REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELCA CASE NO 45 OF 2019

PENTAGON COMMUNICATION LTD.....APPELLANT

VERSUS

THE NATIONAL LAND COMMISSION.....RESPONDENT

JUDGMENT

This is an Appeal/Reference from the Award of the National Land Commission in respect of the Compulsory Acquisition of part of LR MN/VI/3638 measuring 0.3325 Hectares (0.821 Acres). The above named Appellant being aggrieved and dissatisfied with the whole of the above mentioned Compulsory Acquisition and Award Appeals to the High Court of Kenya against the whole of the Acquisition and Award on the following grounds, namely:-

1. That the Appellant is a Limited Liability Company incorporated under the Laws of Kenya and is the registered proprietor and owner of Land parcel No.LR MN/VI/3638. The property is situate in Miritini Area of Mombasa, touching Dongo Kundu by-pass and is of industrial user.

2. That the Respondent is a Constitutional Commission established under Article 67 of the Constitution of Kenya and operationalized pursuant to the provisions of the National Land Commission Act No. 5 of 2012.

3. That the Respondent is under Part VIII of the Land Act No. 6 of 2012 charged with undertaking the process of Compulsory Acquisition of land for public purposes.

4. That the Constitution at Articles 40(3) and the Land Act at Section 111 enjoins the Respondent upon compulsory acquisition of land to promptly pay to the registered owner and interested persons the just and full compensation of the compulsory acquired land.

5. That the Respondent vide Gazette Notice No. 405 of 24th January 2014 and 1796 of 21st March 2014 issued Notice of Compulsory Acquisition1and Inquiry as to compensation of part of the Appellants Land Parcel LR MN/VI/3638 measuring 0.3325 hectares (0.821 Acres) for the public purpose of Construction of Mombasa Port Area Road Development Project (MPARD) Mombasa Southern Bypass and Kipevu New Terminal Link Road by the Kenya National Highways Authority.

6. That upon the conclusion of the Inquiry, the Respondent in violation of the provisions of Section 113(1) and 114 of the Land Act, 2012 failed to serve the Applicant with the award and offer of compensation for the compulsory acquired land being part of land parcel LR MN/VI/3638 measuring 0.3325 hectares (0.821 Acres).

7. That on or about 30th October 2018, the Appellant through third party became aware that the Respondent had reached and/or made an award in respect of the compulsory acquired land being part of land parcel LR MN/VI/3638 measuring 0.3325 hectares (0.821 Acres) in the sum of Kshs. 2,829,000.

8. That vide letter dated 30th October 2018, the Appellant wrote to the Chairman of the Respondent seeking for confirmation of the Award and in any event disputing the same from the outset. The Respondent responded vide letter dated 12th February 2019 asserting that the value returned was the open market value payable at the time of inspection. The Respondent did not confirm the Award nor serve the same upon the Appellant a position that remains to-date and an ongoing violation of the law governing compulsory acquisition.

9. That the Appellant avers that the value returned by the Respondent in respect of the Appellants compulsory acquired land being part of land parcel LR MN/VI/3638 measuring 0.3325 hectares (0.821 Acres) in the sum of Kshs. 2,829,000 is erroneous and not the just and full compensation for the compulsory acquired land necessitating this Appeal in that:-

i.The value returned by the Respondent for the Appellants land is erroneously low and not the just market value of the acquired land based on comparable land sales within the area of land of similar use;

ii. The value returned by the Respondent for the Appellants land is discriminatory low compared to the values awarded by the Respondent to neighbouring plots within the same area;

iii. The value returned by the Respondent for the Appellants land did not take into account the industrial user of the Appellants land;

iv. The value returned by the Respondent for the Appellants land did not take into statutory account in the cases of compulsory 15% disturbance allowance payable acquisition;

v. The value returned by the Respondent for the Appellants land did not factor the developments undertaken by the Appellant in the nature of fencing and ex-gratia payments to squatters to move out of the land;

vi. The value returned by the Respondent as compensation payable to the Appellant is erroneously low and not the full and just compensation based on the open market value of the land.

10. That further and in the alternative to the foregoing, the value returned by the Respondent as compensation payable to the Appellant is null and void for having been undertaken by a valuer not of the Respondent but of the Ministry of Lands and Physical Planning as disclosed in the Respondents letter dated 12th February 2019. The Respondent abdicated its statutory mandate to undertake compulsory acquisition and render the just and full compensation.

11. That on or about 20th June 2016, the Appellant through Dunhill Africa Valuers Limited undertook valuation of the compulsory acquisition land who returned a valuation of Kshs.20,000,000 as at 2014 and Kshs. 24,000,000 as at the date of the valuation report.

12. That the Respondent and the Kenya National Highways Authority (KeNHA) the public entity for whose benefit the part of the Appellants and was compulsorily acquired have since taken possession of the compulsory acquired land with effect from 8th May 2015.

13. That the Appellant is therefore entitled to interest on the full and just compensation awarded by this Honourable Court at 12% being the prevailing Central Bank Base lending rate as per Section 117 of the Land Act from 8th May 2015 being the date of taking possession of the appellants land.

14. That the question as to the just compensation of the 0.3325 Hectares of the Appellants land parcel LR MN/VI/3638 compulsorily acquired for the public purpose of Construction of Mombasa Southern Bypass is a matter within the jurisdiction of this Honourable Court pursuant to section 128 of the Land Act, 2012.

15. That the Appellant is yet to be compensated the full and just compensation despite its land having being compulsorily acquired for the public purpose of Construction of Mombasa Southern Bypass, taken possession thereof and the project completed.

16. That the Respondent's continued failure to promptly pay full and just compensation to the Appellant is contrary to the law and a continued violation of the Appellants rights to property under Article 40(3) of the Constitution necessitating urgent redress by this Honourable Court.

17. That this Honourable Court has the Jurisdiction to hear and determine the Appeal herein pursuant to the provisions of Article 40(3)(b)(ii) of the Constitution of Kenya and Section 128 of the Land Act No.6 of 2012, Laws of Kenya.

18. That this Appeal/Reference has been filed timeously and without delay as the Respondents violations of the Appellants rights to property under Article 40 are still ongoing.

The appellant prays for orders that;

i. That the Appeal herein be allowed.

ii. That the Award by the Respondent in respect of the compulsory acquisition of part of the Appellants land parcel LR MN/VI/3638 measuring 0.3325 Hectares be and is hereby set aside and substituted with an Order that the Appellant be compensated the just and full compensation for the compulsory acquired land.

iii. That the Appellant be and is hereby awarded compensation for the part of land parcel LR MN/VI/3638 measuring 0.3325 Hectares in the sum of Kshs.24,000,000 as per the valuation report by Dunhill Africa Valuers Limited dated 20th June 2016.

iv. That this Honourable Court does and hereby awards the Appellant interest on the awarded compensation of Kshs.24,000,000 from the dates of taking possession of the Appellants land being 8th May 2015 at the rate of 12% being the prevailing Central Bank Base lending rate as per Section 117 of the Land Act.

v. That the Respondent does pay the Appellant the costs of the Appeal herein.

This court has considered the Appeal and submissions therein. On the 11th November 2021 the respondent filed a preliminary objection stating that the entire appeal offends the provisions of Section 16A of the Environment and Land Court Act having being filed out of time and should be dismissed. This court has considered the preliminary objection and the issue for determination herein is, whether this matter was filed out of time. A Preliminary Objection, as stated in the case of Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd (1969) E.A 696,

> "..... consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit"

In the same case, Sir Charles Newbold said:

> "A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion".

J.B. Ojwang, J (as he then was) in the case of Oraro vs. Mbajja (2005) e KLR had the following to state regarding a 'Preliminary Objection'.

> "I think the principle is abundantly clear. A "preliminary objection", correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement …….. that, "where a court needs to investigate facts, a matter cannot be raised as a preliminary point.".

The issue as to whether or not the suit was filed out of time is therefore properly raised as a Preliminary Objection and the court will consider the same first.

Section 16A (1) of the Environment and Land Court Act, 2011 provides that all appeals from subordinate courts and local tribunals shall be filed within a period of 30 days from the date of the decree or order appealed against. The respondent did not file any response and or submissions to the appeal or the preliminary objection. The Appellant stated that on or about 30th October 2018, the Appellant through third party became aware that the Respondent had reached and/or made an award in respect of the compulsory acquired land being part of land parcel LR MN/VI/3638 measuring 0.3325 hectares (0.821 Acres) in the sum of Kshs. 2,829,000. This appeal was filed in court of the 2nd October 2019. This is one year later after the award was made. Section 16A (2) of the said Act provides that:

> **"An appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time."**

The Appellant never sought extension of time and I concur with the Respondent that this Appeal offends the provisions of Section 16A of the Environment and Land Court Act having being filed out of time. Having found so they will be no need to go into the merits and demerits of this appeal and the same is dismissed with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23rd DAY OF FEBRUARY 2022.

N.A. MATHEKA

JUDGE