



Sparkle Properties Limited v National Land Commission & another (Environment & Land Petition 43 of 2021) [2022] KEELC 3687 (KLR) (27 July 2022) (Judgment)

Neutral citation: [2022] KEELC 3687 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION 43 OF 2021**

NA MATHEKA, J

JULY 27, 2022

BETWEEN

SPARKLE PROPERTIES LIMITED PETITIONER

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT

KENYA RAILWAYS CORPORATION 2ND RESPONDENT

JUDGMENT

1. The Petitioner states that until 20th June 2014, they were the registered owners of all that piece of land known as LR. No. 1956/506, CR.No.23789 situate at Voi within Taita Taveta County, measuring 54.26 hectares. By an Agreement for sale dated 2nd November 2010, the Petitioner agreed to purchase the suit property from Bata Shoe Company (Kenya) Limited for a valuable consideration of Kenya Shillings Twelve Million (Kshs 12,000,000/-). A Deed of Transfer in favour of the Petitioner herein dated 8th March 2011 was registered on the 9th March 2011. From the 2nd November 2010, the Petitioner has had actual possession of the suit property save for a section invaded by some squatters and subject of ELC Case No.265 of 2013, *Sparkle Properties Limited-vs- Johana Ngai & Others* that was determined in a judgement of this Honourable Court of 24th February 2020 in favour of the Petitioner. The Petitioner has dutifully paid the land rents and rates to the Government and the County Government of Taita Taveta from the 8th March 2011. On the 20th June 2014 and *vide* Gazette Notice No.4096, the 1st Respondent issued a notice of intention to compulsorily acquire 14.99 ha of the Petitioner's suit property on behalf of the 2nd Respondent for purposes of construction of Mombasa-Nairobi Standard Gauge Railway through Taita-Taveta County.
2. Subsequently on the 25th July 2014 and *vide* Gazette Notice No. 5040, the 1st Respondent also published a notice of its intention to acquire an additional 1.902 ha of the Petitioner's suit property on behalf of the 2nd Respondent for purposes of construction of Mombasa-Nairobi Standard Gauge



Railway in Taita -Taveta County. On the 19th September 2014 and *vide* Gazette Notice No.6578, the 1st Respondent confirmed its intention to acquire a total of 16.983ha on behalf of the 2nd Respondent for purposes of construction of Mombasa- Nairobi Standard Gauge Railway in Taita Taveta County. The Petitioner avers that *vide* Kenya Gazette Notice No.5503 of 8th August 2014, the 1st Respondent published a notice of inquiry pursuant to Section 162(2) of the [Land Act](#) 2012 and Section 9(1) of the [Land Acquisition Act](#), Cap 295(Repealed). The Notice of Inquiry published in the Kenya Gazette No. 5503 of 8th August 2014 scheduled inquiry of the Petitioner's suit property on the 28th August 2014, at Voi County Commissioners Office from 8.30am. The Petitioner avers that in reliance of Gazette Notice No.5503, the Petitioner's advocates instructed Afriland Valuers Limited to value the suit property for purposes of compensation by the 1st Respondent. Afriland Valuers Limited through their valuation report dated 26th August 2014, returned a compensation value of Kenya Shillings Three Hundred and Two Million Four Hundred and Fifty Thousand (Kshs 302,450,000.00) for the 41.742603 acres earmarked for compulsory acquisition by the 1st Respondent. The Petitioner herein through its authorised official and Advocate duly attended the inquiry held on the 28th August 2014 at Voi County Commissioners office in compliance with the provisions of Section 112 of the [Land Act](#) 2012. That the Petitioner also submitted a bulky written memorandum confirming that it is the registered and lawful owner of L.R. No. 1956/506. The Petitioner further lodged a compensation claim of Kshs 502,400,000 being the compensation valuation returned by Afriland Valuers Limited in the valuation of 26th August 2014 and anticipated economic loss of bargain and use of Kenya Shillings Two Hundred Million (Kshs 200,000,000.00). The Petitioner avers that thereafter the 1st Respondent held another inquiry on the 21st May 2015 at the Voi District Commissioners Office. The 1st Respondent also duly attended the inquiry and submitted a further memoranda and documents to buttress its ownership of L.R. No.1956/506 submitted to the commission on the 10/06/2015.

3. The Petitioners avers that despite follow up and numerous demands, the 1st Respondent failed to issue an award to the 1st Respondent as contemplated by Section 113 of the [Land Act](#) until the 18th January 2021. That after the inquiry of 21st May 2015, the 2nd Respondent whimsically and with knowledge that the Petitioner had not been compensated, invaded and seized the Petitioner's property, fenced it off and erected a massive structure being Voi SGR Station and proceeded to construct the Nairobi-Mombasa standard gauge railway through the Petitioner's parcel of land. The Petitioner contends that the actions of the 1st and 2nd Respondents and their agents in invading and seizing the Petitioner's property without compensation from the year 2015 violates the Petitioner's rights to fair hearing and [Fair Administrative Action](#) as protected under Articles 47 and 50 (1) of the [Constitution](#) and the [Fair Administrative Action Act](#).
4. The Petitioner avers that the illegal actions of trespass by the Respondents from the year 2015 violate the Petitioner's right to property protected under Article 40 of the [Constitution](#), Article 68 (v) of the [Constitution](#), the [Land Act](#), the [National Land Commission Act](#) ("NLC Act"), and amounts to blatant disregard of its proprietary rights. The Petitioner does acknowledge and appreciate that the Respondents and indeed the state can acquire property especially for public interest purposes such as rail construction (as in the instant case) but emphasizes that such acquisition must be promptly and justly compensated as envisaged by Article 40 (3)(b)(i) of the [Constitution](#) of Kenya, 2010. It is without doubt that the Respondents have never compensated the Petitioner for the compulsory acquisition of its property which constitutes flagrant infringement of the Petitioner's rights as enshrined under Article 40(3)(b)(i) of the [Constitution](#) of Kenya, 2010. The Petitioner avers that the Respondents actions of compulsorily acquiring the Petitioner's property without prompt, fair and just compensation is a derogation of their mandate and a blatant violation of the Petitioner's right to fair and administrative action under Article 47 of the [Constitution](#). It is clear that the proprietary



rights of the Petitioners were likely to be adversely affected by the Respondents actions thus the obligation to the Respondents to give written reasons for their illegal actions. The failure of the 1st Respondent to give a notice of award to the Petitioner until the 18th January 2021 in pursuant to Section 114 of the Land Act is a derogation of its mandate under Article 67 of the Constitution. The Petitioner avers that the 1st Respondent actions in withholding the award after the public inquiry of 21st May 2015 for a period of more than Six (6) years now is a blatant violation of the Petitioner's right to Fair Administrative Action under Article 47 of the Constitution and its right to fair hearing under Article 50 of the Constitution. That despite a judgment having been rendered in favour of the Petitioner in Mombasa ELC No. 265 of 2013 Sparkle Properties Limited vs Johana Ngai & Others on 24th February 2020, the Respondents have adamantly failed to make good the payment of the award sum to the Petitioner herein.

5. The Petitioner avers that there is currently no order staying the execution of the judgement and decree of 24th February 2020 and the perpetuated failure by the Respondents to compensate the Petitioner is in patent bad faith. The Petitioner further avers that the impetuous actions of the Respondents have occasioned the Petitioner losses that cannot be compensated by any form of damages. The lopsided actions of the Respondents amounts to trespass, forceful seizure of private property and wanton disregard of the Petitioner's proprietary rights as enshrined under Article 40 of the Constitution. The compulsory acquisition of the Petitioner's suit property by the Respondents without prompt, just and full compensation to the Petitioner is in blatant disregard of the provisions of Section 113,114 and 115 of the Land Act, 2012. Upon enquiries, the Petitioner has established that the 1st Respondent has in a letter dated 20th April 2021 to the 2nd Respondent and copied to the Petitioner's advocates called from the Corporation for an amount of Kshs 192,015,974/= being the Petitioner's award for compulsory acquisition of L.R. No. 1956/506. In response thereof, the 2nd Respondent has in a letter dated 9th July 2021 responding to the letter dated 20th April 2021, confirmed to the 1st Respondent that it had on 02nd July 2021 remitted an amount of Kshs 1,223,949,263,20 being payment of awards for compulsory acquisition of SGR Phase 1 including Kshs 192,015,974/- belonging to the Petitioner herein but the 1st Respondent has adamantly failed to release and remit the funds to the Petitioner herein.
6. The Petitioner states that in view of the apparent violation of its rights and the imminent violation of its constitutional and property rights by the Respondents, it is extremely important for this Honourable court do intervene and issue necessary mandatory injunction orders against the Respondents to release forthwith and unconditionally to the Petitioner the award of Kshs.192,015,974/= in respect to compulsory acquisition of L.R. No. 1956/506 situate in Voi together with interest. The Petitioner seeks a declaration that the Respondents' actions of compulsorily acquiring the Petitioner's property without prompt, just and fair compensation violates the rights of the Petitioner and that the Respondents' actions to capriciously trespass the Petitioner's property are unconstitutional, invalid and an abuse of the mandate, power and due process entrusted to the Respondents and the Government under the Constitution. The Petitioner prays for;
 - i. A declaration that the Petitioner's fundamental rights and freedoms as enshrined under Articles 40(1), 40(2)(a), 40(3)(b)(i), 47 and 47(2) of the Constitution of Kenya 2010 have been contravened and infringed upon by the Respondents herein.
 - ii. A declaration that the Petitioner's proprietary interest in L.R. No.1956/506 situate in Voi, within Taita-Taveta County, was compulsorily acquired by the State.
 - iii. A declaration that the Petitioner herein is entitled to prompt, full and fair compensation within the tenor of Articles 40(3)(b)(i) in the sum of Kenya Shillings One Hundred and Ninety Two



Million, Fifteen Thousand Nine Hundred and Seventy Four (Kshs 192,015,974/=) together with interest at court rates from 21st May 2015 until payment in full.

- iv. Judgment be entered for the Petitioner against the Respondents jointly and severally for the sum of Kenya Shillings One Hundred and Ninety Two Million, Fifteen Thousand Nine Hundred and Seventy Four (Kshs 192,015,974/=) together with interest at court rates from 21st May 2015 until payment in full.
 - v. General, exemplary and aggravated damages under Article 23(3) of the Constitution of Kenya for the capricious and unconstitutional conduct of the Respondents herein.
 - vi. Any other orders and directions as this Honourable Court may consider appropriate.
 - vii. Costs of this petition plus interest.
7. The 2nd Respondent stated that they do not have any liability in the Petition because the law under Section 125(1) of the Land Act, 2012 imposes the liability solely upon the 1st Respondent to compensate the Petitioner for the land acquired through compulsory acquisition. Accordingly, even if the Petition succeeds, no liability will accrue against the 2nd Respondent. They therefore urge the Court to dismiss the Petition as against the 2nd Respondent with costs. That the 2nd Respondent already remitted/ deposited with the 1st Respondent Commission the funds required to compensate the Petitioner for the compulsorily acquired land. On 2nd July 2021, the 2nd Respondent remitted to the 1st Respondent a total of Ksh.1,223,949.20/= for purposes of paying compensation to persons affected by compulsory acquisitions for the SGR project, including the Petitioner herein. On 9th July 2021, the 2nd Respondent wrote to the 1st Respondent confirming that the 2nd Respondent already remitted the Ksh. 1,223,949.20/=, and advised the 1st Respondent to disburse the funds to the respective affected persons, including the Petitioner. (the letter dated 9th July 2021 produced as CM-4 in the 2nd Respondent's Replying Affidavit). On 13th July 2021, the 1st Respondent Commission consequently confirmed receipt of the Ksh. 1,223,949.20/= from the 2nd Respondent. (the letter dated 13th July 2021 produced as CM-5 in the 2nd Respondent's Replying Affidavit). The fact that the 2nd Respondent already remitted the funds to the 1st Respondent is not disputed, as it is also admitted by the Petitioner in the Petition and Supporting Affidavit. That in its written submissions, the Petitioner submits that "This is a patent admission in court pleadings that the amount of Ksh. 192,015,974 has already been remitted to the National Land Commission which has deliberately failed to make good the payment to the Petitioner herein." It is therefore not in doubt that the 2nd Respondent remitted to the 1st Respondent Commission the funds required to pay the Petitioner the compensation of Ksh. 192,015,974/=. Accordingly, since the Respondent already availed the funds to the 1st Respondent, the claim for compensation lies solely as against the 1st Respondent. That the 2nd Respondent has no legal duty/ obligation to pay the Petitioner the Ksh. 192,015,974/= compensation plus interest sought in the Petition. The law imposes the obligation to pay compensation for compulsory acquisition exclusively on the National Land Commission, the 1st Respondent herein. This is pursuant to Section 125(1) of the Land Act 2015 which expressly provides that: "The Commission shall as soon as is practicable, pay full and just compensation to all persons interested in the land." In Republic v National Land Commission & 2 Others Ex-parte Samuel M. N. Mweru & 5 others (2018) eKLR, Justice Odunga of the High Court held that:

"...before the Commission acquires land on behalf of any authority it must ensure that the funds required for the said acquisition are placed at the disposal of the Commission so that as soon as the process is completed but before possession of the land is taken the person interested in the land is fully compensated. Where the Commission fails to do so and the



land is possessed by the acquiring authority before payment is made, the obligation to ensure payment is made falls squarely on the Commission. It follows that the Commission cannot escape liability in such circumstances by simply contending that the acquiring authority has not availed the funds.”

8. This court has considered the Petition and the submissions therein. The 1st Respondent was served but failed to file any response. Article 40 (3) of the Constitution of Kenya 2010 provides that;

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.

9. It is not in dispute that on the 19th September 2014 and vide Gazette Notice No.6578, the 1st Respondent confirmed its intention to acquire a total of 16.983ha on behalf of the 2nd Respondent for purposes of construction of Mombasa- Nairobi Standard Gauge Railway in Taita Taveta County. Later inquiries were held and the Petitioner has established that the 1st Respondent has in a letter dated 20th April 2021 to the 2nd Respondent and copied to the Petitioner's advocates called from the Corporation for an amount of Kshs 192,015,974/= being the Petitioner's award for compulsory acquisition of L.R. No. 1956/506. In response thereof, the 2nd Respondent has in a letter dated 9th July 2021 responding to the letter dated 20th April 2021, confirmed to the 1st Respondent that it had on 2nd July 2021 remitted an amount of Kshs 1,223,949,263,20 being payment of awards for compulsory acquisition of SGR Phase 1 including Kshs 192,015,974/- belonging to the Petitioner herein but the 1st Respondent has adamantly failed to release and remit the funds to the Petitioner herein.

10. The statutory framework for compulsory acquisition is founded under Part VIII of the Land Act No. 6 of 2012. Section 107(1) of the Land Act, provides that:-

“Whenever the national or county government is satisfied that it may be necessary to acquire some particular land under section 110, the respective Cabinet Secretary or the County Executive Committee Member shall submit a request for acquisition of public land to the Commission to acquire the land on its behalf.”

11. In the instant Petition, the 1st Respondent was acquiring land on behalf of the Kenya Railways Corporation. Section 111 of the Land Act provides that;

- (1) If land is acquired compulsorily under this Act, just compensation shall be paid promptly in full to all persons whose interests in the land have been determined.
 - (A) The acquiring body shall deposit with the Commission the compensation funds in addition to survey fees, registration fees and any other fees before acquisition.”
- (2) The Commission shall make rules to regulate the assessment of just compensation.”



12. It is clear from Section 111 (1A) of the Land Act that the acquiring body shall deposit with the 1st Respondent the compensation funds in addition to survey fees, registration fees and any other fees before acquisition. In view of this, the 2nd Respondent submitted that they already remitted/ deposited with the 1st Respondent Commission the funds required to compensate the Petitioner for the compulsorily acquired land. That on 2nd July 2021, the 2nd Respondent remitted to the 1st Respondent a total of Ksh.1,223,949.20/= for purposes of paying compensation to persons affected by compulsory acquisitions for the SGR project, including the Petitioner herein.
13. In the case of Patrick Musimbi vs National Land Commission & 4 Others Petition No. 613 of 2014 the court held that;

“As the taking of a person’s property is a serious invasion of his proprietary rights, the application of constitutional or statutory authority for the deprivation of those rights require to be most carefully scrutinized. In short, in our view, there must always exist a presumption against an intention to interfere with vested property rights as the legislative and constitutional intentions is always the protection rather than interference with the proprietary rights.....the power to expropriate private property as donated in the State by both the Constitution and statute law (the Land Act) leaves the private land owner with no alternative. The power involves the taking of a person’s land against his will. It is a serious invasion of his proprietary rights through the use of statutory authority. The private land owner has no alternative but wait for compensation. It is consequently necessary that the court must remain vigilant to see to it that the State or any organ of the State does not abuse the constitutional and statutory authority to expropriate private property. It is on this basis that courts have consistently held that the use of statutory authority to destroy proprietary rights requires to be most carefully scrutinized. Just compensation is mandatory”

14. The main claim in this matter is compensation and interest. In the case of Horn v Sunderland Corporation (1941) 2KB 2640 the court held that;

“The word “Compensation” is almost of itself carried the corollary that the loss to the seller must be completely made up to him, on the ground that unless he receives a price that fully equated his pecuniary detriment, the compensation would not be equivalent to the compulsory”

15. It is therefore clear that where land has been acquired compulsory from an owner that just compensation is to be paid in full to the said affected person(s). This is in line with the Constitutional requirement under Article 40 (3) of the Constitution of Kenya and that person should not be deprived of their property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation as in the case of the Petitioner hereof In the Compulsory acquisition of land the law imposes an obligation on the full payment upon National Land Commission. Section 117 (1) of the Land Act 2015 provides:-

If the amount of any Compensation awarded is not paid, the commission shall on or before the taking of possession of the land open a special account into which the commission shall pay interest on amount awarded”

16. I find that that The National Land Commission has to take the full charge and responsibility for all the full, prompt adequate and/or fair payments. The mischief envisaged and/or by the letter and spirit of the law was core value of accountability, transparency and order as envisaged under Article 10(2) (b)



of Constitution of Kenya. Be that as it may this court finds that in the instant case there was a dispute of ownership over the suit land in ELC Case No.265 of 2013, Sparkle Properties Limited v Johana Ngai & Others that was determined in a judgment of this Honourable Court of 24th February 2020 in favour of the Petitioner. Indeed in the Petitioners bundle of documents at page 134 the 1st Respondent in their letter dated 11th January 2016 states that the money shall be disbursed upon determination of the land (L.R No. 1956/506 Voi) proprietorship by the Court. Based on the foregoing I find it difficult to impose any obligation on the 2nd Respondent or cause of action against them. In my view, therefore, the liability by way of compensation lies against the 1st Respondent as the 2nd Respondent has already remitted the funds to them and has taken possession of the suit property.

17. As indicated above compulsory acquisition of land arising from the Provisions of Article 40 (2) of Constitution of Kenya and Part III of the Land Act, the process and the procedure are well spelt out upon compulsory acquisition the provision of Section 117(1) of the Land Act, 2012 holds that its National Land Commission 3rd Respondent which pays the compensation, the provision of Section 125 (1) of the Land Act of 2012 states that;

“The Commission shall as soon as in practicable, pay and just compensation to all persons interested in the land.”

18. I find that, the law does impose the full responsibility on payment to the National Land Commission. Where the National Land Commission fails to do so and the land is possessed by the acquiring authority before payment is made the obligations to ensure payments is made falls squarely on the commissions. They are the only statutory body that is vested with the legal authority to make all the payment including interest from the compulsory acquisition of land. In this case the 2nd Respondent has remitted the funds to the 1st Respondent and this is not in dispute and hence cannot be liable and hence the law does impose responsibility on them. General, exemplary and aggravated damages were not proved and hence will not be awarded. I find that the dispute of ownership having been settled that Petitioner is entitled to the award however interest at court rates from 21st May 2015 is not payable as ownership had not been determined by then. I find that the Petition has merit and grant the following orders;

1. A declaration that the Petitioner's fundamental rights and freedoms as enshrined under Articles 40(1), 40(2)(a), 40(3)(b)(i), 47 and 47(2) of the Constitution of Kenya 2010 have been contravened and infringed upon by the 1st Respondens herein.
2. A declaration that the Petitioner's proprietary interest in L.R. No.1956/506 situate in Voi, within Taita-Taveta County, was compulsorily acquired by the State.
3. A declaration that the Petitioner herein is entitled to prompt, full and fair compensation within the tenor of Articles 40(3)(b)(i) in the sum of Kenya Shillings One Hundred and NinetyTwo Million, Fifteen Thousand Nine Hundred and Seventy Four (Kshs 192,015,974/=).
4. 1st Respondent to bear the costs of this Petition.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH DAY OF JULY 2022.

N.A. MATHEKA

JUDGE

