REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 445 OF 2014

IN THE MATTER OF COMPULSORY LAND ACQUISITION UNDER THE LAND ACT, 2012

AND

IN THE MATTER OF AN ACQUISITION COMPENSATION APPEAL PREFERRED PURSUANT TO SECTION 128 OF THE LAND ACT 2012

BETWEEN

FIVE STAR AGENCIES LIMITED……………………………APPELLANT

VERSUS

NATIONAL LAND COMMISSION….…...….…………… RESPONDENT

JUDGMENT

Introduction

The Appellant is the registered owner of the parcel of land known as L.R No.209/9727 (IR 37790) in Nairobi whose size is approximately eight point two (8.2) hectares or twenty point two six two two (20.2622) acres. The said land is situated along Langata Road within the Langata residential area of Nairobi City County. The Appellant has appealed against the decision of the Respondent on compensation payable for a portion of the said land which it intends to compulsorily acquire measuring 0.4281 of a hectare, which is embodied in an award dated 23rd December 2013. The Appellant is aggrieved with the award of Kshs. 87,804,225.00 as total compensation payable for the said portion of land and improvements thereon.

The Respondent is the constitutional agency charged with compulsory acquisition and compensation of private land, and it issued a gazette notice number 11990 dated 23rd August 2013 wherein the subject portion of land was earmarked for compulsory acquisition for the Nairobi Southern By-pass project. The Respondent through the Assistant Commissioner of Lands (Valuation) valued the land and improvements thereon at Kenya Shillings Seventy Six Million, Three Hundred and Fifty One Thousand, Five Hundred and Forty (Kshs. 76,351,540/=) and came up with the figure of Kenya Shillings Eighty Seven Million, Eight Hundred and Four Thousand, Two Hundred and Twenty Five (Kshs. 87,804,225/=) as fair compensation for the said plot.

The Appellant is seeking orders that the award of Kshs. 87,804,255/= be set aside, and that it be substituted with a sum of Kshs. 450,800,000/= or as the court may deem fit. It is also seeking that the

costs be provided for.

The Appellant's Case

The Appellant's case is set out in its Memorandum of Appeal dated 8th April 2014 and filed on 10th April 2014, the verifying affidavit sworn by its Director, Mohamed Sharif Abdullahi, and a witness statement filed by the said Director both dated 8th April 2014 and filed in Court on 10th April 2014,. The Appellant's counsel relied upon the said pleadings during the hearing of the Appeal on 10th September 2014.

In summary, the Appellant's case is as follows. The Appellant states that it is in the process of developing the said parcel of land by erecting Nula Apartments thereon, which is a project comprising of two and three bed roomed residential flats for sale as the location is a middle income residential area. The Appellant further stated that it has obtained approved Building Plans and an Environmental Impact Assessment licence, and has mortgaged the whole parcel of land to Gulf African Bank Limited in the sum of Kshs. 300,000,000/ by way of a charge registered on 30/3/2010.

It is the Appellants case that the portion of land to be compulsorily acquired has been drastically undervalued by the Respondent and that an independent valuation shows that the said premise for acquisition is worth Kenya shillings Four Hundred and Fifty Million, Eight Hundred Thousand (Kshs. 450,800,000/=), and that it stands to suffer irreparable injury and loss of future earnings.

Further, that the intended acquisition of 0.4281 hectares will affect the project because it reduces the project size by diminishing the number of flats by a margin of 80. This number is made up of four blocks of flats comprising of 40 two bed roomed flats, 20 three bed roomed flats without domestic servant quarters, and 20 three bed roomed flats with domestic servant quarters. The Appellant also contended that its business proposal will change drastically and costs will be incurred to renegotiate the mortgage, and that the proposed road project will undermine the project during construction phase and further impede quiet use and enjoyment after construction.

The Appellant in particular set out the following as its grounds for appeal:

(a) The Respondent did not take into account damage sustained or likely to be sustained by reason of severance of the land. The land was mortgaged as a whole, compensation to the mortgagee, mortgage renegotiation expenses and mortgage transfer costs were not considered.

b) The Respondent did not consider that the acquisition injuriously affected the actual earnings of the Appellant by downsizing the scale of the approved project.

c) The open market value did not take into account the developmental costs incurred by the Appellant such as obtaining building plan approval from County government and Environmental Impact assessment from National Environment Management Authority.

d) The Respondent did not take into account the damage genuinely resulting from diminution of profits of the land between the date of publication of the notice to acquire the land and the date the Commission takes possession of the land.

e) The Respondent did not take into account the investment nature of the land and failed to consider investment relocation costs.

f) Due to disregard of the above facts the compensation proposed is not just compensation as required by law.

The Appellant attached the following documents in support of its arguments:

1. A Feasibility Study of the project being developed on its parcel of land.

2. The building approval notification by Nairobi City Council

3. The E Environmental Impact Assessment licence issued by the National Environmental Management Authority

4. A copy of the Charge Documents between the Appellant and Gulf African Bank Limited

5. A schedule of commitments to purchase and sale agreements entered into with third parties for purchase of some apartments

6. Two valuation reports, the first dated 30th September, 2013 by M/s Milligan Valuers Limited assessing the compensation at KShs. 405,800,000/, and the second dated 25th February, 2014 by M/s SEC & M Co. Limited assessing the compensation at KShs. 222,297,343/-.

7. The award from the Respondent dated 9th January 2014 showing the Award of Ksh. 87,804,225/-
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8. A copy of Kenya Gazette Notice No. 11990.

The Appellant in submissions dated 6th May 2014 and supplementary submissions dated 28th August 2014 gave a detailed background of the activities it undertook in preparation for the project it is undertaking on the subject parcel of land, and events after the gazettement of the notice to compulsorily acquire its portion of land. It was submitted that through the same notice, the Respondent invited the affected owners to participate in a public inquiry to be held on 1st October, 2013 at the Lands Office. The Appellant submitted that it attended the public inquiry, but was advised to submit a formal self-assessed claim for compensation together with relevant documentation in support of the same.

The Appellant stated that it then retained the services of M/s Milligan International Limited to carry out a valuation of the portion to be compulsorily acquired and determine an appropriate value for compensation. The valuation report proposed compensation in the sum of KShs. 450,800,000. Further, that a written claim for the sum of KShs. 450,800,080/- was subsequently submitted by the Appellant to the Respondent on 3**rd** October, 2013 through its advocates, together with the necessary supporting documentation including the valuation report prepared as at 30th September, 2013 by M/s Milligan Valuers Limited, in respect of the portion to be acquired.

The Appellant contended that no further information or clarification was requested by the Respondent, and that it then received an award dated 9th January, 2014 issued under Section 113(1) of the Land Act, 2012, informing it that having concluded the inquiry relating to acquisition of the portion of 0.4281 hectares, the sum of KShs. 87,804,225/-, had been awarded as compensation.

The Appellant explained that being aggrieved by the valuation, and by way of a letter dated 28th January, 2014, it objected to the award on the grounds that the compensation sums were grossly undervalued, and for purposes of seeking redress, expressly invoked the provisions of Article 35 of the Constitution, in demanding to be provided with a detailed valuation report indicating the factors the Respondent took into account in arriving at its compensation award. However, that the Respondent ignored the Appellant's request for the valuation report and instead directed the Appellant to file an appeal in the Land Compensation Tribunal by a letter dated 5th February, 2014.

The Appellant submitted that it then retained the services of a 2nd firm of land valuers, M/s SEC & M Co. Limited, who visited the site on 13th February, 2014, and prepared a valuation report dated 25th February, 2014, in which its concluded that a fair and just compensation for the portion to be acquired was KShs. 222,297,343/-, and provided cogent justification for this. The Appellant stated that with an assessed compensation value of between KShs. 222,297,343/- and KShs. 450,800,080/-, it was aggrieved by the Respondent's award of KShs. 87,804,225/-, and subsequently lodged this appeal pursuant to the

provisions of sections 128 and 150 of the Land Act.

The Appellant submitted that there was a substantial error or defect in the procedure adopted by the Respondent under the Land Act, 2012 which resulted in error or defect in the amount awarded as compensation under Section 113 of the Land Act, 2012 as, *prima facie*, the Respondent is not ready and/or able to furnish the Appellant with a valuation report indicating the methodology and/or factors it took into account in arriving at its compensation award of KShs. 87,804,225.

Further, that the award of KShs. 87,804,225 as compensation under section 113(1) of the Land Act, 2012 is inordinately low and in violation of the principles of full and just compensation provided by Articles 40 of the Constitution and Section 113 of the Land Act, 2012. Lastly, the Appellant stated that the Respondent in failing to furnish it with the manner it arrived at the compensation award, had breached the Appellant's right on access to information. The Appellant gave an account of the applicable law on the various issues raised by its appeal.

The Respondent's Case

The Respondent relied on a replying affidavit sworn by its Chief Valuer, Fidelis Kamwana Mburu, on 22nd July 2014 and filed in Court on 23rd July 2014; a valuation report attached to the said affidavit dated 5th July 2014 and submissions dated 20th August 2014 and filed on 25th August 2014. The Respondents counsel adopted these pleadings and submissions at the hearing of the appeal on 10th September 2014.

The Respondent stated that at the time of the inquiry and valuation there were no developments on the portion of land to be acquired save for a perimeter wall to the Southern end of the portion of land which was factored in the disputed compensation award. Further, that since several steps including the gazettement of the parcels of acquired had been taken in 2006, the applicable law for purposes of the acquisition according to section 162 of the Land Act 2012 is the repealed Land Acquisition Act.

The Respondent averred that the compensation award of Kenya Shillings 87,804,225/= was arrived by at by employing without deviation the strict criteria for valuation spelt out in the Land Acquisition Act, and that the private valuations are grossly exaggerated and they raise critical questions of objectivity on the part of the private valuers and are primarily based on the projections of the Appellant with no comparable. Further, that failure by the private valuers to adopt the legally prescribed methodology for valuation rendered the subsequent valuation reports untenable illegal and without basis in law. It was further contended that the law does not recognize independent valuations whether private or otherwise, and in any event public funds can only be committed through valuations conducted by the Respondent or by the defunct office of the Commissioner of Lands as the case was previously.

The Respondent also stated that it is unreasonable and opportunistic of the complainant to claim compensation on account of future development plans, and that the policy of the Respondent militates against compensating speculations with public funds. It was the Respondent's position that the compensation award is fair and reflective of the market value of the property, and that there is no substantial error or defect in the procedure it adopted. Further, that under section 113 of the Land Act, 2012 the award of the Respondent is final and conclusive on any matter touching on the size of the land to the acquired, the value of the land and the amount payable as compensation and the award can only be invalidated for reason of discrepancies which may thereafter be discovered in the size of the land so acquired and not for any other reason.

The Respondent in its submissions averred that it carried out inspections of the parcels for purposes of rendering valuation on the second day of September, 2013. Further, that as at the time of valuation the 0.4281 hectare required for acquisition was vacant and undeveloped save for a stone perimeter wall to the southern and fronting the proposed bypass. The Respondent further submitted that based on comparables of other properties lying within the Langata area, and taking into consideration the location of the substratum as well as its size, it gave the market value of the area of land as Sixty Seven, Five Hundred Thousand Shillings (Kshs.67,500,000/=).

The total value of the 0.42 hectares to be acquired was therefore given a market value of Seventy One million, Four Hundred and One Thousand, Five Hundred Shillings (Kshs.71,401,500/=). Further, that it valued the stone perimeter wall which ran Three Hundred and Thirty metres (330m) at Fifteen Thousand Shillings (Kshs.15,000) per metre with the total value being placed at Four million, Nine Hundred and Fifty Thousand (Kshs.4,956,000/=).

The Respondent submitted that taking into account the value of the land as well as value of the wall, the amount payable to the Appellant was computed as Seventy Six Million, Three Hundred and Fifty One Thousand, Five Hundred Shillings (Kshs.76,351,500/=). The Respondent stated that a statutory 15% was also payable to the Appellant which was derived from the total amount payable, and which it found to be to be Eleven Million, Four Hundred and Fifty Two Thousand, Seven Hundred and Twenty Five Shillings (Kshs.11,452,725/=) which was added to make the total award of Kenya Eighty Seven Million, Eight Hundred and Four Thousand and Two Hundred and Twenty Five Shillings (Kshs 87,804,225/=).

The Respondent also gave an account of the applicable law on the various issues raised in its response.

The Issues and Determination

The facts in this appeal that are not disputed are that on 23rd August, 2013, the Respondent published Gazette Notice No. 11990, in respect of land to be acquired for purposes of construction of the Nairobi Southern By Pass. It is also not disputed that the area to be acquired from the Appellant's property, that is, L. R. NO. 209/9727, was 0.4281 hectares which is approximately 1.0578 acres, and the parties also agree that the Respondent through the said Gazette Notice invited the affected owners to participate in a public inquiry to be held on 1st October, 2013.

The issues that are in dispute arise from the award that was subsequently made by the Respondent after the said inquiry as compensation for the Appellant's portion of land, and more specifically as to the quantum of the said award and the manner in which the said award was reached. The disputed issues in this regard are firstly, what the applicable law was at the time of making of the award; secondly, whether the applicable principles and procedures as regards the computation of the award were followed, and lastly whether the compensation award by the Respondent was a just value for the Appellant's land.

(a) The applicable law at the time of making of the award

The Appellant submitted in this respect that the acquisition notice was published by the Respondent in Gazette Notice No. 11990 of 23rd August, 2013 pursuant to Section 162(2) of the Land Act, 2012, and similarly, that the award of compensation of KShs. 87,804,225/- made on 9th January, 2014 was based on this Gazette Notice of 23rd August, 2013.

The Appellant contended that the Gazette Notice No. 3879 of 26th May, 2006 set the inquiry date for 24th July, 2006. However, that no inquiry was held on this day, and was never held, and for purposes of section 9(4A) of the repealed Land Acquisition Act, the 24 month period within which such an inquiry was required to be held under the Act lapsed on or about 24th July, 2008, and that by law, the said acquisition notice thereby lapsed. It was its submission that Gazette Notice No. 11990 published by the National Land Commission on 23rd August, 2013 was therefore to be treated by law as the acquisition notice, and accordingly, this was an acquisition under the Land Act of 2012 for which just compensation was to be paid promptly in full to all persons whose interests in the land have been determined.

The Appellant submitted that even if the repealed Land Acquisition Act was applicable by virtue of Section 162(2) of the Land Act, 2012, it was clear under section 9(4) of the repealed act that an inquiry could not be postponed beyond 24 months from the date first appointed for the holding of the inquiry, and further, the said section provided that where an inquiry is not held within the time prescribed under this section the Minister shall be deemed to have revoked his direction to acquire the land.

Further, that section 24 of the Interpretation & General Provisions Act provides that where an Act or part

of an Act is repealed, subsidiary legislation issued under or made in virtue thereof shall, unless a contrary intention appears, remain in force, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made there under. It was the Appellant's submissions that in the case of the repealed Land Acquisition Act, the only subsidiary legislation thereunder was the Land Acquisition (Appeals to the High Court) Rules**,** whose provisions are inapplicable by virtue of the Environment & Land Court Act**.**

It was thus the Appellant's position that the Land Act, 2012 repealed the Land Acquisition Act, and all the rules previously applicable to regulate the assessment of fair and just compensation thereunder are no longer applicable. Further, that the Respondent is yet to promulgate rules to regulate the assessment of just compensation as mandated under section 111(2) of the Land Act, and there is every possibility that it is applying a compensation assessment criterion that is in direct contravention of the guaranteed property rights under Article 40 of the Constitution.

The Respondent on the other hand submitted that since the enactment of the Land Act of 2012, which repealed the Land Acquisition Act, no rules of regulate the assessment of just compensation have been passed as the same are awaiting enactment by Parliament. Therefore, that the Respondent employed provisions contained in the schedule of the repealed Land Acquisition Act to operationalize part VIII of the Land Act of 20102 on how just compensation ought to be assessed,. The Respondent in this respect relied on Part Two of the Sixth Schedule of the Constitution which provides as follows:-

> **"All law in force immediately before the effective date continues in force and shall be construed with the alternative, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution…."**

Further reliance was also placed by the Respondent on section 162(1) of the Land Act on transitional provisions wherein it is provided that:

> **"Unless the contrary is specifically provided in this Act, any right, interest, title, power or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the Law applicable to it immediately prior to the commencement of this Act…"**

The Respondent also argued that Part VII of the Statutory Instruments Act also provides under section 27(2) that any regulations, order or notice issued immediately before the commencement of the Act shall continue to be in force as if it was made under the Act unless it was expressly revoked under the Act which it was made.

Having considered the arguments made by the parties, it is my view that the applicable law is determined by the operative date of the disputed award of compensation. I find that I must agree with the Appellant that the operative date can only be 23rd August 2013, when the Respondent published the acquisition notice of the Appellant's portion of land through Gazette Notice No. 11990. This is for various reasons.

Firstly, as correctly submitted by the Appellant, section 9 of the repealed Land Acquisition Act provided that an inquiry as to hearing of claims to compensation by persons interested in the land to be acquired was to be held not earlier than thirty days and not later than twelve months after the publication of the notice of intention to acquire. A postponement of the said period was not to exceed twenty four months from the date of the acquisition notice.

Further, that if an inquiry is not held within the time prescribed then the Minister was deemed to have revoked his or her direction to acquire the land. Therefore, the gazette notices of 2006 with respect to the Appellant's portion of land are legally deemed to have been revoked as no evidence of any inquiry held thereto within twenty four months was brought by the Respondent. The said gazette notices of 2006 cannot therefore be relied upon for purposes of compensation.

Secondly, the Appellant acquired its land in 2010 and could therefore only had notice of the acquisition of a portion thereof through the Gazette Notice of 11990 of 23rd August 2013, and not through the earlier gazette notices of 2006. Lastly, the Respondent in its submissions also admits to have conducted its inspection of the Appellant's land for purposes of rendering a valuation on the 2nd day of September 2013. It could consequently only apply the law as regards assessment of compensation that was in force at that particular point in time.

On the question of what law was in force on 23rd August 2013, it is not contested that this is the Land Act of 2012. What is contested is whether the repealed Land Acquisition Act could still apply by virtue of the fact that the Respondent is yet to promulgate rules to regulate the assessment of just compensation as required under section 111(2) of the Land Act of 2012. I am of the view that the repealed Land Acquisition Act is applicable.

The main reason in my view why the repealed Act is applicable is that the law provides for such situations when a lacuna is created by a repealed Act. Section 23 (3) the Interpretation and General Provisions Act (Chapter 2 of the Laws of Kenya) provides as follows with respect to rights and remedies that were previously provided for under a repealed law:

> **"(3) Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not -**
>
> **(*a*) revive anything not in force or existing at the time at which the repeal takes effect; or**
>
> **(*b*) affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or**
>
> **(*c*) affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or**
>
> **(*d*) affect a penalty, forfeiture or punishment incurred in respect of an offence committed against a written law so repealed; or**
>
> **(*e*) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made."**

It is my holding that the investigations or legal proceedings provided in this section include the principles governing assessment of compensation that were provided by the repealed Land Acquisition Act, which are thereby saved as they are not provided for in the repealing law. In any event as these are the last known principles on assessment of compensation that were applied under the law, this Court shall continue to be guided by the same, pending the promulgation of new regulations by the Respondent. However it must be pointed out that the Respondent needs to act with haste in this respect.

(b) Whether the applicable principles and procedures as regards the computation of the award were followed

The Appellant in its submissions relied exclusively on the provisions of the Constitution as providing the principles that needed to be followed, and disputed the principles and procedure applied by the Respondent in assessing the compensation award for its portion of land. It was the Appellant's argument that under Article 40(3)(b)(ii) of the Constitution, what is fair and just compensation can no longer be measured by solely using the standard yard stick of the general market value plus 15% statutory allowance without further investigations to ensure that, the property does not have a special value to the owner, and that this special value is indeed recognized and guaranteed as an inalienable right under Article 40(3) of the Constitution of Kenya. Therefore, that for purposes of compensation under a

compulsory acquisition scheme, the use of the words "full, just compensation to the person" under Article 40(3)(b)(ii) of the Constitution indicate not merely the value of land itself, but the whole of the economic injury caused in relation to the land taken as consequence of acquisition.

In this regard, it is the Appellant’s contention that the correct standard applicable to the assessment of compensation in the current appeal are that for purposes of Article 40 of the Constitution, the “market value plus a 15% statutory allowance” is presumed to be a fair value of compensation, unless the aggrieved party can demonstrate “special value” of land, being the financial value of any advantage, in addition to market value, to the person entitled to compensation which is incidental to the person's use of the land.

Further, that if an owner, as in this case, demonstrates “special value” of the land i.e the financial value of any economic injury done which is related to the land taken as consequence to cause, the onus is on the Respondent, having regard to all relevant matters, to show why such a claim is not payable by law.

The Appellant urged that in the premises, it is within the Court’s jurisdiction to formulate a broad and guiding criteria on the factors which must be taken into consideration in determining the value of compensation under the Land Act, 2012 and in accordance with **Article 40(3)(b)(ii)** of the Constitution, so as to safeguard the guaranteed property rights there under. It was the Appellant’s view that the factors which must be taken into consideration in determining the value include:-

(a) the market value of the interest on the date of acquisition;

(b) any special value to the claimant on the date of acquisition;

(c) any loss attributable to severance;

(d) any loss attributable to disturbance;

(e) any depreciation in value of the interest of the owner, at the date of acquisition, in other land adjoining or severed from the acquired land by reason of the implementation of the purpose for which the land was acquired;

(f) any legal, valuation and other professional expenses necessarily incurred by the owner by reason of the acquisition of the interest;

It was thus the Appellant’s submission that the award of compensation by the Respondent was fundamentally flawed, as it completely disregarded the valuation report given to it that demonstrated that the 15% statutory allowance was insufficient to compensate the Appellant for the economic loss resulting from the acquisition of its portion of land on which four (4) blocks of flats were scheduled to be built and thereafter sold at a huge profit. Further, that the compensation award applied a principle of compensation assessment that was in violation of the principles of full and just compensation under Article 40 of the Constitution.

On the procedure attendant to the assessment of compensation, the Appellant submitted that Article 47(1) of the Constitution guarantees that every person has the right to administrative action that is procedurally fair, and Article 47(2) thereof indeed demands that in the case of compulsory acquisition, a dispossessed owner has the unqualified right to be given written reasons and/or sufficient data and analysis of the factors the Respondent took into account to substantiate its conclusions at the time of issuing of an award.

The Appellant contended that the award dated 9th January, 2014 only set out the breakdown of the final compensation sum following the inquiry but did not in any way seek to provide any reasons for the awarded compensation, particularly, the factors the Respondent took into account in arriving at these sums. It was the Appellant’s contention that this failure by the Respondent to provide written created a rebuttable presumption of a substantial error or defect in the procedure it adopted in assessing the amount of compensation.

The Respondent on this issue submitted that section 111(1) of the Land Act provides that if land is compulsory acquired, just compensation shall be promptly in full to all persons whose interests in the land have been determined. However, that section 111(2) goes further to state that the Respondent shall make rules to regulate the assessment of just compensation. The Respondent submitted that in the absence of these rules, it employed the principles on which just compensation is to be determined as set out in the schedule of the repealed Land Acquisition Act.

The Respondent argued that market value is defined in paragraph 1 of the said schedule to mean the market value of the land as at the date of publication in the Gazette of the notice of intention to acquire the land, as also held in **<u>John Kariuki Macharia vs. Comissioner of Lands</u>, (2014) eKLR.** The Respondent implored the Court to take the view therefore that the market value of the acquired property is the unimproved site value of the said property, as there were no developments thereon, in the open market at the time of gazettement of the notice of intention to acquire the suit property on 26th May, 2006.

The Respondent also relied on the exposition of the law as to what constitutes "market value" of land for purposes of compensation of compulsory acquired land as held in the case of **<u>Kanini Farm Limited vs Commissioner of Lands</u> (1996) KLR 301**, where it was held that the market value as a basis for assessing compensation is the price which a willing seller might be expected to obtain from a willing purchaser. Further, that the purchaser may be a speculator provided that the speculator is neither wild nor unreasonable.

It was the Respondent's submission that the valuation it carried out of the Appellant's property took due account of comparable sales of other properties in the same locality in arriving at the value of Kshs.87,804,225. The Respondent relied on its exhibit marked "NLCI" to show that it took into account comparable sales all which indicated that an acre of land within Langata ranged between Sixty and Eighty Million Kenya Shillings. Further, by Sec. & M. Co. Limited. Further, that the system adopted by the Appellant in assessing what award payable is not anchored in any law and should therefore not be adopted by the Court.

It was the Respondent's contention that the two reports relied on by the Appellant do not disclose the comparable sales used to come up with the market value of the land as they are uncited. The Respondent urged the Court not to place any reliance on these reports as they would not reasonably guide the court on how to determine the market value of the property. Further, that the two valuations adduced by the Appellant are not in accordance nor full compliance with the schedule in the Land Acquisition Act which disallow speculative valuations.

The Respondent averred that no apartment block is yet to be realized on the portion of land under acquisition and it cannot be assumed that the Appellant would have eventually developed it. Further, that there was no evidence that the Appellant had sold any apartments on the acquired portion of land, and that even though the Appellant has approved development plans, this could always be altered at any moment so as to suit market needs or the Appellant's desires. It was contended by the Respondent that there is also a wide and varied valuation difference between the two reports prepared for the Appellant which casts aspersions on the objectivity of the valuations.

On the procedure used in the assessment of the award, the Respondent submitted that it followed the procedure set out under part VIII of the Land Act. According to the Respondent, from a reading of the law and specifically taking into account sections 113 and 114 of the Land Act, it was only under a statutory obligation to prepare an award of compensation which was to be served on interested parties. Further, that nothing more is expected of the Respondent after complying with section 113 and 114 of the Act. In this regard, the Respondent submitted that it furnished the Appellant with an award of compensation on 9th January 2014 and can therefore not be in breach of the Appellant's constitutional rights.

I have considered the arguments by the parties and note that the overriding principle when it comes to assessment and payment of compensation for land that is to be compulsorily acquired is that full and just compensation shall be paid promptly to all persons interested in the land. Article 40(3) of the Constitution

provides as follows in this regard:

> **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.**

Similar provisions are 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.

The Respondent was to make rules under section 111(2) on how the just compensation for compulsorily acquired land is to be assessed. In the absence of these rules, this Court has already found that the principles on assessment of compensation as provided in the schedule to the repealed Land Acquisition Act are still applicable. While I recognize and appreciate the effort made by the Appellant to expound on what a full and just compensation should entaiI in this regard. I must agree with the Respondent that that the assessment system adopted by the Appellant and especially his notion of a special value factor is not currently provided for in any law.

Coming to the applicable principles on assessment of compensation as found in the schedule to the repealed Land Acquisition Act, the said schedule provided that the following matters, and no others, shall be taken into consideration in determining the amount of compensation payable for land that is to be compulsorily acquired :

> a) The market value of the land.
>
> b) Damage sustained by severing part of the land from another land.
>
> c) Damage sustained by reason of the acquisition injuriously affecting the land owner's other property, whether immovable or movable or his actual earnings.
>
> d) Reasonable expenses incidental to change of residence or place of business.
>
> e) Damage genuinely resulting from diminution of the profits of the land between the date of gazettement and the date of taking actual possession.

"Market value" was defined in paragraph 1 of the said schedule to mean the market value of the land as at the date of publication in the Gazette of the notice of intention to acquire the land. In addition under paragraph 4 of the said schedule, a sum equal to fifteen per cent of the market value as determined in accordance with paragraph 1 is to be added by way of compensation for disturbance.

In the present appeal it is only a portion of the Appellant's parcel of land that is being acquired, and the factors therefore that are relevant in determining the compensation payable pursuant to the provisions of the schedule to the repealed Land Acquisition Act are the market value of the said portion of land; the damage sustained by severing the said portion of the land from the other land; the damage sustained by reason of the acquisition injuriously affecting the Appellant's other property, whether immovable or movable or its actual earnings, and damages resulting from diminution of its profits of the land between

the date of gazettement and the date of taking actual possession.

The market value of the portion of land that is to be compulsorily acquired is therefore the unimproved site value of the said portion and the value of the developments thereon in the open market at the time of gazettement of the notice of intention to acquire the suit property on 23rd August, 2013. I am also guided in this respect by the following decisions on the factors that courts should consider in determining the market value of property that has been compulsorily acquired. In **Kanini Farm Ltd v Commissioner of Lands (1986) KLR 310** the court stated as follows**:**

> **"The market value as the basis for assessing compensation is the price which a willing seller might be expected to obtain from a willing purchaser, the purchaser may be a speculator, but a reasonable one…In determining the amount of compensation which ought to be paid the court should take into account comparable sales and awards on other acquisition of land of similar character"**

In **Limo v Commissioner of Lands KLR (E&L) 175** it was also held in this regard as follows:

> **"In addition to the matters contained in the schedule to the Land Acquisition Act which a court should consider in assessing compensation to be paid to a person whose land has been compulsorily acquired, courts have tended to take into account the nearness of the land in question to the main town and its nearness to the road access."**

I note in this regard the Respondent's valuation that it attached as annexure "NLC 1" to its replying affidavit was dated 7th July 2014, and that the closest comparable it provided in terms of the character of the Appellant's property is that of L.R. No. 7337/47 described as "residential with high commercial potential and on Ngong/Dagoretti junction opposite Karen Police Station". The Appellant in its memorandum of appeal described its land as "situated along Langata road but extending to Jonathan Ngeno Estate, adjacent to the by-pass to the east and also in close proximity to Uhuru Gardens while being within Langata residential area of Nairobi City County." This description was not contested by the Respondent. The Appellant has also brought evidence that the said property is being developed for commercial purposes namely apartments for sale.

The comparable property namely L.R. No. 7337/47 measured 2.248167 hectares and sold for Kshs 500,000,000/= in December 2012. The Appellant's portion of land that is being acquired measures 0.4281 of a hectare and is therefore about one fifth of the size of the comparable land. The Appellant's portion of land would then have had a comparable unimproved site value of approximately Kshs 100,000,000/=.

The other comparables provided by the Respondent could not in my view provide an objective basis of comparison as they were different in character from the Appellants' portion of land as they are small residential or commercial units. Even then, according to the analysis provided by the Respondent, the sale prices of the said lands ranged from Kshs 66,477,187 to Kshs 85,198,833/= per acre for sales that took place from February 2012 to December 2012.

It is therefore not comprehensible how the Appellant's portion of land, which was being valued in September 2013, which is over one year after some of the said sales and which measured o.4281 hectares or 1.0578 acres could be valued at a market rate of Kshs 67,500,000/=. The Respondent did not also provide any comparable in terms of compensation paid for similar portions of land in the locality of the Appellant's portion of land. It is thus my finding and for the foregoing reasons that the market value given to the Appellant's portion of land of Kshs 67,500,000/= by the Respondent was substantially undervalued and cannot stand.

More fundamentally however, I also find that the Respondent erred by not taking into account the additional principles provided in the repealed Land Acquisition Act, namely the damage sustained by severing part of the land from another land, the damage sustained by reason of the acquisition injuriously affecting the land owner's other property, whether immovable or movable or his actual earnings, and damages resulting from diminution of the profits of the land between the date of gazettement and the date

of taking actual possession.

The Appellant provided evidence in this regard of planning and development approvals and of valuation reports showing that the intended acquisition of 0.4281 hectares of its land would deprive it of four blocks of flats comprising of 40 two-bedroomed flats, 20 three-bedroomed flats without domestic servant quarters and 20 three-bedroomed flats with domestic servant quarters. The planning approval was given by the City Council of Nairobi on 13th June 2012 and the environmental impact assessment license given by the National Environmental Management Authority on 11th June 2012. These approvals were given before the Respondent's notice of intended acquisition of 23rd August 2013, and it cannot therefore be found that the said development was speculative as alleged by the Respondent.

The Respondent has urged the Court not to rely on the two evaluation reports provided by the Appellant. I have perused the said evaluation reports, and note that they were prepared upon instructions from the Appellant to carry out a valuation of the portion of land that was to be compulsorily acquired with a view to advising on appropriate compensation Both valuations used the expected sales proceeds from the flats that were to be constructed on the portion of land to be acquired as the basis of their valuation. These sale prices were 8.5 million shillings for a two- bedroomed flat, 10.5 million shillings for a three-bedroomed flats without domestic servant quarters and 12.5 million shillings for a three-bedroomed flats with domestic servant quarters.

It is my view that this exercise entailed a mathematical exercise that is fairly objective, and the two evaluation reports provided by the Appellant show that the net profit that the Appellant would have earned from sales of the said apartments would have been Kshs 392,000,000/= and Kshs 193, 300,000/= respectively, after deduction of the development costs including the development space.

The first evaluation report by Milligan Valuers Limited dated 3rd October 2013 adopted an open value approach based on the overall earnings the Appellant is likely to forego as a result of the acquisition. It therefore gave the overall loss that the Appellant was likely to incur as Ksh 392,000,000/=. The second evaluation by Sec & M Co. Ltd dated 25th February 2014 adopted a discounted cash flow approach taking into account among other factors, the time the Appellant would have taken to develop and sell the flats, and found the earnings to be lost by the Appellant to be Kshs 193,302,037/=. I however note that the second evaluation report also found that the overall profits from the said apartments after taking into account the development costs would have been Kshs 406,000,000/=.

It is therefore not correct as submitted by the Respondent that the two evaluation reports were not objective and/or were at wide variance. Both reports actually give the overall profit that would have accrued to the Appellant to be between Kshs 392,000,000/= and Kshs 406,000,000/= after taking into account the development costs. It cannot also be argued that the said developments had not actualized, as the Appellant provided evidence of the commitments in terms of sale agreements entered into with respect to some flats, and it is noted in the evaluation reports that the construction of the flats was ongoing at the time of evaluation.

It is therefore the finding of this Court that the profits to be earned from the apartments that were to be erected on the acquired portion of land were an actual earning that the Respondent ought to have considered in its award pursuant to the principles set out in the Schedule to the repealed Land Acquisition Act.

Before I proceed to the last issue for determination I need to comment on the procedures used in making the award. The Appellant argued in this respect that its right to fair administrative action was infringed by the Respondent's failure to provide written reasons and/or sufficient data and analysis of the factors it took into account in assessing the compensation award. The Respondent in response stated that they did what they were required to do under sections 113 to 114 of the Land Act, namely make an inquiry and give an award.

While I appreciate that the making of an inquiry may be part of fair administrative action, there are other

requirements that may need to be observed to ensure that parties who are affected by an acquisition notice are availed a fair hearing. This is particularly as regards written reasons for a decision, as Article 47(2) of the Constitution now provides that where a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

Likewise, access to information is now an express constitutional right and requirement under Article 35 (b) of the Constitution especially when such information is held by another person and required for the exercise or protection of any right or fundamental freedom. These observations notwithstanding, this Court cannot make any finding as regards the violation of the Appellant's constitutional rights at this appellate stage. The Court however urges the Respondent to ensure that the appropriate procedures to actualise and safeguard these crucial constitutional rights are provided for in the rules and regulations that will be developed on assessment of compensation for compulsorily acquired land.

(a) Whether the compensation award by the Respondent was a just value for the Appellant's land

The upshot of the foregoing is that the Respondent's compensation award was a gross undervalue of the Appellant's portion 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. Just compensation in my opinion and 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 or she intended.

The Appellant has shown to the satisfaction of the Court the intended use of its 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, and that the said earnings were valued between Kshs 193,000,000/= and Kshs 392,000,000/= according to the two valuation reports it presented. I find that an average of the two sums of Kshs 292,500,000/= would be a reasonable and just assessment of the loss of actual earnings in the circumstances, and taking into account the fact that the overall net profit the Appellant would have earned was approximately Kshs 400,000,000 million. The Court has also considered in this respect that it has already taken into account the market value of the unimproved site value of the acquired land, which it found to be Kshs 100,000,000/= from the comparable sales provided by the Respondent, as well as the value of the fence on the acquired portion, which the Respondent found to be Kshs 4,950,000/=.

Lastly, as this appeal concerns land being acquired for a public purpose, each party shall bear their own costs of the appeal.

I accordingly allow the Appellant's appeal and order as follows:

1. The Respondent's award of Kshs 87,804,225.00 dated 9th January 2014 being compensation for the compulsory acquisition of the portion of the land parcel known as L.R No.209/9727 (IR 37790) in Nairobi measuring 0.4281 of a hectare be and is hereby set aside

2. The Appellant is awarded the sum of Kshs 413,192,500/= as compensation for the compulsory acquisition of the portion of the land parcel known as L.R No.209/9727 (IR 37790) in Nairobi measuring 0.4281 of a hectare, which sum is made up of the following assessment:

	Kshs
1. Market value of the portion of land (being the unimproved site value including value of fence on the said property)	104,950,000/=

2. 15% addition to the market value 15,742,500/=

3. Damages for loss of actual earnings 292,500,000/=

Total **413,192,500/=**

3. The Appellant shall forthwith serve a certified copy of this judgment and/or decree upon the Respondent, who shall issue a corrected award under section 113(1) of the Land Act of 2012 in accordance with the compensation as now determined, within 14 days from the date of service.

4. The said compensation award of Kshs 413,192,500/= shall be paid to the Appellant by the Respondent with interest at court rates from the date of this judgment until date of possession by the Respondent of the portion of the land parcel known as L.R No.209/9727 (IR 37790) in Nairobi measuring 0.4281 of a hectare.

5. Each Party shall bear their own costs of this Appeal.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____24th___ day of _____November____, 2014.

P. NYAMWEYA

JUDGE