Lumunge v China City Construction Company Ltd & another; Kenya National Highway Authority (Third party) (Environment & Land Case 234 of 2017) [2022] KEELC 12580 (KLR) (27 September 2022) (Judgment)

Neutral citation: [2022] KEELC 12580 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 234 OF 2017

NA MATHEKA, J

SEPTEMBER 27, 2022

BETWEEN

JACOB KAWITI LUMUNGE ..... PLAINTIFF

AND

CHINA CITY CONSTRUCTION COMPANY LTD ..... 1ST DEFENDANT

NATIONAL LAND COMMISSION ..... 2ND DEFENDANT

AND

KENYA NATIONAL HIGHWAY AUTHORITY ..... THIRD PARTY

JUDGMENT

1. The plaintiff avers that at all material time to this suit, he was and is still the registered owner of Plot No LR 4118/340 situate along Voi Taveta road at Taveta Town. The plaintiff avers that the 1st defendant's contractors working on the Mwatete-Taveta (A23) Road and Taveta-Voi Bypass Road have encroached on the part of his above said plot and trespassed on it in the process of doing road construction. The plaintiff states that the defendants have continued with the acts of trespassing on his said plot despite his protests claiming that the plaintiff has been compensated for the said Plot No LR 4118/340 which is not true. The plaintiff further states that the gravity of trespass on part of his said plot by the defendants is such that he is unable to use his whole property or at all effectively. The plaintiff avers that his property being Plot No LR 4118/340 was never acquired for road construction and/or there has never been an indication that his land will be acquired as part of the road extension and as such, he was never compensated for the said property at all and the 1st defendant has now encroached into the plaintiffs plot claiming that the 2nd defendant had compensated him in respect of the same. The plaintiff avers that the said plot lies within the Taveta town next to the Police Station and as a result of the defendants' trespass, his petroleum business has been interfered with such that he is unable to

carry out normal, day to day activities on the said plot hence suffered loss and damage. The plaintiff contends that the defendants have no rights whatsoever to acquire his land without permission and/or consent and the plaintiff finds the defendants' acts not only a blatant abuse of the due process but also an illegality. The plaintiff slates that he holds the defendants liable loss the said loss and he demands full compensation from the defendants as required by the law, and the plaintiff demands that the 1st defendant be stopped by order of injunction from further trespass until the issue is resolved by this court. The plaintiff further states that the defendants have not done anything to meet him with a view to remedy his loss and/or agree on the way forward despite having raised the issue with both the 1st and 2nd defendants. The plaintiff avers that his said property is commercial having a petroleum station with buildings and the encroachment has affected his business and now demands for compensation. The plaintiff states that he has taken the trouble to cause a report and valuation to be done on the portion of Plot No 4118/340 encroached for his own assessment for compensation purposes and the report states as follows;

Land value.....Ksh 3,000,000.00

Fuel Tanks & Pumps.....Ksh 7,300,000.00

Developments.....Ksh 3,000,000.00

Total.....Ksh 13,300,000.00

Add 15% severance .....Ksh 1,995,000.00

Total.....Ksh 14,925,000.00

and the plaintiff states that the area acquired has been valued at Ksh 14,925,000/= and he seeks compensation for the said acquisition.

2. That by reason of the aforesaid matters, the defendants have deprived the plaintiff of the use and enjoyment of the said land. And therefore the plaintiff prays for Judgment against the defendants jointly and severally for;

    1. An order for injunction to issue restraining the 1st defendant by itself, its agents, servants and/or any other person from encroaching and/or trespassing, and/or working and/or constructing and/or extending road in any part of Plot No LR 4118/340 situate along Voi -Taveta- Holili road at Taveta Town until this suit is heard and determined.

    2. A declaration that the said plot belongs to the plaintiff and he is therefore entitled to be compensated in the event of compulsory acquisition.

    3. A declaration that the plaintiff is entitled to adequate compensation upon compulsory acquisition of Plot No LR 4118/340 which belongs to him.

    4. The plaintiff be awarded Kshs 14,925,000 compensation for the area of Plot No LR 4118/340 compulsorily acquired and/or encroached

    5. General damages and exemplary damages to be granted.

    6. Costs and interests of the suit at court rates.

3. The 1st defendant states that it is not a trespasser to the plaintiff's alleged parcel No LR 4118/340 situate along Voi-Taveta road at Taveta town. That the 1st defendant was and is an agent of a known principal being Kenya National Highway Authority (KeNHA). That vide contract No KeNHA/D & C/1296/2013 dated December 31, 2013, the 1st defendant bided and was awarded a contract

for upgrading of Mwatate-Taveta (A23) Road and Taveta Bypass Road. That the 1st defendant's construction specifications as a contractor were issued by its employer-KeNHA and it has no business in either acquisition or compensating property owners. That the plaintiff's claim against the 1st defendant is thus misplaced, frivolous and vexatious and incapable of enforcement. That whoever comes to court must come with clean hands. Without prejudice to the foregoing, the 1st defendant is aware that the plaintiff was in negotiations with the 2nd defendant and that the plaintiff was fully compensated for his acquired land meant for road construction. The 1st defendant prays that the plaintiff's suit be dismissed with costs.

4. The third party states and avers that under the *Constitution of Kenya (2010)* , the mandate of construction and operation of National Trunk Roads falls squarely on the National Government to which the third party herein is the authority mandated to construct, upgrade, rehabilitate and maintain such roads. Pursuant to the provisions of sections 3, 4, 22, 23 and 24 of the Roads Act, No 2 of 2007, the third party, is established as a corporate body with the exclusive mandate and responsibility to manage, develop, rehabilitate, and maintain national roads in Kenya. The third party further states and avers that in the exercise of that mandate, it embarked on the construction of Mwatate - Taveta Road (A23). The project commenced in May, 2014 and was completed in May, 2017. The third party further states and avers that the project traverses the County of Taita Taveta starting at Mwatate town (Km 0+000) to Holili Border Post (Km 89+423) with a nine (9) kilometer long bypass through Taveta Town. The project also traverses through a private sanctuary (Taita Sanctuary Km 12+200 to Km 21+000) and Tsavo West National Park. The third party states and avers that the project is of extreme importance to the Coastal region and the greater country for the followings reasons that it improves transport infrastructure within the coastal region with a view to supporting integration and economic development and alleviates stiff congestion and traffic snarl ups by increasing the road capacity thereby enhancing movement.

5. The third party states and avers that the project road has a reserve/right of way of sixty (60) meters wide along its total length including the nine (9) Kilometer Taveta Bypass. The reserve, however reduces to thirty (30) meters in the urban town of Taveta. The third party states and avers that the upgrading of the road involved realignment at certain sections of the road, creation of a bypass at Taveta and therefore the road project inevitably affected privately owned land parcels abutting the project road necessitating land acquisition. The third party further states and avers that also affected were structures and traders operating within the road reserve who were also eligible for compensation as per the financiers (African Development Bank (AfDB) Policy. The Resettlement Action Plan (RAP) for the project was developed in compliance with the AfDB Policy, been involuntary resettlement which provided guiding principles on how involuntary land acquisition was to be undertaken and also how small traders with structures operating within the road reserve were to be compensated for relocation purposes. That the plaintiff was identified as a Project Affected Person (PAP) in the RAP Report as Ref: TVT - 096 as a trader operating three locations within the thirty (30) meter wide road reserve in Taveta Town whereby he had erected several structures. The plaintiff was also affected at Timbila area (Town loop at Km 3+100). The third party further states and avers that the RAP report was prepared in 2012 whereby all Project Affected Persons (PAPs) participated in census survey, consultative meetings and in-depth discussions with stakeholders. The third party further states and avers that the exercise to inquire, inspect and determine the compensation payable to the plaintiff was carried out by the National Land Commission in line with the powers denoted to it by dint of article 67 of the *Constitution*. The third party further states and avers that the plaintiffs compensation was for land developments thereon and loss of business. There was no land compensation for alleged Plot No 4118/340 since it was not affected and hence not gazette for land acquisition. In the circumstances, the plaintiff's claim for trespass is misconceived since he had been compensated for the purpose of

relocating and/or removing his affected structures encroaching on the thirty (30) meter wide road corridor. The third party states and avers that the plaintiff is seeking compensation for his fueling station on LR No 4118/340 located at Km 6+300 within Taveta Town as per the land acquisition drawings. However, at Km 6+300 there were no land acquisitions and the road construction works were confined within the thirty (30) meters wide road reserve. The plaintiff's business and structures were therefore found to be encroaching on the reserve.

6. This court has considered the evidence and the submissions therein. It is not disputed that the plaintiff is the registered proprietor of Plot No LR 4118/340 having produced a certificate of lease for the suit property dated June 1, 1991. He claimed that the 1st defendant working on Mwatate-Taveta Road (A23) have encroached on his suit property while constructing on the said road. He maintained that the suit property was never acquired for road extension and further claimed that the encroachment has interfered with his petroleum business causing him loss and damage and prayed special damages of Kshs 14,925,000/=. The 1st defendant denied trespassing on the suit property and further maintained to be an agent of the third party vide a contract dated December 31, 2013 for upgrading of Mwatate- Taveta road (A23). The 1st defendant further claimed that the plaintiff was compensated for his acquired land meant for road construction. The third party stated that the construction of Mwatate-Taveta Road (A23) is within its mandate, which it did through the 1st defendant between May 2013 and May 2017. The said road had a road reserve of 30 meters in the urban town where the suit property is situated. The third party maintained that the plaintiff was fully compensated, by the 2nd defendant as a trader operating at three locations within the 30-meter-wide road reserve in Taveta Town where he had erected several structures at Timbila area (3+100). The third party maintained that the compensation was for land development and loss of business and not for land compensation for the suit property, since it was not affected and hence not gazetted for land acquisition. The third party further claimed that the suit property is at (6+300) within Taveta town, but maintained that, at that point, there was no land acquisitions and the road construction works were confined within the 30-meter-wide road reserve. The third party, maintained that all affected parties including the plaintiff were fully compensated and they had a duty to provide the 1st defendant with right of way to facilitate road construction.

7. The plaintiff produced two different survey reports, the first report is dated June 5, 2017 prepared by Edward Kiguru, a licenced surveyor, who reported that there is a road encroachment on the suit property of area 0.0178 Ha and attached a sketch map for illustration. The report attached a survey plan form F/R No 214/47 for LR No 4118/340-341, is dated August 20, 1991 and plan shows that there is road reserve of 30 meters wide next to the suit property. Edward Kiguru, testified in favour of the plaintiff as PW3, he stated in cross examination that he did the report in June 2017 when there was an existing road. In cross examination, he failed to explain to court why there was some discrepancies between his report which indicated an encroachment of 178 sq meters and the second report stating 0.0431acres. The second report produced by the Plaintiff was prepared by B C Mwanyungu a licenced surveyor at the request of the plaintiff and is dated November 5, 2021, who reported that the encroaching road pavement was found to cover 0.0431 of the suit property. He attached a sketch of the road to illustrate that the encroachment had caused the plaintiff not to fully enjoy the suit property. B C Mwanyungu, testified in favour of the plaintiff as PW4, he testified that there was an encroachment of 0.043ha, as indicated in his report, where he relied on the survey report when preparing the same.

8. The third party produced land acquisition drawing, which showed the suit property is next to the road reserve, with some developments inside the 30-meter road reserve. The third party has also relied on the survey plan form F/R No 214/47 for the LR No 4118/340-341 dated August 20, 1991, which shows that indeed there is a 30-meter-wide road reserve sitting next to the suit property. Daniel Mbuteti, the

third party surveyor testified as DW1, he stated that the road was not encroaching on the suit property and maintained that the plaintiff was fully compensated for the developments he had made on the road reserve. He insisted that it was the plaintiff who had encroached into the road reserve but was still compensated fully for the developments made.

9. I find that both the plaintiff and third party are relying on a similar map, survey Map F/R 214/47 dated August 20, 1991 which both parties have produced as evidence, showing a 30-meter road reserve sitting next to the suit property. The third party has demonstrated that the plaintiff's developments were located inside the 30-meter-wide reserve on the 6 kilometre of the road, and was fully compensated in June 2016. I agree with the land acquisition drawings presented by the Third party to show the extent of the road reserve, on the ground that the drawing, unlike the survey map, it shows with precision the exact kilometre of the road that touches the suit property.

10. Further the plaintiff has not challenged the evidence produced by the third party showing compensation was paid for those people whose land was acquired for the construction of the road. The plaintiff's name was not included in the Kenya Gazette Notice No 13942 and 13943 of October 18, 2013, where all land owners to be compensated for land acquisition were identified. During examination in chief, the plaintiff testified that he was compensated for a different plot but did not produce any evidence to support that claim. During cross examination by counsel for the third party, the plaintiff admitted to being identified as one of the affected parties and was paid Kshs 6 million for the structures on the road reserve and not the plot.

11. Compulsory acquisition of land by the National Land Commission for construction of Mwatate-Taveta Road (A23) was a creature of statute and was done within the article 40 (3) of the *Constitution* of Kenya. The statutory framework for compulsory acquisition is founded on part VII of the *Land Act*, which in details strikes a balance between the right of the state to compulsory acquire land for public use and the right of a citizen to be adequately compensated for the value of his property. From the testimonies given by witnesses, the plaintiff has always been aware of the compulsory acquisition of various parcels of land. He acknowledged that he was identified as an affected party and was compensated for the structures he had on the road reserve.

12. I find that the petitioner was made aware of the intended acquisitions pursuant to section 107 of the *Land Act*. The plaintiff did not object to the compensation process of the structures he had on the road reserve, neither did he object to the Gazette Notices of October 18, 2013 where different parcels were listed to be acquired by the 2nd defendant for construction of the road. section 112 of the *Land Act*, lays out that an inquiry hearing will be conducted where the plaintiff ought to have attended and present their claim for compensation. I find that the third party has demonstrated that the suit property was not gazetted to be acquired for road construction as it was not to be affected and, further the plaintiff was indeed compensated for the structures and development on the road reserve.

13. In the amended plaint, the plaintiff has prayed for court to award him Kshs 14,925,000/= as compensation for the compulsory acquisition of the suit property. The amount claimed was based upon a valuation report dated April 5, 2017, which placed the value of the land, fuel tanks and pumps as well as other developments at Kshs 14,925,000/=. The same however has not been proved, reason being the plaintiff produced two different survey reports each reporting different magnitude of encroachment by the third party. During cross examination, both surveyors who prepared the reports, admitted to the discrepancies but none of them were able to explain to court the real extent of encroachment. The plaintiff failed to demonstrate to court, the manner in which he was able to value the fuel tanks and pumps in his petrol station. There is no evidence to support the claim and the plaintiff has failed to establish indeed he ran a petrol station at all, in support of this position,

the plaintiff during cross examination was unable to produce documents to show that he was indeed running a petrol station.

14. Compensation for land acquisition ought to be just, and be paid promptly in full. In the case of *Patrick Musimba v National Land Commission & 4 others* (2016) eKLR, it was held that;

> A person is entitled to compensation for losses fairly attributed to the taking of his land but not to any greater amount as "fair compensation requires that he should be paid for the value of the land to him, not its value generally or its value to the acquiring authority": see *Director of Buildings and Lands v Shun Fung Wouworks Ltd* [1995] AC 111,125.
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> We see no reason why the same approach should not be adopted locally. The *Constitution* decrees "just compensation" which must be paid promptly and in full. The *Constitution* dictates that the compensation be equitable and lawful when the word "just" is applied as according to *Black's Law Dictionary* 9th Ed page 881 the word "just" means "legally right; lawful; equitable". In our view, the only equitable compensation for compulsory acquisition of land should be one which equates restitution. Once the property is acquired and there is direct loss by reason of the acquisition the owner is entitled to be paid the equivalent. One must receive a price equal to his pecuniary detriment; he is not to receive less or more. This can be achieved to the satisfaction of the owner of land by reference to the market value of the land."

15. I find that the plaintiff was fairly compensated for the developments he made on the road reserve and received just compensation for it. The suit property was not compulsorily acquired by the 2nd defendant for the benefit of the third party since the same was not gazetted as one of the affected parcels of land. From the material before court, I find that the 1st defendant acting on the instructions of the third party did not encroach onto the suit property. The plaintiff has failed to establish on a balance of probability that the road encroached onto his suit property and the prayers sought in the amended plaint dated November 2, 2017 are dismissed with costs to the 1st defendant and the third party.

It is so ordered.

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

N.A. MATHEKA

JUDGE