



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

CIVIL APPEAL NO 623 OF 2006

(An Appeal from Land Acquisition Compensation Tribunal dated 5th May, 2005)

JULIUS MUSYOKA KIMUNDUU.....APPELLANT

VERSUS

1. COMMISSIONER OF LANDS

2. NATIONAL LAND COMMISSION.....RESPONDENTS

JUDGMENT

This is a case where a land owner disputes compensation paid to him in respect of compulsory acquisition of part of his land. On 11th February 2005, a notice of intention to acquire two parcels of land was published as provided for in Section 6 of the Land Acquisition Act. An inquiry was held on 23rd March 2005 to determine the nature of the land and the extent of developments thereon with a view to assessing the compensation to be paid. Among the parcels of land affected by the notices were those of the Appellant. After the inquiry the two parcels of land measuring 7.6132 ha and 0.0912 ha respectively were valued at Kshs. 960,255/-.

According to the commissioner, he based compensation on his inspection of the land acquired over which he had taken note that it was agricultural land under natural bushes of thickets and grass.

The Appellant appealed to the Land Acquisition Compensation Tribunal claiming that they were worth Kshs. 8,013,960/- and that is the amount due to him. The Government intended to compulsorily acquire the parcels of land to enable construction of the 80 Kilometer Sultan Hamud-Mtito Andei Road Project.

According to the Respondent in their arguments before the Tribunal, the land was to be used in the future for repair materials of the same road and therefore it was imperative that it becomes Government property. That being the case, the said land was solely for use by the Government and transfer did not at any one point pass to Strabag International the company that had leased the land for Six (6) months prior to issue of the notices to acquire land.

The appellant disputed the valuation amounting to Kshs. 960,260/- through his expert witness, a registered valuer who averred that the character and nature of the acquired lands should have been considered as quarry land and valued as such. This was based on the notion that quarrying of the lands had started prior to the publication of the Gazette notice of intention to acquire the parcels of land.

The Tribunal in its ruling held that the acquired land was zoned in the Agro-ecological map from the Ministry of Agriculture as LM5 – Livestock Millet Zone with a very short cropping season and after visiting the parcels of land also confirmed that where use of land, had changed to quarry land it had to satisfy legal requirements provided in the schedule of the Land Acquisition Act.

Being dissatisfied with the award of the Tribunal, the appellant filed memorandum of appeal on 14th September 2006 upon seven (7) grounds of appeal. The main complaint raised in those grounds is that the compensation was inadequate based on several considerations. The appeal was heard *ex parte* as the Respondents did not file any documents opposing it even after having been duly served with the Record of Appeal and written submissions.

Section 75 of the repealed Constitution provided for compulsory acquisition of one's property in the interest of defence, public safety, public order, public morality, public health, town and country planning for the development or utilization of property so as to promote the public benefit. Paragraph 1(c) of the Section provided for prompt payment of full compensation for the property so acquired. This is enforced by Section 8 of the Land Acquisition Act ((Cap 295) also repealed) which also provided for the payment of full compensation for the land compulsorily acquired under that Act.

Article 40(3) of the Constitution provides as follows in this regard -

“40(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.”

A similar provision is to be found in Section 111 of the Land Act of 2012 to the effect that, just compensation shall be paid promptly in full to all persons whose interests in the land have been determined upon compulsory acquisition.

No doubt the acquisition of the appellant's land for the construction of a road network was a necessary acquisition for the country planning or the development or utilization of the property for the promotion of public benefit. The appellant told the Court he did not dispute the acquisition but what he disputed was the amount of compensation paid to him.

The Schedule to the repealed Land Acquisition Act provides compensation will only be based on the following factors namely -

“2. In determining the amount of compensation to be awarded for land acquired under this Act, the following matters, and no others, shall be taken into consideration -

(a) the market value of the property,

(b) damage sustained or likely to be sustained by persons interested at the time of the Commissioner's taking possession of the land by reason of severing the land from his other land.

(c) damage sustained or likely to be sustained by persons interested at the time of the

Commissioner's taking compensation of the land by reason of the acquisition injuriously affecting his other property whether movable or immovable in any other manner or his actual earnings,

(d) if in consequence of the acquisition any of the persons interested would or will be compelled to change his residence or place of business, reasonable expenses incidental to the change, and

(e) damage genuinely resulting from diminution of the profits of the land between the date of publication in the Gazette of the notice of the intention to acquire the land and the date the commissioner takes possession of the land."

Nevertheless, courts have tended to take into consideration other factors for example the nearness of the land to be acquired to the main town and it's nearness to the roads of access.

In this case, a factor that ought to have been considered by the Tribunal was that prior to the issue of notices to acquire the land, a private company, Strabag International had leased 3¹/₄ (three and quarter acres) of the appellant's land for six (6) months at a cost of Kshs. 817,872/- for purposes of extracting hardstone from the area.

The Respondent pointed out in its submissions to the Tribunal, that the 'quarry' was compulsorily acquired due to the fact that it was to be required in the future for repair materials of the same road.

It is therefore clear that the purpose for which the Appellant's land was acquired was for use as a quarry, exactly as Strabag International had intended to use it when it entered into the lease agreement dated 13th November 2004 with the Appellant.

Just compensation 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 intended in this case leasing it out to private companies as a quarry.

In conclusion therefore, the Respondent's compensation award was a gross undervalue of the Appellant's parcels 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.

The Appellant has shown to the satisfaction of the Court the intended use of his property and the benefits that would have accrued therefrom were it not for the compulsory acquisition. This Court however notes that the Appellant only provided evidence of loss of actual earnings from the agreement between him and Strabag International and that the said earnings were valued at Kshs Kshs. 817,872/= for the limited period according to the lease agreement.

I am persuaded the appellant did not get full value in terms of compensation for his land. However, I am unable to say his valuer was correct in the application of the law applicable.

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. Each party shall bear their own costs of this appeal. There shall be liberty to apply.

Orders accordingly.

Dated, signed and delivered at Nairobi this 21st day of July, 2015

A. MBOGHOLI MSAGHA

JUDGE