



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.265 OF 2014

BETWEEN

BROADWAY ENTERPRISES LTD.....PETITIONER

AND

MINISTRY OF LAND, HOUSING

AND URBAN DEVELOPMENT.....1ST RESPONDENT

NATIONAL LAND COMMISSION2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

THE KENYA NATIONAL HIGHWAYS AUTHORITY.....4TH RESPONDENT

RULING

1. In the Petition dated 12th June 2014 the Petitioner is seeking amongst other orders, an order of mandamus directing the 1st and 2nd Respondents to pay it the sum of Kshs.90,234,750.00 together with interest at the rate of 14% per annum from 17th April, 2012 until payment in full in respect of 0.8866 Ha of land that was compulsorily acquired out of its property, L.R No 13562/26, and costs of the suit. The parties settled the matter out of Court and the 4th Respondent paid the Petitioner the said sum Kshs.90,234,750.00 and so this ruling is limited to the issue of interest on that sum and costs of the Petition only.

2. In that regard, the Petitioner submits that the sum payable ought to have been paid with interest in accordance with the provision of **Section 117(1)** of the **Land Act, 2012** and that the 4th Respondent ought to pay interest at the prevailing market rates and not 6% as was provided under the **Land Acquisition Act (Cap 295 Laws of Kenya)**, now repealed. Reliance for that proposition was placed on the case of **Christabel Akinyo Onyango vs Kenya Aiports Authority (2014) e KLR** where Majanja J granted the Petitioner interest at 12% per annum from the date when the award became payable until payment in full.

3. The Petitioner also claims payment of exemplary damages since the 4th Respondent had allegedly failed to provide any explanation why it delayed compensating it from April 2012. On that submission

reliance is made on the case of *Obongo vs Municipal Council of Kisumu (1971) EA 91* where the Court of Appeal held that exemplary and punitive damages should be awarded where there is oppressive, arbitrary or unconstitutional action by the agents of the Government and where the Defendant's action was calculated to procure him some benefit at the expense of the Plaintiff. It therefore urges the Court to grant it Kshs. 5,000,000.00 as exemplary damages to be paid by the 4th Respondent.

4. The Petitioner has also prayed for costs of the Petition and I note that the 1st, 2nd and 3rd Respondents neither made submissions nor appeared at the hearing of the matters above.

5. The 4th Respondents on its part submits that the law governing the acquisition of the suit property was the **Land Acquisition Act** and not the **Land Act of 2012**. That **Section 16(1)** of the **Land Acquisition Act** provided that the interest payable was at the prescribed rate which would not be less than 6% per annum and payable from the time of taking possession until the time of payment of the award. It claims that in the present acquisition, interest rate payable had not been prescribed and relies on the case of *Shanzu Investments Ltd vs Commissioner of Lands (1993) e KLR* where the Court of Appeal awarded interest at the rate of 6%. It is its case therefore that the interest rate of 14% sought by the Petitioner is manifestly excessive and argues that the rate of 6% would be fair and appropriate.

6. On the claim of exemplary damages, the 4th Respondent submits such an award would amount to unjust enrichment of the Petitioner and it urges the Court not to grant the Petitioner the said prayer.

7. On the issue of costs of the Petition, it submits that costs, if awarded, would affect public funds and that the Court ought to consider the public interest in awarding such costs.

8. I have taken into account the rival submissions made and it is my view that the principal facts in this Petition are not in dispute. The Petitioner is the owner of LR. No.13562/26, Ruiru, out of which the Government, through Gazette Notice No.16180, issued a directive that it intended to compulsorily acquire 0.8866ha out of that parcel of land for the expansion and construction of the now reputable Thika Super Highway.

9. A valuation was carried out thereafter by the Petitioner and it showed that the land ought to be compulsorily acquired at Kshs.112,509,100.00. However, the Commissioner of Lands inquiry gave an award of Kshs.90,234,750 on 4th April 2012. The Petitioner duly signed the statutory statement accepting the award on 17th April 2012 but failure to compensate the Petitioner promptly led to the filing of this Petition. Through an out of Court settlement, the Petitioner was paid its full compensation in two installments and the last payment being made on 21st January 2015. The issue now before me is the amount of interest payable on the said award.

10. In the above context, the process leading to the compulsory acquisition of the Petitioner's land begun on 23rd December 2011 when the Government published its intention to compulsorily acquire the land through Gazette Notice No. 16180. The Commissioner of Lands made the award of Kshs.90,234,750.00 payable to the Petitioner on 4th April, 2012 but payment was not effected until 21st January, 2015.

11. The Petitioner now demands payment of interest at 14% per annum and the 4th Respondent does not dispute that the Petitioner is entitled to payment of interest but the bone of contention is the rate of interest payable.

12. The law governing the compulsory acquisition of land at the time the Petitioner's land was compulsorily acquired was the **Land Acquisition Act** (now repealed). This is because **The Land Act No. 6 of 2012** came into effect on 2nd May 2012 and obviously, it does not have retrospective effect. But what did the law provide on interest rates?

13. **Section 16(1)** of the **Land Acquisition Act**, as amended by **Act No. 6 of 1990**, provided as follows;

Where the amount of any compensation awarded is not paid or paid into court on or before the taking of possession of the land, the Commissioner shall pay interest on the amount awarded at such rate as may be prescribed which shall not be less than six percent per annum from the time of taking possession until the time of payment or payment into court.

14. The law above is crystal clear and it is to the effect that interest rate is ascertained in two ways; as is prescribed, and if has not been prescribed at a rate not less than six percent. In the instant case, no rate had been prescribed but the Petitioner nonetheless claims 14% interest rate. It failed to provide the basis upon which it sought the said interest rate and I have already said that the **Land Act of 2012** is not applicable. In that regard, the Court of Appeal in the case of ***Shanzu Investments Ltd vs Commissioner of Lands (supra)*** awarded the Appellant interest at the rate of six percent and taking guidance from the Court of Appeal I shall award the Petitioner interest at 6 % rate of the principle sum payable to it and from the date of award until payment in full.

15. The Petitioner has also claimed exemplary damages for failure of the 4th Respondent to pay it promptly. In the case of ***Obongo vs Kisumu County Council (supra)***, it was stated as follows;

Exemplary damages are appropriate in two classes of case oppressive, arbitrary and unconstitutional action by the servants of government, and conduct by a defendant calculated to make profit for himself which may well exceed the compensation payable to the Plaintiff, and these classes should not be extended.

16. While I am in agreement with the above holding, to my mind, although a case may fall within the two categories for which exemplary damages may be awarded, it does not necessarily follow that in each case, the same must be awarded. For instance, exemplary damages should not be awarded in constitutional violation cases where the acts complained of were as a result of the same transaction and where an award has been made on the principal violation. That position also applies where interest has been awarded on the principal award. See - ***Benedict Munene Kariuki and 14 others vs the Attorney General High Court Petition No.722 of 2009*** and ***Dominic Arony vs Attorney General Misc. Appl. 494 of 2000.***

17. In the circumstances, and having awarded the Petitioner interest on the principal amount that would in my view be sufficient, reasonable and appropriate. I so find despite the submission made by the Petitioner that there is need to punish the 4th Respondent for failure to pay promptly the compensation owed to the Petitioner. The award of interest from the date of the acquisition to the date of payment is sufficient punishment.

18. As regards costs, I am aware that the parties herein compromised the matter through an out of Court settlement and the 4th Respondent cooperated throughout the proceedings. In the premise the best order would be one entitling each party to bear its own costs.

19. The final order is that the 4th Respondent shall pay the Petitioner interest at 6% per annum on the sum of Kshs.90,234,750 from the date it took possession of the land in issue until payment of that sum in full i.e. from 14th April 2012 to 21st January 2015.

20. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 13TH DAY OF NOVEMBER, 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Mr. Wawire holding brief for Mr. Gichuhi for Petitioner

Mr. Gitonga holding brief for Mr. Cheruiyot for 4th Respondent

Order

Ruling duly delivered.

ISAAC LENAOLA

JUDGE