



**Waita v National Land Commission & another (Civil Suit 50 of 2021)
[2022] KEELC 13704 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 13704 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT 50 OF 2021
LL NAIKUNI, J
SEPTEMBER 29, 2022**

BETWEEN

STEPHEN MBAIKI WAITA PLAINTIFF

AND

NATIONAL LAND COMMISSION 1ST DEFENDANT

KENYA NATIONAL HIGHWAY AUTHORITY 2ND DEFENDANT

JUDGMENT

I. Preliminaries.

1. This Judgement pertains the suit that was instituted in this Court by Mr. Stephen Mbaiki Waita, the Plaintiff herein. On March 22, 2021 the Plaintiff instituted this suit against The National Land Commission (Hereinafter referred to as “the NLC”) and the Kenya Highway Authority (Hereinafter referred to as KenHA) 1st and 2nd Defendants herein through a Plaint dated March 22, 2021. He held that the Plaintiff carried on the entertainment and food business at Magongo Mombasa in the name and style of Magongo Night Club on Plot No. MN/VI/2519. The Plaintiff had carried on the said business at the said plot for many years having taken over the said business from his father Francis Waita in October, 1992 paying ground rent and other statutory obligations without interruption. Through the Gazette Notices No. 16421 of 2016, 10503 of October 12, 2018 23 and 24 of February, 2019, the 1st Defendant compulsorily acquired Plot No. MN/VI/2519 for the construction of Magongo and Oil Refinery Road at compensation price a sum of Kenya Shillings Twenty-Seven Million Eight Seventy Thousand, Four Hundred and Fifty (Kshs. 27,870,450.00) and Kenya Shillings Five Million Five Eighty Thousand (Kshs. 5,580,000/=).
2. The 1st Defendant valuation and investigation as to the ownership of the Plot and structures thereon confirmed the Plaintiff was entitled to fair and prompt compensation in Sum of Kenya Shillings Twenty-Seven Million Eight Seventy Thousand, Four Hundred and Fifty (Kshs. 27,870,450.00) and



Kenya Shillings Five Million Five Eighty Thousand (Kshs. 5,580,000/=) for the structures and loss of business. The 1st Defendant undertook to compensate the Plaintiff and issued him with an Award dated April 15, 2019 for these sums inclusive of loss of business. But the 1st Defendant had since refused to remit the agreed compensation amount in the award to the Plaintiff despite several demand letters. As a result, this state of affairs caused untoward anguish, frustration and trauma upon the Plaintiff and his family who had been depending on the business on the suit premises for their livelihood and for a long period of time. The 1st Defendant never communicated to the Plaintiff the reason for failure to remit the award. This state of affairs caused the Plaintiff immense anguish, trauma and anguish which necessitated the filing of this suit.

3. Although, the Plaintiff served the 2nd Defendant National Land Commission (NLC) they have never filed any replies.

The Plaintiff prays for Judgment against the 1st and 2nd

Defendants jointly and severally for:-

- (a) A declaration that the demolition of his structures and disrupt his business on Plot No. MN/VI/2519 on March 22, 2021 or any day immediately without payment of Kenya Shillings Twenty-Seven Million Eight Seventy Thousand, Four Hundred and Fifty (Kshs. 27,870,450.00) and Kenya Shillings Five Million Five Eighty Thousand (Kshs. 5,580,000/=) as stated in the awards is unconstitutional and is contrary to the provisions of the Land Act 2012 and the Constitution Article 40 null and void.
- (b) A declaration that he is entitled to payment of Kenya Shillings Twenty-Seven Million Eight Seventy Thousand, Four Hundred and Fifty (Kshs. 27,870,450.00) and Kenya Shillings Five Million Five Eighty Thousand (Kshs. 5,580,000/=) stated in the awards dated April 15, 2019 issued by the 1st Defendant to the Plaintiff.
- (c) A declaration that failure by the 1st Defendant to communicate the reasons for non-payment, existence of objection if any to payments of the award in capricious and contrary to Plaintiff's legitimate expectations.
- (d) An order to restrain 2nd Defendant, its employees or in any other manner whatsoever from demolishing Plaintiff's business structures known as Magongo Night Club on Plot No. MN/VI/2519 before payment of Awards Kenya Shillings Twenty-Seven Million Eight Seventy Thousand, Four Hundred and Fifty (Kshs. 27,870,450.00) and Kenya Shillings Five Million Five Eighty Thousand (Kshs. 5,580,000/=).
- (e) A mandatory order to issue against 1st Defendant to the Plaintiff to pay Kenya Shillings Twenty-Seven Million Eight Seventy Thousand, Four Hundred and Fifty (Kshs. 27,870,450.00) and Kenya Shillings Five Million Five Eighty Thousand (Kshs. 5,580,000/=) as per its own awards issued to the Plaintiff dated April 15, 2019.
- (f) Any other or further relief that the Honorable Court may deem fit just to grant.
- (g) Interest on the sum of award till payment in full.



- (h) Costs of this suit.

II. The Plaintiff's Case.

4. In the given circumstances, on April 5, 2022 the matter was heard vide formal proof in open court. The evidence was adduced as follows.

Examination in Chief of PW – 1 by Mr. D.G. Wachira Advocate

5. PW – 1 testified and sworn in the English language. He stated that his name was Stephen Mbaki Waita. He was a holder of the national identity card bearing numbers 4828XXX. His date of birth was August 12, 1956. He lived at Sagana and Magongo of the County of Mombasa. He recorded a witness statement dated March 22, 2021. He produced the witness documents dated March 22, 2021 as part of the records for the Plaintiff. These included all the twenty 21 documents founded under Folders 1 to 6 of the Plaintiff's List of Documents filed in Court on April 4, 2022 and Marked as Plaintiff Exhibits Numbers 1 to 21 thereof. He stated having operated an entertainment and food business at Magongo Mombasa. The business was in the style and name of Magongo day & Night Club. It was situated on Plot No. MNB/VI/2519. He had inherited from his father, Mr. Francis Waita Mbiaki who retired and settled in Upcountry. He got into a fresh tenancy agreement. He had caused extensive improvement on it. These included, drilling a borehole. Page 28. He paid all the ground rent to the land Lord and other statutory obligations accordingly. On pages 6 and 7 of the bundle of documents, the 1st Defendant published a Gazette Notice in the year 2018 wishing to compulsorily acquire the suit property for public use. On the November 15, 2018, an inquiry sitting for the subject matter was held at Chamgamwe Deputy Commissioner's office. During this session, the land owners and any person with interest in the affected land presented ownership documents, compensation claims and any other information the National Land Commission. His interest was my building structures and loss of business.
6. On April 15, 2019 offered them an Award for a sum of Kenya Shillings Twenty-Seven Million Eight Seventy Thousand, Four Hundred and Fifty (Kshs. 27,870,450.00) and Kenya Shillings Five Million Five Eighty Thousand (Kshs. 5,580,000/=) for the loss of business. Pursuant to that demolition took place but without any compensation having been made. He stated that other people and tenants were compensated. As found on Pages 36 to 55 of the bundle of documents, he instructed his Advocate and who did write several letters to NLC but without any responses. There was no inquiry for people objecting to them to be paid. He reported the matter to the police. I would want this court to give us the relief sought from the Pliant.

Cross Examination of PW – 1 by M/s. Oduor Advocate

7. He informed Court having inherited the building and the business from his father. There was the issue of the family dispute. See the succession cause No. 76/2022 a Court order dated 4th March 2021 on page 76 of the bundle of documents.

Re - Examination by PW – 1 by Mr. Wachira:-

8. PW – 1 stated that the reason for the court issuing an order on March 4, 2021. It was a revocation by Getrude Chao Waita to the estate of George Francis Waita (Deceased). The deceased had been married to a co-wife – called Agnes. He testified that Agnes had no claim against us.



Examination in Chief of PW – 2 -Testifies and sworn in Kiswahili

9. PW – 2 was called Henry Mwairu Mbozah. He indicated having recorded a witness statement on May 26, 2021 as found in Pages 187 of the bundle of documents. He was a tenant and doing business on the suit property. He had been there for a long period.

He testified that he was paid a sum of Kenya Shillings One Hundred and Twenty Thousand (Kshs. 120,000/=). He informed Court knowing for a fact that the other tenants were also paid by the 1st Defendant herein.

Cross Examination of PW – 2 by M/s. Oduor Advocate

10. He stated that he was paid by the NLC. He had no dispute with this family.

Re – Examination of PW – 2 by Mr. Wachira Advocate

11. He had never heard of any family dispute.

iii. The Defendant's Case.

There was no testimony by the Defendants as they never participated at all.

IV. Submissions

12. On April 5, 2022 upon the closure of the hearing- formal proof, the Honorable Court directed that the Parties file their Written Submissions. Pursuant to that and upon full compliance, the Honorable Court reserved a date for the delivery of the Judgment accordingly.

A. The Plaintiff's Written Submissions Upon Formal Proof

13. On April 13, 2022, the Learned Counsel for the Plaintiff the law firm of Messrs. D.G. Wachira & Company Advocates filed their Written Submissions dated April 6, 2022. Mr. D.G Wachira submitted that by a ruling dated 24th February, 2022 this Honorable Court entered interlocutory Judgment against the 1st Defendant. The matter was slated for formal proof in accordance with the provision of Order 10 Rule 4 and 10 of the *Civil Procedure Rules, 2010*.

The formal proof session was fixed for hearing on April 5, 2021. On the said date the Plaintiff testified and summoned a witness called Henry Mwairu Mabishi as his witness. The Learned Counsel contended that the Suit by the Plaintiff was for the enforcement of payment of the two awards totaling to Kenya Shillings Thirty-Three Million Four Hundred Fifty Thousand Four Hundred and Fifty (Kshs. 33,450,450/-) which had already been paid by the 2nd Defendant to the 1st Defendant for onward transmission to the Plaintiff through a letter Ref No. KENHA/F/NLC/6/VOL 3/3306 dated October 15, 2020.

14. The Learned Counsel held that the 2nd Defendant/Respondent Defence dated April 23, 2021 under the contents of Paragraphs 12, 19, 21, 23, 24 and 33 respectively of the said Defence indeed confirmed an inquiry was carried out by the 1st Defendant which confirmed Plaintiff was entitled to compensation. The Plaintiff was relying on the admission contained in the said Statement of Defence that the subject parcel of land was leased to several persons who had put up residential buildings and business structures.
15. He held that the Plaintiff was a tenant having leased the same from the owners therefore eligible for compensation for land development and loss of businesses. He averred that the said Statement of



Defence also stated that an inquiry sitting for the subject parcel of land was held as per the Kenya Gazette Notice No. 10530 at Changamwe Deputy Commissioner's office on November 5, 2018 at 9.30 am whereby land owners and any person with interest in the affected land presented ownership documents, compensation claims and any other information to the 1st Defendant. The Learned Counsel stated that the Plaintiff was an occupier and tenant of the land having developed the same and also doing business therein.

16. The Learned Counsel averred that the 2nd Defendant's said statement further stated that the 2nd Defendant as advised by the 1st Defendant went ahead to transfer of Kenya Shillings Twenty-Seven Million Eight Seventy Thousand, Four Hundred and Fifty (Kshs. 27,870,450.00) and Kenya Shillings Five Million Five Eighty Thousand (Kshs. 5,580,000/=) to the 1st Defendant's account vide the above stated letter. He held that the compensation was for the affected land developments and loss of business since the Plaintiff was a tenant and did not own the subject property.
17. The Learned Counsel submitted that the claim by the Plaintiff against the 1st & 2nd Defendant was in respect of compensation for structures and loss of business as a result of the compulsory acquisition of the land in which he used to operate his business. He stated that the Plaintiff testified in Court on April 5, 2022 and summoned one (1) witness called Henty Mwairu Mabishi Mbozali. During the hearing the Plaintiff produced the following documents in support of his case. These were:-
 - (a) Plaintiff's Statement dated March 22, 2021;
 - (b) Award dated April 15, 2019 for Kshs. 27,870,450/-;
 - (c) Award dated April 15, 2019 for Kshs. 5,580,000/-;
 - (d) Notice of taking possession and vesting dated February 19, 2021;
 - (e) Gazette Notice No. 10503 dated October 4, 2018;
 - (f) Liquor License for Magongo Day & Night Club paid for by the Plaintiff;
 - (g) Tenancy agreement dated 1December 8, 2002 between the Plaintiff as Tenant and Landlord Shamasu Naaman Mohamed the land of Plot No. 25/9/VI/MN on which Magongo Day & Night club operated;
 - (h) Transfer agreement of two (2) houses without land comprising of Magongo Day & Night Club by Shamasu Naaman Mohammed and others the Land lord/Trustees of Plot No. 2519/VI/MN to Plaintiff dated November 14, 2003 which agreement confirmed that the Plaintiff had taken over ownership from his father Waita Mbaki since October 1992;
 - (i) Ground rent payment receipts of Magongo Day and Night Club issued to the Plaintiff by the Land Lord;
 - (j) Daily stock taking samples of Magongo Day & Night Club for years 2016, 2017 and 2018;
 - (k) Letter of confirmation by Plaintiff's mother Gertrude Waita and Plaintiff's sister Lucy Msigo Waita dated January 7, 2009 Plaintiff was proprietor of Magongo Day & Night Club.
 - (l) Magongo Night valuation survey report by Keriasek & Co. Valuation Surveyors and Real Estate Agents;



- (m) Financial Statements of Magongo Day & Night Club for the years 2016, 2017 and 2018 prepared by Monde & Associates Certified Public Accountants;
- (n) Equity Bank Ltd loan facility for Kenya Shillings Four Hundred Thousand (Kshs. 400,000/-) advanced to the Plaintiff;
- (o) Confirmation dated October 9, 2019 by Senior Chief Changanwe Location;
- (p) Affidavit sworn by Plaintiff on March 23, 2021 served on National Land Commission;
- (q) An order issued in Succession (Mombasa) Cause No. 72 of 2012;

18. He testified that the 1st Defendant had not informed him of any objection to his payment. He held that the 1st Defendant had treated him with discrimination, malice, unlawful and all the particulars set out in the Plaint by paying his tenants and everyone else but refusing to pay him or give him the reason or responding to the letters written by his Advocates despite having visited their offices severally. They withheld the demolition notice for two (2) days which denied the Plaintiff to salvage his property.

19. The Learned Counsel argued that there was breach of *the Constitution* of Kenya by non-payment by the 1st Defendant contrary to the Provisions of Article 40 and Section 125 of the *Land Act* which provided for full and just compensation before taking possession after compulsory acquisition. The Plaintiff's business structures were demolished in March 2021 but he is still to be compensated. He averred that the 2nd Defendant in Paragraph 33 of the Defence stated that the 1st Defendant made a determination on the amount due and payable to the Plaintiff and the amount had been deposited with the 1st Defendant.

The 2nd Defendant had knowledge of the unlawful acts carried out by the 1st Defendant or substantially contributed to the said acts. The 2nd Defendant demolished the structures belonging to the Plaintiff and disrupted his business without first ensuring the Plaintiff had been fully compensated thus the Learned Counsel held that to that extent the 2nd Defendant could be faulted even though the 2nd Defendant forwarded full compensation to the 1st Defendant.

20. The 2nd Defendant was pointing a finger at the 1st Defendant for non-payment and conceded the Plaintiff was truly and fully entitled to payment which the 2nd Defendant forwarded to the 1st Defendant for onward transmission to the Plaintiff but the 2nd Defendant had casually observed as Plaintiff struggled to have the money released without intervening or following on the issue. On all these issues the Learned Counsel relied on the Provisions of Article 40 (3) & 10 of *the Constitution* of Kenya, 2010 and the decision of "*Thomas Kimagut Sambu – Versus - National Land Commission & 2 others Kericho*" ELC Case No. 5 of 2017" where Court made finding against the 1st Defendant the National Land Commission for being "Cavalier, insensitive and deplorable"..... it's discernible that just compensation ought to be paid promptly before taking possession. The only exception is where there is urgent necessity to take Possession and the only vacant land can be acquired under such circumstances.

..... The Court has consistently held that the procedure with regard to compulsory acquisition laid down in the law must be strictly followed.

In conclusion the Learned Counsel urged Court to grant the Orders prayed for from the filed Plaint dated March 22, 2021 with costs.



V. The Issues For Determination

21. I have intensively assessed the filed pleadings by the Plaintiff being the Plaint dated March 22, 2021, the Written Submission, the numerous authorities cited hereof and the relevant Provisions of *the Constitution* of Kenya, 2010 and Statutes.

For the Honorable Court to reach an informed, just, fair, reasonable and equitable judgement, the Court has framed the following salient issues for its determination. These are:-

- (a) Whether the Suit instituted by the Plaintiff against the 1st & 2nd Defendants fulfils the laid down principles for compulsory acquisition as provided for under *the Constitution* of Kenya and the relevant Statutes.
- (b) Whether the Plaintiff is entitled to the relief sought; and
- (c) Who will meet the costs of the suit.

VI. Analysis & Determination.

22. As stated above, the Court has proceeded to conduct an analysis of the framed issues as herein below.

Issue No. (a) Whether the Suit instituted by the Plaintiff against the 1st & 2nd Defendants fulfils the laid down principles for compulsory acquisition as provided for under *the Constitution* of Kenya and the relevant Statutes.

Brief facts

23. The Honorable Court feels it imperative to extrapolate on brief facts before embarking on the analysis of this sub-heading. From the filed pleadings and the testimony adduced before this Court is that the 1st Defendant by a Gazette Notice No. 1642 of 2016, 10503 of October 12, 2018, 923 & 924 of February, 2019 for Compulsory acquisition of Plot No. MN/VI/2519 for the construction of the Magongo and Oil Refinery Road. The Plaintiff was affected as he was operating an entertainment and food business on the said plot under the name and style of Magongo Day and Night Club.

From the surrounding facts the Plaintiff had operated the said business since October 1992 having taken over from his father Francis Waita who opted to retire and settle upcountry. The Plaintiff entered into a fresh Tenancy Agreement with the Landlord and had since then been operating it without any interruption paying ground rent to the Landlord and other statutory obligations.

24. An inquiry sitting for the subject matter was held as per the Kenya Gazette Notice No. 10503 at Changamwe Deputy Commissioner's office on November 15, 2018 whereby the land owners and any person with interest in the affected land presented ownership documents, compensation claims and any other information to the 1st Defendant. The Plaintiff herein was an interested person entitled to compensation for structures and for loss of business. The 1st Defendant issued the Plaintiff with an Award dated 15th April, 2019 for a sum of Kenya Shillings Twenty-Seven Million Eight Seventy Thousand, Four Hundred and Fifty (Kshs. 27,870,450.00) and Kenya Shillings Five Million Five Eighty Thousand (Kshs. 5,580,000/=) for loss of business pursuant to that demolition took place without any compensation having been made by the 1st Defendant.
25. The 2nd Defendant as per the advise by the 1st Defendant went ahead to transfer a total of Kenya Shillings Twenty-Seven Million Eight Seventy Thousand, Four Hundred and Fifty (Kshs. 27,870,450.00) and Kenya Shillings Five Million Five Eighty Thousand (Kshs. 5,580,000/=) being the



Plaintiff's compensation amount to the 1st Defendant's account *vide* a letter Ref No. KENHA/F/NLC/6/ Vol. 3/3306 dated 15th October, 2020.

The compensation was the affected land development and loss of business since the Plaintiff was a tenant and did not own the affected land. This was the very reason why the Plaintiff filed this case against the 1st & 2nd Defendants herein.

That is adequate on the fact of the case.

26. Now turning to the issue under this sub-heading whether the Suit instituted by the Plaintiff against the 1st & 2nd Defendants herein fulfils the laid down principles for compulsory acquisition as provided for under *the Constitution* of Kenya and the relevant Statutes. From the very onset, it's imperative to extrapolate indepth on the concept of Land Compulsory acquisition and in Kenya. The current law or statutory framework governing compulsory acquisition of interest in land is founded under Part VIII, Sections 107 to 133 of the *Land Act* No. of 2012 and Article 40 (1), (2) and (3) of *the Constitution* of Kenya (See *Viranda Ramji Gudka & 3 Others The AG* [2014] eKLR as read together with Part V of The *Land Regulations* of 2017. The process of the compulsory acquisition is in summary provided as follows:-

The Article 40 (3) provides as follows:-

“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.
27. Under the provisions of the *Land Act*, of No. 3 2012, Section 107 of the Act holds that, the NLC - the 3rd Respondent herein is ordinarily prompted by the request of the National or County Government through the Cabinet Secretary or County Executive member respectively for authentication of the compulsory acquisition of land are required to submit the request to NLC providing a reason for the land acquisition which must not be remote or fanciful. Strictly, the Land must be acquired for public purpose or in public interest and not any other purpose as dictated by Article 40 (3) of *the Constitution* of Kenya. In this case the threshold must be met.
- Significant variation in the law includes Section 107 (3) of the *Land Act*, of 2012 which gives the NLC powers to reject a request for acquisition if it establishes that the requirement prescribed in Section 107 (3) of the *Land Act* and Article 40 (3) of *the Constitution* of Kenya.
28. Under Section 108, as part of the NLC's due diligence, it must ensure that the land to be acquired is authenticated by the survey department to ascertain the real owner. It must be satisfied that the purpose for public use has been met through conducting intense inquiry that the land is suitable for the intended acquiring body. (See “*Nas Auto Spares v Land Acquisition & Compensation Tribunal & 2 Others* [2015] eKLR).



29. This process is thereafter followed by a verification meeting (See Section 107 (2) with the acquiring body where the latter provides a list of affected parcels of land and the respective owners, title searches details, Cadastral Maps of the affected areas, a Resettlement Action Plan (RAP) accompanied by a list of Persons Affected by the Project (PAPs) so that their applications can be put into consideration. Under the provisions of Sections 107 (5) & 110 (1) of the Act, the 1st Respondent upon approval of a request for the compulsory acquisition a Notice of the intention to acquire the land is published in the gazette and County gazette. A notice must clear. Failure to give notice in itself is a denial of the natural justice and fairness. The notice is delivered to the Land Registrar as well as every person who appears to have an interest in the land. The 1st Respondent should also ensure that the land to be acquired is georeferenced and authenticated by the authority responsible for survey department both County and national governments – Section 107 (8) of the *Land Act* for the identification of the legal owner. In the course of such inquiries the NLC is also to inspect the land and do all things as may be necessary to ascertain whether the land is suitable for the intended purpose as stated out under Section 108 of the *Land Act*. This preliminary or per inquiry stage of the land acquisition is merely undertaken by the NLC. The land owners plays no role at all hereof.

30. Under the provision of Section 112 of the *Land Act* is where the land owner gets to be involved directly for purposes of determining proprietary interest and compensation. The section makes an elaborate procedure where at least 30 days after the publication of the notice of intention to acquire land in gazette and at least fifteen (15) days before the actual date of inquiry of an intended inquiry. The NLC is required to serve the notice of inquiry on every person who appears to have an interest on the land in question. The inquiry hearing determines who the interested persons are based written claims for compensation received by the NLC by the date of the inquiry (See Section 112 (2) of the Act. At this stage, the NLC exercises a quasi - judicial powers.

For purposes of conducting this inquiry, the NLC has powers of court to summon and examine witnesses including the interested persons and the public body for whose land is acquired and to administer oaths, affirmation and to compel production of documents and delivery of title documents (See Section 112 (5) of the Act makes a separate award of compensation for every person determined to be interested in the land and then offers compensation. The compensation may take either of the two forms prescribed. It could be a monetary award or land in lieu of the monetary award of land of equivalent value is available. Once the award is accepted, it must be promptly paid by the NLC. Where it is not accepted then the payment is to be made into a special compensation account held by the NLC – as stated under the provision of Sections 113-119 of the Act.

31. If the Land is so acquired the compensation which is just, adequate, full and prompt is to be to persons affected by the project or have interest on the land under the provision of Section 111 of the Act.

Upon the conclusion of the inquiry, the NLC makes compensatory awards to every person whom it has determined to be interested in the land after serving such person with a notice of award and offer of compensation. (See. Sections 113 & 114). Adequate and conclusive compensation can also be in form of land if available, whose value is not exceed that amount of money the NLC considers should have been awarded (See. See Section 142 (2). Once the award is accepted, it must be promptly paid by the NLC, after which the process of compulsory acquisition of land is completed by the taking possession of the Land in question being taken by the NLC. The property is deemed to have vested in the National or County Government as the case may be with both the proprietor and the Land Registrar being duly notified.

32. Where the award is not accepted then the payment is made into a special compensation account held by NLC and which NLC shall pay interest on the amount awarded at the prevailing bank rates from



the time of taking possession until the time of payment and such award is not subject to taxation. A compensation award can be successfully reviewed by court when there has been an error in assessing an award payable through the misapprehension of the nature of the user of property in question as envisaged under the provision of Sections 120-122 of the Land Act. In the case of Patrick Musimbi – Versus- National Land Commission & 4 Others No. 613 of 2014 eKLR the word compensation was viewed as carrying a 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 equaled his pecuniary detriment the compensation would not see equivalent to the compulsory sacrifice. Just compensation is therefore mandatory. It should be prompt and in full, and should use principles of equivalence but must also protect coffers from improvidence.

33. Therefore, from the above detailed statutory analogy, its clear that the compulsory acquisition of Land by the state for public use is ordinarily a creature of statute. While this is the case, the citizens should not be deprived, disowned and/or dispossessed of their land by the state or any public authority whatsoever against their wish unless expressly authorized by law and public interest also decisively demands so. The citizen has to be protected from wanton and unnecessary deprivation of their private property. There is no doubt to the fact that deprivation of a person’s private property against their will is an invasion of their proprietary rights. There is no contention that while the state is indeed entitled to compulsory acquisition rights of land for public use this fundamental rights must be keen and exercised with circumspect to be checked lest it is being done merely as an abuse and sheer whimsical gimmick to deprive the citizen their private rights. It’s a extremely delicate balance to be weighed with utmost case.

In the case of “Patrick Musimbi v National Land Commission & 4 Others” Petition No. 613 of 2014” held *inter alia*:-

“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”

34. In application of these principles to this case, the 1st Defendant published a Gazette Notice No. 1642 of 2016, 10503 of October 12, 2018, 923 & 924 of February, 2019 for Compulsory acquisition of Plot No. MN/VI/2519 for the construction of the Magongo and Oil Refinery Road. The Plaintiff was affected as he was operating an entertainment and food business on the said plot under the name and style of Magongo Day and Night Club.

From the surrounding facts the Plaintiff had operated the said business since October 1992 having taken over from his father Francis Waita who opted to retire and settle upcountry. The Plaintiff entered



into a fresh Tenancy Agreement with the Landlord and had since then been operating it without any interruption paying ground rent to the Landlord and other statutory obligations.

35. An inquiry sitting for the subject matter was held as per the Kenya Gazette Notice No. 10503 at Changamwe Deputy Commissioner's office on November 15, 2018 whereby the land owners and any person with interest in the affected land presented ownership documents, compensation claims and any other information to the 1st Defendant. The Plaintiff herein was an interested person entitled to compensation for structures and for loss of business. The 1st Defendant issued the Plaintiff with an Award dated April 15, 2019 for a sum of Kenya Shillings Twenty-Seven Million Eight Seventy Thousand, Four Hundred and Fifty (Kshs. 27,870,450.00) and Kenya Shillings Five Million Five Eighty Thousand (Kshs. 5,580,000/=) for loss of business pursuant to that demolition took place without any compensation having been made by the 1st Defendant.

The 2nd Defendant as per the advise by the 1st Defendant went ahead to transfer a total of Kenya Shillings Twenty-Seven Million Eight Seventy Thousand, Four Hundred and Fifty (Kshs. 27,870,450.00) and Kenya Shillings Five Million Five Eighty Thousand (Kshs. 5,580,000/=) being the Plaintiff's compensation amount to the 1st Defendant's account vide a letter Ref No. KENHA/F/NLC/6/ Vol. 3/3306 dated 15th October, 2020.

The compensation was the affected land development and loss of business since the Plaintiff was a tenant and did not own the affected land. This was the very reason why the Plaintiff filed this case against the 1st & 2nd Defendants herein.

Issue No. (b) Whether the Plaintiff is entitled to the relief sought; and

36. Under this Sub - heading, and based on all the surrounding facts and inference of Law elaborately made out here, it is graphically clear that the Plaintiff is entitled to the relief sought from the filed suit herein. Under the provision of Section 75 of the repealed *Constitution of Kenya*, it guaranteed the rights to property and provided conditions for compulsory acquisition. The right to or interest in property however is not created by *the Constitution* itself. In order to protect the right to property, a party must establish a proprietary right or interest in the land – *Joseph Ibungo Mwaura & Other v The AG & Others* [2012] eKLR (Nbi). -
37. The Honorable court has also taken deep cognizance to the importance and sensitivities apportioned to land in this country. Indeed, land is a source of livelihood and very emotive. It is not a matter to treat so lightly but with great care and circumspect lest one is misunderstood and it leads to grotesque conflict which may even cause blood shed as it has happened before and quite often. Therefore, no citizen is to be deprived off his land by the State Or any public authority against his wish unless expressly authorized by law and public interest.
38. Suffice to it say, the main quest in the matter is compensation. As was stated by Scott L.J. in relation to compulsory acquisition in the case of "*Horn -Versus - Sunderland Corporation* [1941] 2KB 2640 "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"

Based on the above legal expose, the Law demands 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.



39. From the above observation, the facts derived from the pleadings and the law herein and the cited relevant provisions of the law, this court finds it significantly intriguing that although the 1st and 2nd Defendants all having unanimously admitted that the Plaintiff is entitled to a full, fair, prompt and just compensation for the compulsory acquisition of his suit land herein and indeed the payment schedule having been drawn and the Plaintiff granted an award, as has been graphically indicated herein. The money was still being held by the Government of Kenya – the National Treasury is unclear the reason and their conduct for the non payment for a period of over three (3) years.

None of them has imparted any reasonable and cogent cause for the procrastination for a period of over three (3) years in the payment of the compensation to the Plaintiff. Honestly, I find this conduct extremely callous, outrageous and insensitive contrary to what the law provides – payment promptly and just under Article 40 (3) of *the Constitution* of Kenya 2010.

40. Once more, I find this attitude to be an evasive, dereliction and abdication of their statutory obligations depicted by the 1st and 2nd Defendants. It is a mere theatrics clothed in such casual and playful blame games of mechanically passing the buck from one quarter to the other even after three (3) years of the project at the chagrin of the Plaintiff. Why should the Plaintiff or any other innocent citizen of this country who are Person Affected by the Projects (PAPs) be subjected to such inhuman, ill and unreasonable treatment for the mistake of the State and its agencies? It is unacceptable. In my view these actions are utter violation, infringement and denial of their Constitutional rights and freedoms to say the least. Indeed, court has been wondering loudly the lack of a plausible reason or wise counsel by the parties herein to have had the matter expeditiously and amicably resolved in the spirit enshrined under Article 159 (1) and (2) of *the Constitution* of Kenya 2010 by making the payments as agreed rather than reverting to such unnecessary, costly and protracted litigation process as it has happened hereof.

IssueNo. (c) Who will meet the costs of the suit

41. It is now trite law that costs is at the discretion of the Court. Costs mean an award that a party is granted at the conclusion of any legal action cause of proceeding in any litigation process. According to the Provisions of Section 27 (1) of the *Civil Procedure Act* Cap 21 provides that costs follow the event. By the event here, it means the result of the legal action and cause of proceeding the case.

42. In the instant case the result are that the Plaintiff has been able to successfully demonstrate that he is entitled to all the reliefs sought from the filed pleadings. For that reason, it's just, fair, equitable and reasonable that the costs of this suit be borne by the 1st & 2nd Defendants herein.

VII. Conclusion & Disposition

43. In the long run, upon conducting an in-depth analysis of the framed issues, this Honorable Court finds on preponderance of probability that the Plaintiff herein has well and successfully established his case as per the filed pleadings herein and the evidence adduced. Therefore, Judgment is entered in his favour in totality. For avoidance of any doubts these are the Orders:-

a. That Judgment be and is hereby entered against the 1st and 2nd Defendants jointly and severally with costs.

b. That a declaration be and is hereby made that the demolition of his structures and disrupt his business on Plot No. MN/VI/2519 on March 22, 2021 or any day immediately without payment of an amount of a sum of Kenya Shillings Twenty-Seven Million Eight Seventy Thousand, Four Hundred and Fifty (Kshs. 27,870,450.00) and Kenya Shillings Five Million Five Eighty Thousand (Kshs. 5,580,000/=) respectively hence a total sum of Thirty-Three Million Four Fifty Thousand



Four Fifty Hundred Fifty (Kshs. 33, 450, 450.00) as expressly stated out in the two (2) awards is unconstitutional and is contrary to the provisions of the Land Act, No. 3 of 2012 and the Constitution Article 40 (1), (2) & (3) null and void.

c. That a declaration be and is hereby made that he is entitled to payment of an amount of a sum of Kenya Shillings Twenty-Seven Million Eight Hundred Seventy Thousand, Four Hundred and Fifty (Kshs. 27,870,450.00) and a sum of Kenya Shillings Five Million Five Hundred Eighty Thousand (Kshs. 5,580,000/=) respectively being a total sum of Kenya Shillings Thirty-Three Million Four Fifty Thousand Four Fifty Hundred (Kshs. 33,450,450/=) as expressly stated out in the awards dated 15th April 2019 issued by the 1st Defendant to the Plaintiff within the next thirty (30) days from the date of this Judgement.

d. That an order of Permanent Injunction be and is hereby made restraining the 2nd Defendant, its employees or in any other manner whatsoever from demolishing Plaintiff's business structures known as Magongo Day & Night Club on Plot No. MN/VI/2519 before payment of Awards an amount of Kenya Shillings Twenty-Seven Million Eight Seventy Thousand, Four Hundred and Fifty (Kshs. 27,870,450.00) and a sum of Kenya Shillings Five Million Five Eighty Thousand (Kshs. 5,580,000/=) respectively.

e. That a mandatory order be and is hereby issued against 1st Defendant to the Plaintiff to pay an amount of a sum of Kenya Shillings Twenty-Seven Million Eight Seventy Thousand, Four Hundred and Fifty (Kshs. 27,870,450.00) and a sum of Kenya Shillings Five Million Five Eighty Thousand (Kshs. 5,580,000/=) being a total sum of Kenya Shillings Thirty-Three Million Four Fifty Thousand Four Fifty Hundred (Kshs. 33,450,450/=) respectively as per its own awards issued to the Plaintiff dated 15th April, 2019 within the next Thirty (30) days from the date of this Judgment hereof.

f. That the Plaintiff be granted general and exemplary damages.

g. That an Interest of (c) and (e) at 14% of the Court rate on the sum of the award of a sum of Kenya Shillings Thirty-Three Million Four Fifty Thousand Four Fifty Hundred a sum of (Kshs. 33,450,450/=) till payment be and is hereby made in full.

h. That Costs of this suit to be awarded to the Plaintiff herein.

JUDGEMENT DELIVERED, SIGNED AND DATED AT MOMBASA THIS 29TH DAY OF SEPTEMBER 2022

HON. JUSTICE (MR) L.L NAIKUNI (JUDGE),

ENVIRONMENT & LAND COURT AT

MOMBASA

In the presence of:-

a. Mr. Ben, Court Assistants.

b. M/s. Githanda holding brief for Mr. D. G Wachira Advocate for the Plaintiff.

c. No appearance for the 1st & 2nd Defendants.

JUDGEMENT ELC. 50 OF 2021 Page 9 of 9 JUSTICE L.L. NAIKUNI (JUDGE)

