



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 318 OF 2014

FRANCIS KURIA MWAURA & 64 OTHERS.....PLAINTIFFS/APPLICANTS

(Suing on their own behalf of all other Persons affected by the Compulsory Acquisition

for the Construction of the Thogoto-Gikambura-Mutarakwa Road)

-VERSUS-

KENYA RURAL ROADS AUTHORITY.....1ST DEFENDANT/RESPONDENT

KENYA ROADS BOARD.....2ND DEFENDANT/RESPONDENT

MINISTRY OF LANDS, HOUSING & URBAN DEVELOPMENT...3RD DEFENDANT/RESPONDENT

NATIONAL LAND COMMISSION

(THE COMMISSIONER OF LANDS).....4TH DEFENDANT/RESPONDENT

RULING

INTRODUCTION:

1. Vide Notice of Motion Application dated the 16th October 2020, the Plaintiffs/Applicants herein have sought for the following Orders:
 - I. *The Respondents be Ordered to make the following Payments.*
 - a. *Interests to all the Applicants at the rate of 14% p.a of the full Compensation award of Kshs.140, 656, 345.06/= Only, from the date of Compulsory Acquisition/Possession of the Applicants' Property, i.e January 2010, until payment in full.*
 - i. *15% of (a) (1) above to the firm of M/s J.M Njenga & Co. Advocates being Legal Fees due pursuant to the 15% Legal Fees Agreement to every award.*
 - b. *Kshs.3, 204, 016.00/= Only, plus all accrued Interest to the M/s J.M Njenga & Co. Advocates, being the balance of unremitted Legal Fees from the already paid up awards pursuant to the 15% Legal Fees Agreement for every award.*
 - c. *Kshs.22, 263, 249 Only, plus all accrued Interest to the 32 Applicants (as per attached list) whose claims are pending to date, less Kshs.3, 339, 487.35 Only, to be paid to the firm of M/s J.M Njenga & Co. Advocates, being Legal Fees due pursuant to the 15% Legal Fees Agreement.*
 - d. *Costs of the Application be provided for.*
2. The subject Application is premised on the Grounds contained in the body thereof and same is further supported by the affidavit of one, Ms Victoria Wambua, who is an advocate, working in the law firm of M/s J.M Njenga & Co. Advocates.
3. Upon being served with the subject Application, the 4th Defendant/Respondent filed a response vide Replying Affidavit sworn by one

Edmond Gichuru, wherein the 4th Defendant/Respondent opposed the subject Application.

Depositions by the parties:

4. Vide Supporting Affidavit sworn on the 16th October 2020, the deponent, namely, Ms Victoria Wambua has averred as hereunder;
5. The Plaintiffs/Applicants herein are the registered owners and/or Proprietors of all those Parcels of land running along the *Thogoto-Gikambura-Mutarakwa Road*, within Ndeiya Area of Kiambu County.
6. It is further averred that during the expansion and/or construction of the said road into a tarmac road, the Respondents herein compulsorily acquired the Applicants land and therefore the Respondents were obliged to compensate the Applicants in line with the Provisions of the Land Acquisition Act, Chapter 295 Laws of Kenya,(Now repealed).
7. Further, it is averred that the compensation that was due to the Applicants was tabulated in various awards and same formed and/ or amounted to an aggregate of Kes.140, 656, 345/= only.
8. Besides, it is averred that upon the compulsory acquisition, the 1st Respondent entered upon and took possession of the said parcels of Land before paying the compensation and as a result, it became necessary to file and/or lodge the subject suit.
9. On the other hand, it has been averred that as a result of the failure to pay the compensation/awards, the Applicants herein proceeded to and retained the firm of *M/s J.M Njenga & Co. Advocates*, to represent same and in this regard, a Legal fee Agreement, was entered into and executed, whereby the Applicants agreed to have 15% of the compensation deducted to cater for and/or cover the legal fees.
10. Owing to the foregoing, it has been averred that the Respondents herein thereafter proceeded to and paid out compensation awards to some of the Applicants but failed to release the sum of Kes.3, 204, 016/= Only, to the firm of *M/s J.M Njenga & Co. Advocates*.
11. Other than the foregoing, it has also been averred that a total of 32 Applicants have not been paid the compensation awards amounting to Kes.22, 263, 249/= only, which ought to have been paid and/or released to the concerned Applicants.
12. Further, the deponent has averred that out of the kes.22, 263, 249, Only, which is due and payable to the 32 Applicants, the sum of Kes.3, 339, 487.35/=, only, ought to be deducted and be paid to the firm of *M/s J.M Njenga & Co. Advocates*, on account of the 15% Legal Fee Agreement.
13. Besides, it has further been averred that owing to the failure to timeously pay and release the compensation award, the Respondents herein have effectively breached and/or infringed upon the provisions of Article 40 of the Constitution, 2010.
14. Finally, the deponent has averred that having taken possession of the compulsorily acquired properties before releasing and/or remitting the compensation moneys, it is incumbent upon the Respondents herein to pay interest at 14% from the date of taking possession, that is January 2010, until payment in full.

RESPONSE BY THE 4TH DEFENDANT/RESPONDENT:

15. Vide Replying Affidavit sworn by one Edmond Gichuru, the 4th Respondent herein has confirmed that there are Applicants who have not been paid the compensation award. However, the deponent has clarified that such payments have not been made because the affected persons have still not sorted out the issues of succession, to authenticate the rightful administrators of the concerned estates.
16. On the other hand, it has been averred that there are those Applicants who were duly and fully paid the compensation award, without the deduction of the 15% legal fees, which was agreed between the Applicants and the advocate.
17. Nevertheless, the deponent has further averred that in such situations, the advocate can only proceed as against the Applicants, who were his clients and not against the Commission.
18. At any rate, the deponent has further averred that the Commission was never a Party to the Legal Fees Agreement between the Applicants and the advocate and in this regard, the 4th Respondent is not obligated to pay to and in favor of the advocate any moneys on account of his costs. For clarity, it is stated that such costs ought to be pursued from the Applicants who have since been paid.
19. Finally, the deponent avers that under the law the commission can only pay and/or release Monies to the affected Applicants, once same, that is, the Commission, has received the payments from the acquiring authority and not otherwise.
20. Based on the foregoing, the 4th Respondent has therefore implored the court to dismiss the Application beforehand.

SUBMISSIONS:

21. The subject matter came up for hearing of the Notice of Motion Application dated the 16th October 2020 on the 13th October 2021, on which dated directions were taken and/or issued, pertaining to the manner of disposal of the Application.

22. For clarity, it was ordered and/or directed that the subject Application be canvassed and/or disposed of by way of written submissions. In this regard, the Plaintiffs/Applicants were ordered and/or directed to file their written submissions within 14 days.

23. On the other hand, it was ordered that the Defendants/Respondents shall thereafter file and serve their written submissions within 14 days from the date of service by the Plaintiffs/Applicants.

24. Despite the stipulated timelines, the Applicants herein only filed their written submissions on the 16th November 2021, whereas the 4th Defendant filed her written submissions on the 16th December 2021.

25. Suffice it to say, that the two sets of written submissions form part and parcel of the record of the court and same have been taken into account, appraised and duly considered.

ISSUES FOR DETERMINATION:

26. Having reviewed the Application dated the 16th October 2020, the affidavit in support thereto and the Replying affidavit on behalf of the 4th Defendant/Respondent and having similarly considered the written submissions filed by and/or on behalf of the Parties, the following issues Do arise and are germane for determination;

a. *Whether the Court has Jurisdiction to deal with and or Pronounce itself on the issue of Interests being sought on the basis of a post-judgment Application.*

b. *Whether the issues raised at the foot of the subject Application, including claim for Interests and payment of 15% Legal Fee Agreement, would constitute a violation of the Doctrine of Departure.*

c. *Whether there are Applicants who have not been paid the Compensation award and if so, whether the outstanding payments amounts to Kshs..22, 263, 249/= only.*

ANALYSIS AND DETERMINATION

ISSUE NUMBER 1

Whether the Court has Jurisdiction to deal with and or Pronounce itself on the issue on Interests being sought on the basis of a post-judgment Application.

27. In respect of the 1st issue herein, it is worthy to note that the Applicants herein have sought for an order for payment of interest at the rate of 14% p.a on the full compensation award amounting to Kes.140, 656, 345.06 only, computed and/or reckoned from the date of compulsory acquisition, namely, January 2010.

28. On the other hand, the Applicants have further claimed payment of 15% interests on the moneys amounting to Kes.140, 656, 345.00 Only, under the said payments to be made to the firm of *M/s J.M Njenga & Co. Advocates*.

29. The starting point in addressing the 1st issue herein, is whether or not the issue of award and payment of interests on the moneys claimed herein, can be dealt with and/or addressed vide an application and more particularly when same was not captured in the substantive pleadings and/or dealt with during the plenary hearing.

30. The other related issue would be whether an award for payment of interests during the period prior to the filing of a suit, is a matter of right and capable of being pursued vide an Application.

31. In answer to the foregoing two questions, I wish to point out that the issue of award of interests is a substantial issue and the same can well be dealt with and/or adjudicated upon in the substantive matter and essentially during the plenary hearing, when the claimant is obliged to tender evidence and to justify the claim for such interests.

32. On the other hand, it is my further observation that the issue of award and payment of interest cannot be addressed and/or otherwise be pursued on an ex-post judgment application, either in the manner sought herein or at all.

33. Other than the fact that the claim for an award of interest is a substantial issue, it is also worthy to note that a claim for payment of interests during the period preceding the filing of a suit, can only arise where same is statutorily provided for and or arises out of practice in a particular area and/or field.

34. Either way, it is the trial court that is seized and/or possessed of jurisdiction to address, deal with and/or adjudicate upon whether a claim for payment of interests, is legally justified or otherwise.

35. In this case, the issue pertaining to the claim for interests on the total compensation award, was neither ventilated nor placed before the trial court and therefore the trial court neither considered nor pronounced herself on the said issue.

36. In the premises, it is my finding and holding that this court, which is not dealing with the substantive dispute and/or claim (which for good measure) had been dealt with by the trial court, is therefore not seized of the requisite jurisdiction to proclaim payment of interests to

and or in favor of the Applicants as claimed or at all.

37. In support of the foregoing observations, I do adopt and rely in the decision in the case of **Highway Furniture Mart Limited v Permanent Secretary Office of The President & another [2006] eKLR**, where the court observed as hereunder;

In this case the interest referred to in paragraph 1 of the plaint at 36% from 12th October, 1990 is interest for a period prior to the institution of the suit as the suit was instituted on 17th February, 1998. Although the appellant never gave justification for the operative date (i.e. 12th October, 1990), it is apparent that that was the date when the CERTIFICATE OF PRACTICAL COMPLETION of the project was given by the Ministry of Works. It is evident that the appellant claimed interest for a period of more than 7 years prior to the institution of the suit.

In Gulam Husein v French Somaliland Shipping Co. Ltd [1959] EA 25 the predecessor of this Court while referring to section 34 of Indian Code of Civil Procedure which is in pari materia with section 26 of the Civil Procedure Act said, obiter:

“Section 34 of the Indian code was considered by the Privy Council in the case of Bengal Magpur Railway Co. v Ruttanji Ramji 1938 AIR PC & 67 and it was indicated by their Lordships that the section has no application to interest prior to date of the suit, which is a matter of substantive law. It was also indicated that the power conferred is to order interest upon the principal sum adjudged from the date of suit to the date of the decree but from that date to the date of payment it may be ordered to be paid upon the aggregate of the principal and interest as at the date of the decree”.

That construction of section 26 (1) of the Civil Procedure Act was adopted by this Court in New Types Enterprises Ltd v Kenya Achand Insurance Company Ltd [1988] KLR 380 where the Court held that the award of interest for any period prior to the filing of the suit is a matter of substantive law.

Section 34 (1) of the Indian Code of Civil Procedure is still intact and is in the same language as section 26 (1) of the Civil Procedure Act, (see Mulla – The Code of Civil Procedure 16th Edition vol.1 page 505). At page 511 of Mulla (supra) the authors state:

“Interest up to date of suit is a matter of substantive law and the section does not refer to payment of interest under the first head (that is interest accrued prior to the institution of the suit).

..... It has been said the right to interest prior to the suit is a substantive one whereas Pendente Lite, it is one of procedure within the discretion of the court”.

The authors further show that according to the substantive law, interest antecedent to the suit is only claimable where under an agreement there is stipulation for the rate of interest (contractual rate of interest) or where there is no stipulation, but interest is allowed by mercantile usage (which must be pleaded and proved) or where there is statutory right to interest or where an agreement to pay interest can be implied from the course of dealing between parties (see pages 511 – 514) of Mulla (supra).

38. Based on the foregoing decision, it is my finding and holding that the issue as to entitlement to interests or otherwise, being a substantive issue, same ought to have been dealt with by the trial court and not otherwise.

39. Simply put, this court cannot now delve into the issues and make pronouncement on the award and quantum of Interests, albeit on the basis of an Application.

ISSUE NUMBER 2:

Whether the issues raised at the foot of the subject Application, including claim for Interests and payment of 15% Legal Fee Agreement, would constitute a violation of the Doctrine of Departure.

40. It is settled and/or trite law that Parties are bound by their pleadings and that whenever a Party is intent on raising new issues that were not captured in the previous pleadings, then it behooves the Party to seek for and obtain an amendment.

41. Perhaps, to underscore the importance of Parties being bound by their Pleadings, it is important to take cognizance of the provisions of Order 2 Rule 6 of the Civil Procedure Rules, 2010, which provides as hereunder;

Departure [Order 2, rule 6.]

(1) No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.

(2) Subrule (1) shall not prejudice the right of a party to amend, or apply for leave to amend, his previous pleading so as to plead the allegations or claims in the alternative.

42. Having taken note of the foregoing provisions, it is now worthy to revisit the nature of relief that were sought by the Plaintiffs/Applicants herein vide the Plaint dated the 6th January 2014.

43. For the avoidance of doubt, the Applicants herein did not implead and/or seek for payment of any interests, either as statutorily provided for under the provision of the Land Acquisition Act, Chapter 295, now repealed or at all.

44. Having neither sought for nor pleaded the claim for interests, either at 14% or otherwise, it is apparent that the trial court could therefore not have dealt with the issue of award of interests.

45. Suffice it to say, that it is the Parties who set the agenda for trial vide their pleadings and once the agenda for trial has been set, both the Parties, as well as the court are duly bound.

46. To my mind, where the issue and/or claim for interest was not impleaded and/or claimed in the pleadings, it would constitute a complete departure to now canvass the claim for interests and seek for an award thereof. Such a procedure, would certainly constitute a violation of the Doctrine of Departure.

47. To underscore the importance of the Doctrine of Departure and the Rule that Parties are bound by their pleadings, it is worthy to adopt and/or state the observation of the court of Appeal in the case of **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR**, where the court observed as hereunder;

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial.

The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation.

Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

48. In the premises, I find it difficult and legally untenable to deal with and/or make pronouncement on issues that are clearly at variance with the original pleadings.

ISSUE NUMBER 3:

Whether there are Applicants who have not been paid the Compensation award and if so, whether the outstanding payments amounts to Kes.22, 263, 249/= only.

49. The third aspect of the claim raised by the Applicants is that there are 32 Applicants who have not been paid the compensation award and in this case a list has been attached to the affidavit in support of the subject Application.

50. Nevertheless, it is worthy to recall that the affidavit in support of the subject Application has been sworn by one, Ms Victoria Wambua, advocate, working in the law firm of M/s J.M Njenga & Co. Advocates.

51. However, the issue as to whether or not payments have been released to and/or remitted in favor of the rightful claimants, the 32 Applicants not excepted, is an evidential issue, which can only be adverted to by the persons who are entitled to receipt of the moneys.

52. It is equally important to note that there is evidence that some of the Applicants were paid the compensation award directly and/or without passing through the advocate and in this regard, the Advocate has approached the Court to seek to recover their portion of the agreed Fees..

53. Be that as it may, the critical issue to take note of is that the claim for the monies which are alleged not to have been paid out and/or released to the Applicants, is one that can only be vindicated and/or addressed by the Parties and not otherwise.

54. Notwithstanding the foregoing, it is also important to note that the list containing the names of the alleged 32 Applicants, who are said to be owed the sum of kes.22, 263, 249 only, has neither been signed nor endorsed by any of the persons whose names are contained therein.

55. In the premises, it is difficult to ascertain and/or authenticate the validity of the said list, which has not been owned by any one.

56. Worse still, though the list contains a column relating to the compensation awards, against each of the names, curiously however no award, if any, that was made has been annexed and/or attached. Simply put, the list upon which the claim for KShs. 22, 263, 249 Only, is premised is devoid of probative value.

57. Finally, I must also observe that a claim for Kshs.22, 263, 249 only, on the basis of compensation awards, which have not been paid out and/or released, is a claim in the nature of liquidated and/or special Damages.

58. To the extent, that the claim under reference is one of special and/or liquidated Damages, it was incumbent upon the Applicants, not only to particularly plead, but also to specifically prove same.

59. Despite the foregoing trite position, I must observe that the claim for kshs.22, 263, 249 only, has neither been particularly pleaded nor specifically proved. In any event, the requirement to particularly plead such claim, would denote that there is indeed a substantial pleading placed before the court.

60. Without belaboring the law pertaining to proof of special/liquidated claims, it is important to take cognizance of the time-honored Decision in the case **Idi Ayub Shabani V. City Council of Nairobi (1982-88) 1KAR 681** at page 684:

“Special damages in addition to being pleaded, must be strightly proved as was stated by Lord Goddard C. J. in Bonham Carter Vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:

“Plaintiffs must understand that if they bring actions for damage it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, ‘this is what I have lost, I ask you to give me these damages.’ They have to prove it’

61. In a nutshell, I must state that I am unable to decree and/or award the payment of Kshs.22, 263, 249 only, when same is neither pleaded in accordance with the law nor specifically proved.

FINAL DISPOSITION:

62. Having addressed and/or considered all the issues that were itemized herein before, I come to the conclusion that the Notice of Motion Application dated 16th October 2020, is Devoid of Merits and thus legally untenable.

63. Consequently and in the premises, same be and is hereby Dismissed with costs to the 4th Defendant/Respondent only.

64. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10th DAY OF MARCH 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

June Nafula Court Assistant