



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**E.L.C NO.27 OF 2013**

**(Formerly HCCC No. 148 of 2012)**

**MAVOLONI CO. LTD ..... PLAINTIFF**

*Versus*

**TANATHI WATER SERVICES BOARD ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiffs claim against the defendant is for **Kshs.33,907,000/=** being the value of fixed improvements and land acquired by the defendant from the Plaintiffs for purposes of construction of the proposed Yatta Dam along Thika River in the year 2009.
2. It was averred by the Plaintiff that **Ithanga/Gituamba/Mavoloni Block 2/205** measuring **5 acres** (Suit property) was not valued and/or compensated for although the defendant took possession of the same on the ground whose value was Kshs.1,482,000/=. Other improvements were:

- Pipes and piping works - 30%

G.I.6” .....Kshs.17,000,000/=

70% PVC6” .....Kshs.14,165,000/=

- Grading shade, store,

Double pit latrine and

Charcoal cooler .....Kshs. 317,000/=

- Grading shed, Security house

and double pit latrine .....Kshs. 943,000/=

**Kshs.32,425,000/=**

Compensation for Plot No

Gatuanyaga/Ngolimba/205 .....Kshs.1,482,000/=

**TOTAL..... Kshs.33,907,000/=**

3. Further, it was averred that before the first list of valued items was prepared, the defendant made a physical inspection by the Valuers appointed by it in the presence of Senior officers who came up with the list, therefore the defendant had no justification to omit the same in the 2<sup>nd</sup> valuation report without any explanation and/or verification.
4. The second Valuation report was received by the Plaintiff and signed by both parties on the understanding that verification and assessment of land and developments or improvements left out would be done upon initial payments. Therefore if any fixtures or improvements may have been lost or could not be accounted for it was while in possession of the defendant.
5. The defendant denied being indebted to the Plaintiff for the sum claimed. It denied having taken possession of interest in the property. It averred that any relationship between it and the Plaintiff in regard to compensation was reduced into writing and executed by both parties and it paid the Plaintiff fully.
6. At the hearing the plaintiff called 4 witnesses. **PW.1 Joseph Munyao Mutisya**, the chairman of the Plaintiff stated that their land that was taken by the defendant was for construction of a dam. Their claim is for Kshs.33,907,000/= in respect of items that were valued that were in possession of the defendants in respect of Plot No. Ithanga/Gituamba/Mavoloni Block 2/205. The Plaintiff willfully entered into a sale agreement with the defendant. They sold 95 acres of land which was valued in the year 2011. The sum demanded of Kshs.33,907,000/= is in respect of Plot No.205 and the items left thereon.
7. **PW.2 Peter Munyao Muasya** the Manger of the Plaintiff alluded to photographs that showed pipes were used to irrigate coffee on the suit property. He stated that the pipes were in their possession ad there was a Valuer who valued the items from the defendant company in two (2) days' time.
8. **PW.3 Joseph Wambua** a Land consultant who did the sub-division of Mavoloni plots stated that he was called in December 2011 by PW.1 who informed him that the defendant had compulsorily acquired their land to build Yatta Dam. He was shown a letter to that effect and another letter from an Engineer of the defendant which had a valuation report from a Valuer. He stated that the valuation report should have been from the Government Valuer. He advised the chairman to avail a valuation from a Registered Valuer. According to him some figures were missing from the document.
9. **PW.4 Charles Kibuthi Gathogo** a Land Surveyor and a consultant on land matters stated that he was involved in the excision of the area that was taken up by the dam by Tanathi.
10. The defendant called **Nicholas Muthuri** the Chief Executive Officer who stated that the suit property which was purchased from the plaintiff was within the proposed area of the dam. In the course of acquisition the Plaintiff did not raise any concern. The agreement was signed on 30/10/2011 the parcel of land No. Gatuanyaga Ngoliba Block No.2/209 was valued at Kshs.110,361,348/=. They purchased interest in 95 Hectares, and among the plots were:-

- Gatuanyaga/Ngoliba Block 2/206
- Gatuanyaga/Ngoliba Block 2/207
- Gatuanyaga/Ngoliba Block 2/208
- Gatuanyaga/Ngoliba Block 2/209
- Gatuanyaga/Ngoliba Block 2/130
- Gatuanyaga/Ngoliba Block 2/28
- Kakuzi/Ithanga/Gituamba block 1 (Mavoloni)/877
- Kakuzi/Ithanga/Gituamba block 1 (Mavoloni)/876
- Kakuzi/Ithanga/Gituamba block 1 (Mavoloni)/828

11. Gatuanyaga/Ngoliba/205 was not part of the dam. They

did not purchase it. He testified that after digging of the dam the suit plot will not be submerged. The legal officer signed documents without any duress. There was a Revised Valuation Report in 2011 which involved the Plaintiff although they were not consulted, they agreed to it and duly signed it.

12. Rival submissions by both the Plaintiff and defendant have been duly considered. Issues to be

determined may be condensed as:

- ***Whether the defendant and the plaintiff had a contractual relationship.***
- ***Whether the compensation made to the Plaintiff was unjust.***
- ***Whether the defendant is liable to compensate the plaintiff for parcel of Land Registration No. Gatwanyaga/Ngoliba/205.***

13. According to evidence adduced by both parties, the defendant compulsorily acquired land belonging to the plaintiff for purposes of excavating the proposed Yatta dam. The area affected was evaluated. The first valuation report was done. These was not used due to budgetary constraints per the allegation of the defendant. A second valuation was undertaken. Although the plaintiff was not consulted at the outset, it was involved in that its representative duly signed the document. The payment of compensation by the defendant to the plaintiff was based on the second valuation report. These second Valuation is what omitted some items that were worth Kshs.33,907,000/= that is the basis of the claim in this suit.

14. It is argued by the Plaintiffs that there was a quasi – contract between the defendant and the plaintiff. The basis of the argument is that the elements of offer and acceptance had never arisen so as to bring the transaction within the parameters of the law of contract. Further, according to PW.3, the chairman of the company informed him that he was advised against insisting on payment of the items claimed by the plaintiff following the defendant’s action of departing from the initial valuation report. In the case of **Madhupaper International Ltd & Another vs Kenya Commercial Bank Ltd & 2 Others (2003) eKLR Kuloba J.** in discussing quasi -contracts highlighted that:

***“forming the foundation of quasi contractual claims, such as actions for money had and received, and for money paid to a third party from which the defendant has derived a benefit, and equitable relief from undue influence and catching bargains, amongst other restitutionary claims, the idea of unjust enrichment or unjust benefit is intended to prevent a person from retaining money or some benefit derived from another which it is against conscience that he should keep it, and he should, in justice, restore it to the plaintiff. The gist is that a defendant, upon the circumstances of the case is obliged by the ties of natural justice and equity to make restitution.”***

Section 3(3) of the Law of Contract Act, provides .....

***“No suit shall be brought upon a contract for the disposition of an interest in land unless—***

***(a) the contract upon which the suit is founded—***

***(i) is in writing;***

***(ii) is signed by all the parties thereto; and***

***(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:***

***Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act, nor shall anything in it affect the creation of a resulting, implied or constructive trust.”***

15. This is a case where there is proper evidence of a contract of sale of land in the meaning of the provisions of **section 3** of the Law of Contract Act. There was an offer in force of the valuation report and acceptance in terms of signing the sale agreement.

16. It is confirmed by the defendant that Ithanga/Gituamba/Mavoloni Block 2/205 was not part of the sale agreement as it was not affected by the intended Yatta Dam. They have adduced in evidence a survey map to confirm the same and a report thereto. The Plaintiff can therefore not claim

- compensation for what was not acquired by the defendant.
17. This therefore brings us to the issue whether the compensation was unjust. According to the evidence adduced, the suit property was not part of the contract entered into by the parties herein and the defendant has no claim over it. The items claimed by the plaintiff having been left out of the report have not been canvassed as to where they were. If these items form part of Ithanga/Gituamba/Mavoloni Block 2/205 there can be no claim over them as they automatically belong to the plaintiff.
18. It is alleged that the plaintiff was coerced into signing the agreement. The court of Appeal considered what amounts to coercion in the case of **Kenya Commercial Bank & Another vs Samuel Kamau Macharia & 2 others (2008)eKLR**, it noted that:-

*“At common law money paid under economic compulsion could be recovered in an action for money had and received: See Astley vs Reynolds (1731)2 Stra 915,93 ER 939. The compulsion had to be such that the party was deprived of “his freedom of exercising his will”. It would appear that American law, also, now recognizes that a contract may be avoided on the ground of economic duress. See Williston on Contracts (3<sup>rd</sup> Edition, 1970 Chapter 47). The commercial pressure alleged to constitute such duress must, however, be such that the victim:-*

- i. *Must have entered the contract against his will*
- ii. *Must have had no alternative course open to him and*
- iii. *Must have been confronted with coercive acts by the party exerting the pressure.”*

19. In the instant case the plaintiff has not claimed to have unwillingly entered into a contract and has not demonstrated that they had no alternative. There is absolutely no evidence of coercion.
20. In the result, I find that the plaintiff has not proved its case on a balance of probabilities. Consequently, the same is dismissed with costs to the defendants.
21. It is so ordered.

**DATED, SIGNED and DELIVERED at MACHAKOS this 26<sup>TH</sup> day of AUGUST, 2015.**

**L. N. MUTENDE**

**JUDGE**