



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
ENVIRONMENT & LAND COURT
JUDICIAL REVIEW CASE NO.11 OF 2013

SHAJANAND ENTERPRISES LIMITEDAPPLICANT

VERSUS

LAND ACQUISITION & COMPENSATION TRIBUNAL.....1ST RESPONDENT

THE COMMISSIONER OF LANDS.....2ND RESPONDENT

CHAIRMAN NATIONAL LAND COMMISSION.....3RD RESPONDENT

J U D G M E N T

1. INTRODUCTION

(a) By Notice of Motion dated 23rd April 2013 Shajanand Enterprises Limited, the Exparte Applicant, seeks for the following orders:

" 1. **AN ORDER OF PROHIBITION** prohibiting the Respondent his officers or agents or any other person or entity acting under his authority from implementing any awards made under the Land Acquisition Compensation Tribunal as purportedly constituted under the Land Acquisition Act (Cap 295) (repealed) in purported compensation for the compulsory acquisition of the Applicant's parcel of lands namely **KISUMU/KASULE/3263 and KISUMU/KASULE/3795**.

2. **AN ORDER OF CERTIORARI** to remove this Honourable Court to be quashed the proceedings and decision of the respondent, his officers or agents or any other person or entity acting under his authority to a purported award on compensation for

the compulsory acquisition of the Applicant's said parcel of land namely **KISUMU/KASULE/3263 and KISUMU/KASULE/3795** which awards was purportedly made on the 11/7/2012.

3. **AND ORDER OF MANDAMUS** compelling the Respondent his officers or agents or any other person or entity acting under his authority to compensate the Applicant for the compulsory acquisition of its said parcel of land namely **KISUMU/KASULE/3263 and KISUMU/KASULE/3795** under the provisions of the Land Act (Number 6 of 2012) and not the Land Acquisition Act (Cap 295) (repealed).

4. That this Honourable Court do proceed to make such other or further orders that it may deem apt in the circumstances.

6. That costs of these proceedings be catered for."

(b) The application is based on five grounds as belows:

" 1. The Respondent has purported to award compensation for the compulsory acquisition of the Applicant's said parcel of land in July 2012 under the Land Acquisition Compensation Tribunal as constituted under the Land Acquisition Act

(Cap 295) whilst the said Act had already been repealed in May 2012 and thus had no force of law it being non-existent at the material time save as a repealed Act.

2. That in view of the repeal of the Land Acquisition Act (Cap 295) Laws of Kenya by the Land Act 2012 in May 2012 the appeal to the Land Acquisition Compensation Tribunal could not possibly lie as the said Tribunal no longer existed in law.

3. The Respondent's said awards are therefore Whimsical, Arbitrary, Illogical, Unreasonable, Capricious, Illegal, Irrational, Ultra Vires, Null and Void and are an Utter and Blatant abuse of power.

4. That the Respondent's actions are thereby Unlawful, Improper in Law and in fact, amount to an act of Utter Bad Faith and Ineptitude, Malicious, Oppressive and Utterly unjust to the applicant.

5. That the reliefs sought herein can only be obtained before this Honorable court by virtue of these proceedings."

(c) The application is also based on the statement of facts dated 21st March 201 and the verifying affidavit of Naresh Kumar Rambhai Patel, a director of the Exparte Applicant, sworn on 21st March 2013. The two documents had been filed with the Chamber summons for leave.

(d) The Exparte applicant case is that they became the registered proprietor of Kisumu/Kasule/3263 on 7th November 2011 and Kisumu/Kasule/3795 on 14th November 2011. A copy of title deed and register for Kisumu/Kasule/3263 and copy of the register for Kisumu/Kasule/3795 are annexed to the verifying affidavit. Also annexed to the said affidavit are copies of the award in respect of the two parcels dated 11th July 2012 addressed to Stephen Okello Okumu. The Exparte Applicant faults the Respondents for making the awards under the Land Acquisition Act, Chapter 295 of Laws of Kenya while it had been repealed in May 2012.

2. The application is opposed by the Respondents through the replying affidavit of Elias Gitari Rwigy sworn on 14th October 2013. The deponent annexed a letter dated 24th February 2011 addressed to the Director General Kenya National Highways Authority by the Commissioner of Lands asking for the cheques for the affected land owners whose details are in pages 2 and 3. The letter indicates that the inspections, inquiries, valuations and issuing of the awards had been completed. Also annexed to the replying affidavit are copies of the awards dated 15th February 2011 in respect of land parcels Kisumu/Kasule/3263 and 3795 addressed to Stephen Okello Okumu. The deponent also annexed copies of the gazette notice No.8753 and 8754 on the intention to acquire the parcels described and dates for the inquiries. Both gazette notices indicates that the registered owner of the two parcels of land which are the subject matter of this proceeding was Stephen Okello Okumu.

3. The Exparte Applicant filed a further affidavit sworn by Neresh Kumar Rambhai Patel on 4th November 2014 in response to the replying affidavit. The deponent annexed among others, an affidavit sworn by Stephen Okello Okumu on 12th November 2013 in which he depones at paragraphs 3 that he sold land parcel Kisumu/Kasule/3263 and 3795 to the Exparte Applicant in 2010. The deponent indicated in paragraph 7 of the said affidavit that he had annexed the agreement of sale but none was attached. The court is therefore unable to verify the contents of the said sale agreement.

4. The Exparte Applicant filed the Chamber Summons Under Certificate of Urgency dated 25th

September 2011 seeking to enjoin the Chairman, National Land Commission. The application was granted on 10th December 2014 but there is nothing to confirm that the Notice of Motion and order were not served on the National Land Commission. The affidavits of service of Mitchell J.B. Menezes and Dominic Ouma Olang sworn on 10th April 2015 are on service of hearing notice dated 2nd April 2015 only. The National Land Commission did not participate in the proceedings.

5. The counsel for the Exparte Applicant and that of the 1st and 2nd Respondent appeared before the court on 15th April 2015 and agreed to file written submissions in respect of the notice in motion dated 23rd April 2013. Consequently the Exparte Applicant filed their submission dated 7th May 2015 while Respondents' filed theirs dated 9th June 2015.

6. The court has considered the grounds on the statement of facts, affidavit, evidence and counsel's submissions and the main issues for determination are as follows:

(a) Whether the compulsory acquisition in respect of the two parcels of land was done in accordance with Land Acquisition Act (repealed) or the Land Act, 2012.

(b) Whether the Respondents followed the procedure set by the law.

(c) Whether any of the orders sought should issue.

(d) Who pays the costs.

7. FINDINGS:

(a) That from the affidavit evidence availed, the Exparte Applicant became the registered proprietor of **Kisumu/Kasule/3263 and 3795** on 7th November 2011 and 14th November 2011 respectively. Before those dates the two parcels were registered in the joint names of Stephen Okello Okumu and Yegon Nixon Kiprotich since 22nd January 2009.

(b) That the 2nd Respondent gazatted the intention to compulsorily acquire the two parcels among others vide the gazatte notice number 8753 of 23rd July 2010 in accordance with Section 6(2) of the Land Acquisition Act (now repealed). By gazatte notice 8754 of the same date the 2nd Respondent gave notice of public hearing. The notice was for "inquiries for the hearing of claims to compensation by people interested in the land for the construction of Kisumu Bypass - Kericho – Mau Summit Road". The meetings for the inquiries in respect of the various parcels of land were to be held at the venue, date and time specified. The meeting for the inquiries of the two parcels of land subject matter of this proceedings was scheduled for 9.30 am on Thursday, the 2nd December 2010 at DC's Office, Kisumu.

c. The notice further required "every person who is interested in the affected landto deliver not later than the day of inquiry, a written claim to compensation." It further required "all interested parties to appear for inquiries with copies of the following documents: PIN Number, Identity card, Copy of title deed to confirm ownership and electronic funds transfer form duly executed."

As already found in (a) above, the registered proprietors of the two suit lands at the time of gazatte notices numbers 8753 and 8754 were issued to Stephen Okello Okumu and Yegon Nixon Kiprotich. The gazatte notice had the name of only Stephen Okello Okumu as the registered owner while the copies of the title deed and register had names of the two registered proprietors. Stephen Okello Okumu, in his affidavit attached to the further affidavit of Naresh Kumar Rambhai Patel deponed that he sold the two parcels to the Exparte Applicant in 2010. He did not disclose whether Yegon Nixon Kiprotich was involved in the transaction and as the sale agreements were not annexed, the court has no way of confirming the date of the sale and whether or not Yegon Kiprotich was a party. If indeed the Exparte Applicant bought the two parcels of land in 2010, then they had every right to attend the inquiry and

lodge their compensation claims. The Exparte Applicant do not appear to have done so from the evidence availed through the various affidavits.

(c) That the Exparte Applicant became the registered proprietors of the two suit land in November 2011 while the acquisition process had been completed in February 2011 and no appeal was filed with the 1st Respondent.

(d) That having found as above, it is therefore apparent that the vendor who sold and transferred the suit lands to the Exparte Applicant in November 2011 did so while knowing the suit lands had already been compulsorily acquired. These proceedings are not against the vendors and the court do not intend to say much on this. The Respondents have in their submission suggested a way forward when they stated that " from the records in our custody, the ownership of parcels Kisumu/Kasule/3623 (sic) and 3795 was in dispute hence the Commission of Land was to verify and confirm the true owner. The Applicant is at liberty to make a follow up with the Commissioner of Lands for payment upon verification. whenever there is a dispute, succession or the owner is not known, its upon the parties to resolve the issues then seek directions from the National Land commission." The Exparte Applicant's recourse lies elsewhere as in judicial review proceedings the court can only fault the decision where the public body has failed to follow the laid down procedure. There is no such evidence in this case.

(e) That the evidence availed shows the process of gazattement of the intention to acquire the two parcels of land, the notice of inquiries and the issuance of the award were done between July 2010 to February 2011 when the Exparte Applicant had not become the registered proprietor. No appeal was preferred with the 1st Respondent in accordance with Section 29 (7) of the Land Acquisition Act (repealed) if there is any aspect of the acquisition process, like payment that had not been released on identification of the person or persons, to be paid the compensation, that does not make the whole acquisition process undertaken under the Land Acquisition Act illegal, unlawful or ultra vires. The office of the Commissioner of Land and the National Land Commission would be in a position to deal with such outstanding acquisition process.

8. That for reasons set out above, the court finds that the Exparte Applicant Notice of motion dated 23rd April 2013 has not merit and is dismissed with costs.

S.M KIBUNJA

ENVIRONMENT & LAND – JUDGE

Dated and delivered this 28th day of October 2015

In presence of

Applicants N/A

Respondents N/A

Counsel Mr Indimuli for Nyamweya for Applicants.

S.M KIBUNJA

ENVIRONMENT & LAND – JUDGE

28/10/2015

28/10/2015

S.M. Kibunja

Court clerk Oyugi

Parties absent

Mr Indimuli for Nyamweya for Applicants

Court: Judgment dated and delivered in open court in presence of Indimuli for Nyamweya for Applicant.

S.M KIBUNJA

ENVIRONMENT & LAND – JUDGE

28/10/2015

Mr Indimuli: I seek leave to appeal.

S.M KIBUNJA

ENVIRONMENT & LAND – JUDGE

28/10/2015

Court: Leave to appeal granted.

S.M KIBUNJA

ENVIRONMENT & LAND – JUDGE

28/10/2015