matter, it is obvious to me that the Consent Order in issue was lawfully entered into and I am not persuaded that it should be set aside.

Conclusion

30. Having addressed the two primary issues before me, while I agree with the 4th Respondent that its funds are from public coffers, compulsory acquisition of land is also made for the benefit of the same public, forcefully so, as the land owner has no say in the acquisition save that he is entitled to prompt compensation.

31. In the present case, close to 5 years of toing and froing from the Respondents has led to unnecessary litigation in a very straight forward matter. Had they paid the Petitioner its compensation promptly, interest would never have been an issue. The 4th Respondent cannot now benefit from its continued shifting of goal posts.

Disposition

32. As I see no merit in the Application dated 24th June 2016 it is hereby dismissed with costs to the Petitioner.

33. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2017

ISAAC LENAOLA

JUDGE

DELIVERED AND SIGNED AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2017

E. CHACHA MWITA

JUDGE