



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC. APPEAL CASE NO. 70 OF 2015**

**STANLEY MUNGA GITHUNGURI.....APPELLANT**

**VERSUS**

**NATIONAL LAND COMMISSION.....RESPONDENT**

**JUDGMENT**

This is an appeal from the award of Ms. Salome L. Munubi, the Director, Land Valuation and Taxation at the National Land Commission dated 27<sup>th</sup> July 2015.

By Gazette Notice No. 1190 dated 23<sup>rd</sup> August 2013, the National Land Commission declared its intention to acquire a portion of the Appellant's land being L.R. No. 12389 and invited the Appellant and/or his representative to attend a meeting at its offices on 1<sup>st</sup> October 2013. The land intended to be acquired comprised of 4.914 acres hived out of L.R. No. 12389 and is located within the Karen Estate along Ngong Road. The Appellant presented a valuation by Ragos Valuers & Estate Agents Ltd where the portion of land intended to be acquired was valued at **Kshs. 652,176,500/-**. The Appellant's representative appeared before Mr. E.G. Rwigi, the then Assistant Commissioner of Lands, on the date set for hearing after which Mr. Rwigi awarded the Appellant the sum of **Kshs. 155,398,925/-**. The Appellant rejected that award and filed an appeal being **ELC Civil Appeal No. 3 of 2014** in the Environment and Land Court in accordance with **section 128** of the **Land Act, 2012** whereby judgment was delivered by Gitumbi, J. setting aside the Respondent's award of **Kshs. 155,398,925/-** on the ground that there was no ascertainable criteria used by the Respondent in arriving at that award. In the said judgment, the court directed the Respondent to revalue the portion of land being acquired and issue a fresh award. In compliance with that direction, the Respondent proceeded to revalue the portion to be acquired and awarded the Appellant **Kshs. 215,031,918/-**. The Appellant, being aggrieved by that second award, has filed this appeal. The Appellant has based his appeal on the following grounds:

1. The Respondent failed to take into account the value of the property of the Appellant and arrived at a unilateral quantum not backed by any reasoned valuation.
2. The Respondent erred in failing to acknowledge the fact that the user of the property of the Appellant was commercial the City Council of Nairobi and the Commissions for Lands having approved the change of user and as such its value was not considered with this information in mind and the Respondent arrived at a value that was not commensurate with similar properties in the area, and took into account irrelevant consideration.

3. The Respondent failed to appreciate the location of the property, its proximity to the Highway and reach a valuation that was just and as such properly compensate the Appellant.
4. The Respondent also failed to consider the fact that the Appellant had already commenced development of a hospitality centre when the decision to commence the acquisition was made.
5. The Respondent misconstrued the location of the property and reached an erroneous decision as a result.
6. The Respondent failed to consider all the material placed before him and arrived at a decision that was wrong in the circumstances.
7. Salome N. Munubi usurped the powers of the National Land Commission and arrived at a unilateral decision that was neither correct nor supported by any proper valuation and as such was contrary to the Land Act and the Constitution of Kenya.
8. The Respondent unilaterally divided the land into blocks and failed to give uniform valuation. That by depreciating other portions of the Appellant's land the Respondent acted unlawfully.

On the basis of those listed grounds, the Appellant now prays that the second award of **Kshs. 215,031,918/-** made on behalf of the National Land Commission be set aside and judgment be entered in favour of the Appellant for:

- i. The value of the property as contained in the valuation of Ragos Valuers & Estate Agents Ltd being **Kshs. 652,176,500/-** be awarded.
- ii. The date of valuation be deemed as the date of compensation.
- iii. Pending determination of this Appeal, the Respondent be barred from taking possession of the property.
- iv. Interest.
- v. Any other or further relief deemed fit in favour of the Appellant.

In response thereto, the Respondent filed the Replying Affidavit of Fidelis Kamwana Mburu, sworn on 5<sup>th</sup> February 2016, in which he averred that he is the Chief Valuation Officer at the National Land Commission. He further averred that the Respondent is the body legally vested with the authority to carry out compulsory acquisition of private property required for public purpose or public interest in line with Article 40(3) of the Constitution. He added that pursuant to its mandate under Part VIII of the Land Act, the Respondent commenced compulsory acquisition of 4.914 acres out of all that parcel of land known as L.R. No. 12389 registered in the name of the Appellant on behalf of Kenya National Highways Authority for construction of the Nairobi Southern By-pass. He averred further that on 2<sup>nd</sup> September 2013, he and Mr. E. Rwiggi, a former Assistant Commissioner of Lands undertook site inspections of the area under acquisition for the purpose of carrying out valuation thereof on behalf of the Respondent. He noted that at that time, there were no physical developments on site. He added that following that inspection, on 1<sup>st</sup> October 2013, the Respondent held inquiries as to compensation in line with section 113 of the Land Act. He noted that the Appellant submitted a written claim of compensation of **Kshs. 652,176,500/-** based on a Valuation Report prepared by Ragos Valuers & Estate Agents Limited. He noted that the Appellant's claim of compensation sought Kshs. 115,000,000/- per acre. He averred further that on 20<sup>th</sup> December 2013, the Respondent issued an award of compensation amounting to **Kshs. 155,398,925/-**. He stated that this award was however set aside on 6<sup>th</sup> February 2015 by Honourable Justice Gitumbi in **ELC Appeal No. 3 of 2014** after the Appellant successfully appealed against that award. He added that the court in setting aside the award directed the Respondent to issue the Appellant with a reasoned award on the basis of clearly ascertainable criteria. He averred further that on 17<sup>th</sup> July 2015, the Respondent held a second

inquiry where the Appellant, duly represented by Ragos Valuers & Estate Agents Limited, submitted the same claim of **Kshs. 652,176,500/-**. He averred that on 27<sup>th</sup> July 2015, the Respondent after having taken all factors into account prepared and issued a detailed and reasoned award of compensation of **Kshs. 215,031,918/-** as just compensation for the acquisition. He annexed a copy of the award as well as the valuation report prepared by the Respondent.

He stated that the second award of **Kshs. 215,031,918/-** issued to the Appellant is a just compensation of the value of the property compulsorily acquired based on the Land Act of 2012 and also taking into account the principles of determining just compensation as set out in the Land Acquisition Act, now repealed. He argued that the quantum of the award issued by the Respondent was not unilateral as alleged by the Appellant. He added that the second award was arrived at as a result of a property and professional valuation report dated 20<sup>th</sup> July 2015 prepared in line with the guidelines of the International Valuation Standards Council (IVSC) with clear reasoning as to how the award was arrived at as directed by the court. He pointed out that the report was provided to the Appellant together with the second award.

He stated that it is clear from the report and valuation prepared by the Respondent that the user of the parcel was properly taken into consideration during valuation. He pointed out that the report clearly stated that the user of the property is RESIDENTIAL HOTEL as this is the user that was approved by the City Council of the Nairobi as per the Appellant's copy of approval notification. He pointed out that the Appellant had misconstrued the approval granted by the City Council of Nairobi for change of user of the suit property to Residential Hotel to mean a COMMERCIAL user which was not the correct position.

He further stated that the Respondent did not fail to appreciate the location of the suit parcel as alleged in this Appeal pointing out that indeed the valuation report clearly states that the property is located along Ngong road at the intersection with the southern bypass and that this is the location that formed the basis for the value that was returned in the report and valuation prepared by the Respondent.

He further added that in issuance of the second award of **Kshs. 215,031,918/-**, the Respondent did consider whether the Appellant had commenced development of the hospitality centre and arrived at these two conclusions:

- First, that there were no physical developments on site as at the time of initiating the acquisition and the time of inspection for valuation purposes; and
- Secondly, that the building plans for the hospitality centre submitted by the Appellant at the time of both inquiry and inspection of the land had not been approved.

He noted that these particulars brought them to the conclusion that there were no developments on the portion to be acquired which could be included in the report and valuation and which would form the basis of a higher award.

Further to the above, he pointed out that all materials before the Respondent especially the report and valuation by the Appellant's Valuer M/s Ragos Valuers and Estate Agents Limited were exhaustively considered and deliberated upon between the Respondent's Valuer and the Appellant's Valuer in a meeting held at the Respondent's offices at Ardhi House on 17<sup>th</sup> July 2015. He averred that the Report and Valuation prepared by the Appellant's Valuer M/s Ragos Valuers and Estate Agents Limited was wanting and could be challenged on the following grounds:

- a) That based on comparables taken into account, the valuation assumes that the user of the suit parcel is a commercial user while the user of the property is residential with approval from the Nairobi City Country to change user to Residential Hotel. Both Residential and Residential Hotel use are inferior to commercial use and the value of the property would therefore be significantly of lesser value.
- b) That the report relies on only ONE comparable which is wanting in terms of comparability as follows;

- LR. No. 7336/47 measuring 6 acres is situated opposite Karen Police Station and is about 2.7. Kilometers away from the suit parcel. L.R. No. 7336/47 is situated within Karen shopping centre within the vicinity of major retail outlets like Nakumatt, Java house etc
- Karen shopping centre is an already established convergence centre with adequate commercial goodwill while the suit parcel is still unopened land without any complimentary services and facilities like banks, retail outlets, petrol stations, police station etc.
- The adduced comparable was sold for 83,000,000/- per acre in December 2012 but this figure was not adopted by the Appellant's Valuer. Instead, the value as per the report and valuation prepared by Ms Ragos Valuers and Estate Agents Limited being Kshs. 115,000,000/- per acre was arbitrary and without any justifiable reason. This represents an almost 40% increment in less than one year which is not supported by any comparables, facts or even reason.
- The above comparable used is therefore not reliable to arrive at fair compensation.

On those grounds, he asserted that the credibility of the report and valuation used as the basis of claim by the Appellant was denied and can only be construed as an attempt to defraud government of public coffers to suit selfish individual interests.

He further asserted that Salome L. Munubi, who issued the second award of **Kshs. 215,031,918/-**, is a registered and expert Land Economist and holds the position of the Director, Land Valuation and Taxation at the National Land Commission and that by virtue of her said position, she is in-charge of all valuation and land taxation matters including valuation for compulsory acquisition on behalf of the Respondent. He emphasized that the office of the Director Valuation and Taxation is thus the technically competent and relevant office of the Respondent where all compulsory land acquisition and compensation matters are handled. He stated that Salome L. Munubi could not, therefore, have usurped the powers of the Respondent as alleged by the Appellant.

As I stated in the Judgment delivered on 6<sup>th</sup> February 2015 in **ELC Appeal No. 3 of 2014**, although **section 113(2)** of the **Land Act, 2012** provides that the award of the Respondent shall be final and conclusive, the court must consider whether the compensation is "just compensation" within the meaning of **Article 40(3)** of the **Constitution of Kenya, 2010**. In that case, the Assistant Commissioner did not give any reasons for his award of **Kshs. 155,398,925/-** for the parcel of land to be acquired hence it was not possible for the court to evaluate the award and consider whether, in light of the Appellant's submissions, the Assistant Commissioner had misdirected himself. I stated that the award of the Respondent must not be subjective but objective and must be based on objectively ascertainable grounds and reasons. I considered such an approach as being consistent with the national values and principles which guide decision making contained in **Article 10(2)** of the **Constitution of Kenya, 2010**, more particularly transparency, accountability, etc. On that basis, I found that the decision of the Assistant Commissioner cannot stand as no reasons were given for awarding the sum of **Kshs. 155,398,925/-**. In the circumstances, I set aside the award of **Kshs. 155,398,925/-** and directed the Respondent to issue a reasoned award on the basis of clearly ascertainable criteria.

The Appellant is not challenging the validity of the acquisition of the said portion of the suit property (hereinafter referred to only as "**the disputed property**"). The Appellant's complaint is that the Respondent has not paid fair compensation for the disputed property. The issue I am called upon to determine in this Appeal is whether or not to set aside the second award of **Kshs. 215,031,918/-** issued by the Respondent and instead award the Appellant the claimed value of **Kshs. 652,176,500/-** based on the Valuation Report prepared by Ragos Valuers & Estate Agents Limited.

**Article 40(3) of the Constitution** provides as follows:-

**"The state shall not deprive a person of property of any description, or 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 5; 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 alright of access to a court of law;”**

**Section 107 (1) of the Land Act, 2012** empowers the Respondent to acquire land on behalf of the national or county government for public purposes or in the public interest.

**Section 111(1) of the Land Act, 2012** provides that,

**“If land is acquired compulsorily under this Act, just compensation shall be paid promptly in full to all persons whose interests in the land have been determined.”**

Under **Section 111(2) the Land Act**, the Respondent was supposed to make rules to regulate the assessment of just compensation for land acquired compulsorily. No such rules have been made to date. The **repealed Land Acquisition Act, Chapter 295 Laws of Kenya** had a schedule that set out the principles upon which compensation for land acquired compulsorily was to be determined. In the absence of similar rules under the **Land Act, 2012**, we may have to rely on the principles in the said repealed Act for guidance. Among the principles set out in the schedule to the said repealed Act for determining compensation are the following:-

1. Market value in relation to land is the market value of land at the date of publication of the notice of intention to acquire land.
2. In determining compensation, the following matters shall be taken into account.
  - i. The market value of the land.
  - ii. Damage sustained or likely to be sustained in the land at the time of taking possession of the acquired land by reason of severing the land from other land.
  - iii. Damage sustained or likely to be sustained by persons interested in the land at the time of taking possession of the acquired land by reason of such acquisition injuriously affecting his other property whether movable or immovable in any other manner or his actual earnings.
  - iv. Reasonable expenses incidental to change of residence if occasioned by the acquisition of the land.
  - v. Damage genuinely resulting from diminution of profits of the land between the date of publication of notice of intention to acquire the land and the date possession of the acquired land is taken.
3. To the amount of compensation determined to be payable shall be added a sum equal to 15% of the market value for disturbance.

**Section 112 and 113 of the Land Act, 2012** provides for the procedure of making inquiries to ascertain those who are interested in the land to be acquired and the amount of compensation to be paid to them.

Section 128 of the Land Act, 2012 provides that:-

**“Any dispute arising out of any matter provided for in this Act may be referred to the Land and Environment Court for determination.”**

The Appellant’s Appeal has been brought under Section 128 of the Land Act aforesaid.

### **Analysis and Determination**

In challenging the Respondent’s second award of **Kshs. 215,031,918/-**, the Appellant asserted that the Respondent failed to take into account the value of the property to be compulsorily acquired and arrived at a unilateral quantum not backed by any reasoned valuation. I find this assertion to be incorrect for the

reason that the Respondent demonstrated that this award was arrived at after the Respondent's Chief Valuer conducted a valuation thereof, after discussing the Appellant's own valuation of the same and after preparing and serving a copy of their Report and Valuation Report dated 20<sup>th</sup> July 2015 which was produced to this court. It is not true therefore that the second award was unilateral. I find that the second award was indeed backed by a reasoned valuation.

The Appellant also asserted that the Respondent erred in failing to acknowledge the fact that the user of the property of the Appellant was commercial, the City Council of Nairobi (as it then was) and the Commissioner for Lands having approved the change of user, resulting in the Respondent arriving at a value that was not commensurate with similar properties in the area. On this point of the user of the portion to be acquired, I agree with the Respondent's submissions that in the valuation report prepared on behalf of the Appellant by Ragos Valuers and Estate Agents, the user of the property was identified as Residential Hotel and they referred to a notification of approval of development permission dated 10<sup>th</sup> December 2012 issued by the City Council of Nairobi (as it then was) ref no. CPD/PIS/2690/12389/DM/SNG which granted the Appellant approval for change of user of the property from Residential to Residential Hotel. It cannot be true therefore that the user of the portion to be acquired is commercial as asserted by the Appellant. In their valuation, the Respondent used a residential hotel user for 1 acre and next best alternative user for the remainder of the land to be acquired. The comparables used by the Respondent were both commercial and residential user.

The other ground asserted by the Appellant is that the Respondent failed to appreciate the location of the property and its proximity to the Highway to reach a valuation that was just and as such properly compensate the Appellant. To this point, I note that the Respondent stated in their Valuation Report dated 20<sup>th</sup> July 2015 that the location of the property is along Ngong Road at the intersection with the Southern Bypass and having frontage to Mutuini river. They took into consideration the location of the parcel and its size and proceeded to adopt Kshs. 50 million per acre for the incompletely approved hotel and Kshs. 35 million per acre for the remaining portion as at 23<sup>rd</sup> August 2013.

Further, the Appellant asserted that the Respondent also failed to consider the fact that the Appellant had already commenced development of a hospitality centre when the decision to commence the acquisition was made. To that point, as noted above, the Respondent awarded the sum of Kshs. 50 million per acre for 1 acre of the portion to be acquired which was to be used to set up a residential hotel. I find this to be in order.

To the assertion that Salome N. Munubi, who issued the second award of **Kshs. 215,031,918/-**, usurped the powers of the National Land Commission and arrived at a unilateral decision that was neither correct nor supported by any proper valuation, I agree with the position taken by the Respondent which is that Ms. Munubi is an employee of the Respondent duly mandated to issue the award complained of. There can therefore be no truth that she usurped the powers of the Respondent.

My overall finding is that in issuing the second award of **Kshs. 215,031,918/-**, the Respondent has satisfied this court that this second award amounts to just compensation for the portion of land to be acquired and is backed by a well-reasoned valuation report that I find no ground to question. To that extent therefore, I decline to award the Appellant his prayers and proceed to dismiss this Appeal with no order as to costs.

**DELIVERED, DATED AND SIGNED IN NAIROBI**

**THIS 29<sup>TH</sup> DAY OF JULY 2016.**

**MARY M. GITUMBI**

**JUDGE**