



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTION AND HUMAN RIGHTS DIVISION**

**PETITION NO.409 OF 2014**

**BETWEEN**

**JUDY WAIRIMU NJUGUNA.....1<sup>ST</sup> PETITIONER**

**JEDIDAH WAMBUI NJUGUNA.....2<sup>ND</sup> PETITIONER**

**VANESSA JOAN WAMBUI.....3<sup>RD</sup> PETITIONER**

**AND**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**MINISTRY OF LANDS & SETTLEMENT.....2<sup>ND</sup> RESPONDENT**

**MINISTRY OF ROADS & INFRASTRUCTURE.....3<sup>RD</sup> RESPONDENT**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....4<sup>TH</sup> RESPONDENT**

**NATIONAL LAND COMMISSION.....5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petition herein is dated 15<sup>th</sup> of August, 2014 and is supported by an Affidavit sworn on the 14<sup>th</sup> of August, 2014 by Judy Njuguna, proprietor of a business known as Vantage Elementary School situated on LR Number MUGUGA/GITARU/11411, Naivasha /Kikuyu Road, registered in 2003 although it had started operating from 1997. The Petitioners also filed written submissions dated 5<sup>th</sup> of December, 2014 in support of their case.
2. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents on their part jointly filed written submissions dated 2<sup>nd</sup> day of July 2015 in support of their case.
3. The case for the Petitioners is premised on the imminent risk of losing their property without any fair and reasonable compensation, breach of their right to fair administrative action with regard to compulsory acquisition as well as alleged gender discrimination.

**Case for the Petitioners**

4. The Petition is supported by the Affidavit aforesaid sworn by Judy Njuguna, the 1<sup>st</sup> Petitioner, who was granted authority to swear the Affidavit by Jedidah Njuguna and Vanessa Wambui, the 2<sup>nd</sup> and 3<sup>rd</sup> Petitioner, respectively.
5. The 1<sup>st</sup> and 2<sup>nd</sup> Petitioners contend that they are partners and proprietors of the business named Vantage Elementary School situated on LR Number MUGUGA/GITARU/1141 (*hereinafter referred to as the "suit land"*) while the 3<sup>rd</sup> Petitioner has urged the point that she is the registered proprietor of the suit land and that the Government of Kenya on 26<sup>th</sup> May 2006, pursuant to **Section 6(2) of the Land Acquisition Act Cap 295 Laws of Kenya** embarked on a compulsory acquisition process of land in the Muguga/Gitaru area to pave way for the construction of the Nairobi South Road By-pass. They were informed by the Ministry of Lands vide Gazette Notice number 3788 & 3789 of 26<sup>th</sup> May 2006 of the intended acquisition as prescribed by law.
6. The Petitioners thereafter engaged a firm of Valuers with instructions to assess the market value of the property, developments thereon as well as the business which was still ongoing for the purposes of compensation upon compulsory acquisition. The Valuers wrote a report of the assessment conducted and dated it 24<sup>th</sup> July 2006 and they prescribed the property value at Kshs.43,320,800/- while the loss of business was assessed at Kshs.94,752,000/-.
7. The 2<sup>nd</sup> Respondent had meanwhile notified the 3<sup>rd</sup> Petitioner of an award of Kshs.21,937,937/- for the land acquisition but the Petitioners promptly rejected the award and communicated to the Respondents that the award for the physical assets of the suit land was done in an arbitrary and opaque manner and was made without taking into account the on-going business in the form of the Vantage Elementary School.
8. Despite the fact that the Petitioners had rejected the award and had lodged an appeal against it, the 4<sup>th</sup> Respondent issued notices requiring them to vacate the suit land and the Petitioners allege that they are facing the imminent risk of losing their property as well as their business, arbitrarily, to the Respondents without any fair and reasonable compensation.
9. In summary, the Petitioners allege that the Respondents have violated their constitutional rights and in particular cite violation of their rights to non-discrimination, right to property and fair administration as enshrined in **Articles 27, 40 and 47 of the Constitution of Kenya, 2010**. They therefore seek the following declarations and orders;
  - a. ***For a declaration that [the] Petitioners' rights under Articles 27, 40 and 47 of the Constitution, 2010 have been violated by the Respondents in the process of compulsory acquisition of the suit land.***
  - b. ***Judicial review and order quashing the proceedings and award of the 2<sup>nd</sup> Respondent in respect of compensation for the compulsory acquisition of the suit land.***
  - c. ***For Judicial review and order of prohibition against the 2<sup>nd</sup> Respondent prohibiting the 2<sup>nd</sup> Respondent from compulsorily acquiring the suit land without adequate compensation.***
  - d. ***For an order for damages and or compensation for breach of the Petitioner's rights under Article 27.***
  - e. ***Any other or further order (s) as may be deemed fit and just to the honorable Court.***
  - f. ***Cost.***
10. The Petitioners, in seeking the above orders, invoke **Articles 23 and 65 of the Constitution of**

**Kenya, 2010** the former which empowers this Court to grant appropriate relief (s) in the circumstances.

### Case for the Respondents

11. The Respondents' case is supported by written submissions from the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents.

12. The Respondents submit that compulsory acquisition is indeed a serious matter whose reasonable justification to the aggrieved party is public benefit as espoused in **Commissioner of Lands & Anor-Vs-Coastal Aquaculture Ltd, KLR (E&L) 1** and **Re Kisima Farm Ltd [1978] KLR 36**

13. Further, they rely on **Article 40(3)** of the **Constitution** which 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;*

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.*

*(b) Is for a public purpose or in the public interest and is in accordance with this Constitution and any Act of Parliament that—*

i. *Requires prompt payment in full, of just compensation to the person*

ii. *Allows any person who has an interest in, or right over, that property a right of access to a court of law.”*

14. The Respondents submit in the above context that they adhered to the process of compulsory acquisition of the suit land in accordance with the **Land Acquisition Act** (now repealed) and the **Constitution**. That the delay in compensating the Petitioners was caused not by the Respondents but was as a result of the Petitioners' contesting the value of the suit land which the Government had valued in accordance with the **Land Acquisition Act** (now repealed).

15. The Respondents also submit that the Petitioners' claim that the Respondents' main aim was to arbitrarily dispose them of their property is unfounded as there has been no evidence adduced supporting that claim. Additionally, that the Respondents did not discriminate against the Petitioners based on their gender and such allegations in that regard are misplaced and untrue.

16. The Respondents further propose that this Court, in determining the Petition, ought to assess public interest in having the Southern Road By-pass completed on time as that interest is superior to private interests.

17. With respect to the Petitioners' prayer for Judicial review orders, the Respondents submit that an order of certiorari is granted only if the decision in question was made in excess of jurisdiction, or where the rules of natural justice were not complied with as was the position in **Kenya National Examination Council v Geoffrey Gathenji Njoroge CA No. 266 of 1996**.

18. The Respondents in conclusion submit that the Petition is misconceived and ought to be dismissed with costs.

### Determination

19. I have had the opportunity to look at both the pleadings and submissions of the Petitioners and Respondents and it is clear that this matter revolves around the compulsory acquisition of the suit land, more specifically, the compensation due to the Petitioners. Other issues raised are peripheral

to that question.

20. In that regard, the process of compulsory acquisition of the Petitioners' property began in 2006 before the promulgation of the **Constitution, 2010** and therefore, the **Repealed Constitution** would be the applicable law subject to the fact that by dint of **Section 7** of the **Sixth Schedule** to the **Constitution**, any decision today must take into account the present prevailing circumstances. That **Section** provides thus:

*“(1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.*

2. *If, with respect to any particular matter—*

- a. *a law that was in effect immediately before the effective date assigns responsibility for that matter to a particular State organ or public officer; and*
- b. *a provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer, the provisions of this Constitution prevail to the extent of the conflict.”*

21. In that regard, under **Section 75** of the **Repealed Constitution**, the right to, and protection from deprivation of property, is espoused and similarly, these rights are encapsulated under **Article 40** of the **Constitution, 2010**. Any rights protected under the **Repealed Constitution** were therefore carried over in the new constitutional dispensation and are still protected therein.

22. In light of the above, **Section 75** of the **Repealed Constitution** provided that:

*“(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied :*

*(a) The taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit; and*

*(b) The necessity therefor is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and*

*(c) Provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.*

*(2) Every person having an interest or right in or over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the High Court for—*

*(a) The determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled; and*

*(b) The purpose of obtaining prompt payment of that compensation:*

*Provided that if Parliament so provides in relation to a matter referred to in paragraph (a) the right of access shall be by way of appeal (exercisable as of right at the instance of the person having the right or interest in the property) from a tribunal or authority, other than the High Court, having jurisdiction under any law to determine that matter.” (Emphasis added)*

23. **Article 40** of the **Constitution, 2010** while providing for the right to protection to property however has an exception in **Article 40 (3)** which states that:

*“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.” (Emphasis added)*

24. Further to the above, I also note that in the present matter, the process of acquisition of the suit land began at the time when the **Land Acquisition Act Cap 295 Laws of Kenya** was in force that is, prior to its repeal but presently, the **Land Act 6 of 2012** is the operative legal regime.

25. Furthermore, from the evidence adduced, the Ministry of Roads and Public works issued a directive in April 2008 stating that the suit land was required for a public purpose and would be affected by the process of land acquisition. **Section 9** of the **Land Acquisition Act** provided as follows in such a situation:

*“(1) The Commissioner shall appoint a date, not earlier than thirty days and not later than twelve months after the publication of the notice of intention to acquire, for the holding of an inquiry for the hearing of claims to compensation by persons interested in the land, and shall—*

*(a) cause notice of the inquiry to be published in the Gazette at least fifteen days before the inquiry; and*

*(b) serve a copy of the notice on every person who appears to him to be interested or who claims to be interested in the land.*

*(2) The notice of inquiry shall call upon the persons interested in the land to deliver to the Commissioner, not later than the date of the inquiry, a written claim to compensation.*

*(3) On the date appointed under subsection (1), the Commissioner shall—*

*(a) make full inquiry into and determine who are the persons interested in the land;*

*(b) make full inquiry into the value of the land, and determine that value in accordance with the principles set out in the Schedule; and*

*(c) 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.*

*(4) The Commissioner may for sufficient cause postpone an inquiry or adjourn the hearing of an inquiry from time to time:*

*Provided that a postponement or an adjournment under this subsection shall not extend the inquiry beyond twenty-four months from the date appointed under subsection (1) for the holding of the inquiry.*

**(4A) Where an inquiry is not held within the time prescribed under this section the Minister shall be deemed to have revoked his direction to acquire the land and section 23 shall mutatis mutandis apply.**

**(5) For the purposes of an inquiry, the Commissioner shall have all the powers of the Court to summon and examine witnesses, including the persons interested in the land, to administer oaths and affirmations and to compel the production and delivery to him of documents of title to the land.**

**(6) The public body for whose purposes the land is being acquired, and every person interested in the land, is entitled to be heard, to produce evidence and to call and to question witnesses at an inquiry.”** (Empasis added)

26. Again from the evidence adduced and pursuant to the above Section, Gazette Notices Numbers 3788 & 3789 of 26<sup>th</sup> May 2006 were published informing all affected and interested parties, including the Petitioners, that the land their business was situated on would be compulsorily acquired. There is however no indication that the Commissioner held any inquiry hearings leading to compensation payable to the Petitioners neither is there any evidence that the process to determine what compensation is payable was ever undertaken.

27. I also note that **Section 8** of the **Land Act** provides that;

***“Where land is acquired compulsorily under this Part, full compensation shall be paid promptly to all persons interested in the land.”***

In that regard, on 24<sup>th</sup> of July 2006, the Valuers appointed by the Petitioners wrote a report of the assessment conducted indicating that the property was valued at 43,320,800/- and loss of business computed at 94,752,000/-.

28. The above notwithstanding, **Section 10(1)** of the **Land Acquisition Act** provides that;

***“Upon the conclusion of the inquiry, the Commissioner shall prepare a written award, in which he shall make a separate award of compensation to each person whom he has determined to be interested in the land.”***

In following the above provision, on or about 15<sup>th</sup> November 2006, the 2<sup>nd</sup> Respondent notified the 3<sup>rd</sup> Petitioner of an award of Kshs.21,937,937/- in respect of the compulsory acquisition of the suit land. I reiterate that the Respondents have however failed to indicate the process by which this award was arrived at. Further, there has been no submission of inquiry proceedings which ought to precede the preparation of such an award. Can it then be said that the award was just compensation to the Petitioners?

29. In that regard, in **Five Star Agencies Limited v National Land Commission ELC Suit No. 445 of 2014**, Nyamweya J opined as follows:

***“Coming to the applicable principles on assessment of compensation as found in the schedule to the repealed Land Acquisition Act, the said schedule provided that the following matters, and no others, shall be taken into consideration in determining the amount of compensation payable for land that is to be compulsorily acquired:***

- a. ***The market value of the land.***
- b. ***Damage sustained by severing part of the land from another land.***
- c. ***Damage sustained by reason of the acquisition injuriously affecting the land owner’s other***

*property, whether immovable or movable or his actual earnings.*

- d. *Reasonable expenses incidental to change of residence or place of business.*
- e. *Damage genuinely resulting from diminution of the profits of the land between the date of gazettelement and the date of taking actual possession” (Emphasis added)*

In furtherance of the above assessment, Nyamweya J computed the Appellants’ compensation in that case as follows:

1. *Market value of the portion of land (being the unimproved site value including value of fence on the said property) Kshs 104,950,000/=*

2. *15% addition to the market value Kshs 15,742,500/=*

3. *Damages for loss of actual earnings Kshs 292,500,000/=*

*Total Kshs 413,192,500/=*

The Learned Judge then added:

*“With regard to future earnings, Nzoia Sugar Company Ltd v Capital Insurance Brokers Ltd Civil Appeal No. 86 of 2009 and the National Conservation Forum v Attorney General (2013) eKLR the courts in espousing the position, stated that a relief cannot be hinged on what could only be deemed as a hypothesis and speculation. This therefore guides the court to only determine actual earnings and treat future earnings as opportunistic and unreasonable.”*

The Learned Judge further stated:

*“The Respondent’s compensation award was a gross undervalue of the Appellant’s portion of land and not a full and just compensation as required by the Constitution, the Land Act of 2012 and the repealed Land Acquisition Act. Just compensation in my opinion and as illustrated by the principles set out in the Schedule to the repealed Land Acquisition Act includes both the present and potential value of the land being acquired, had the owner thereof been allowed to continue using it for the purposes he or she intended.”*

I agree with the exposition of the law above and in the present case, the Petitioners have shown this Court that Vantage Elementary School was a continuing business and any compensation should have taken that fact into account. This is because had it not been for the compulsory acquisition, the Petitioners would have intended to use the property for their benefit including income from the school. The earnings from it were actual and were quantifiable. This fact was acknowledged by the 2<sup>nd</sup> Respondent which by letter dated 14<sup>th</sup> October 2008 addressed to the 1<sup>st</sup> Respondent, stated that there was need for additional compensation in respect of the said developments. In that letter, a value of Kshs.18,000,000/- was made on that aspect of the compensation. No basis for that computation was ever made and I will return to the appropriate relief in the circumstances.

30. With regard to any complaints as to the compensation to be awarded, **Section 29 (2) and (7)** of the **Land Acquisition Act** stated that:

*(2) There shall be established a Tribunal to be known as the Land Acquisition Compensation Tribunal which shall consist of five members appointed by the Minister by notice in the Gazette of whom—*

*(a) one shall be an advocate of not less than ten years’ standing, who shall be the chairman; and*

(b) *two shall be registered valuers of not less than ten years' standing.*

(c) *one shall be a prominent businessman of not less than thirteen years standing; and*

(d) *one shall be a prominent farmer of not less than ten years standing.*

(7) *A person interested who is dissatisfied with the award of the Commissioner may apply to the Tribunal in the prescribed manner for—*

(a) *the determination of his interest or right in or over the land; or*

(b) *the amount of compensation awarded to him under section 10; or*

(c) *to amount of compensation paid or offered to him under section 5, 9, 23, 25 or 26.*

31. With the repeal of the **Land Acquisition Act**, the processes under the said Act are no longer available to the Parties hence the invocation of **Section 7** of the **Sixth Schedule** to the **Constitution** above to govern present circumstances. If that be so, under **Para VIII** of the **Land Act No.6 of 2012**, the **National Land Commission** and the **Environment and Land Court** are the bodies to determine disputes arising from actions undertaken under the said Act including compulsory acquisition of land. It is presently therefore the National Land Commission that awards compensation by dint of **Section 113** of the said Act – See also **Maisha Nishike Ltd vs Permanent Secretary, Ministry of Lands & Others H.C. Petition No.95 of 2012**.

32. Having found as I have done above that there are errors in the way that the Petitioner's land was acquired, the **National Land Commission** must, together with the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents, rectify that error.

33. In saying so, I take the view that the two valuations (by the Petitioners and the 2<sup>nd</sup> Respondent, respectively) before me are so far apart that either one is a gross undervalue of the land or the other is an exaggerated one. A new valuation is absolutely necessary but limited to the value at the time of acquisition. That reasoning was also invoked by Msagha J. in **Julius Musyoka Kimunduu v Commissioner of Lands and National Land Commission Civil Appeal No.623 of 2006** where he stated as follows:

*“In the circumstances, the valuation by the respondents is hereby set aside. The land shall now be subjected to valuation by an independent valuer to be agreed upon by the parties. As this matter has dragged on for a considerable time, this exercise must be completed within 60 days of today. The valuer's fees shall be shared equally by the parties”* (Emphasis added)

34. In agreeing with the Learned Judge, the suit land. L.R. No.Muguga/Gitaru/11411 shall be subjected to a new valuation including on the expected earnings from Vantage Elementary School by an independent Valuer to be agreed upon by the Parties. The Valuers' report shall be presented within 45 days and his fees shall be paid equally by the Parties.

35. Before I turn back to the Prayers in the Petition, although **Articles 27** and **47** of the **Constitution** were referred to in the Petition, no further reference was made of them and the question whether the Petitioners were discriminated against because of their gender was never addressed at all. Further, regarding **Article 47**, it is unclear to me how it was applicable to the Petitioners' circumstances.

36. I reiterate that this Petition was a simple one rotating around compulsory acquisition of land under **Section 75** of the **Repealed Constitution** and **Sections 8-11** of the **Land Acquisition Act**. I have addressed that matter and that is all that should be done.

37. Regarding the specific prayers in the Petition, I have shown that only the Petitioners' rights to fair

and just compensation was breached and all other prayers are of no consequence save that of costs. Costs follow the event and therefore the Petitioners shall have the costs of the Petition.

**Disposition**

38. From my findings above, the final orders to be made are that:

1. *It is hereby declared that the process leading to the award of Kshs.21,937,937.00 to the Petitioners for the compulsory acquisition of L.R No.Muguga/Gitaru/11411 was irregular.*
2. *Let a Valuer to be agreed upon by the parties give a valuation of the land at the time of acquisition taking into account the need to compensate them for the demolition of Vantage Elementary School situated on that land. The Valuer's fees shall be jointly paid by the parties hereto.*
3. *The Valuation Report shall be submitted to the 5<sup>th</sup> Respondent, the National Land Commission for appropriate action within 60 days of this Judgment.*
4. *The Petitioner shall have costs of the Petition.*

39. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 27<sup>TH</sup> DAY OF MAY, 2016**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of :**

Kazungu – Court clerk

Miss Mutua holding brief for Mr. Owalla for Petitioner

Mr. Obura for 1<sup>st</sup> and 3<sup>rd</sup> Respondent

Miss Masinde for 4<sup>th</sup> Respondent

No appearance for 5<sup>th</sup> Respondent

**Order**

Judgment duly delivered.

**ISAAC LENAOLA**

**JUDGE**