



**Mwangi v Kenya National Highways Authority & another (Environment & Land
Petition 1 of 2021) [2022] KEELC 13712 (KLR) (25 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13712 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION 1 OF 2021
NA MATHEKA, J
OCTOBER 25, 2022**

BETWEEN

LUCY WANJIRU MWANGI PETITIONER

AND

KENYA NATIONAL HIGHWAYS AUTHORITY 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

JUDGMENT

1. The petitioner states that she is the owner of two structures and or buildings situated in adjacent plots situated about 500 meters off Magongo Road due north west of Pwani Oil Factory and about 500 meters to Magongo Road and Mombasa-Nairobi Highway junction in Jomvu Area of Mombasa Mainland West, Mombasa County. The two plots (hereinafter referred to as 'A' and 'B' respectively can be described as follows; plot 'A' comprises a rectangular shaped plot on which is constructed a main building with a plinth area of 1594 square feet being a residential property with commercial activity comprising an entrance lobby, passage, cyber cafe, shop, 7 no rooms, kitchen, washrooms with WC and overhead shower with main electricity, water and drainage into a septic tank and soakage pit.
2. Plot 'B' comprises a rectangular shaped plot on which is constructed a main building with a plinth area of 1464 square feet being a residential property with commercial activity comprising an entrance lobby, passage hotel, saloon, charcoal shop, 5 no rooms, kitchen, washrooms with WC and overhead shower with main electricity, water and drainage into a septic tank and soakage pit.
3. The petitioner is the owner of the said plots 'A' and 'B' hereinafter collectively referred to as 'the suit properties' pursuant to an occupation and tenancy agreement with the head landlord, Kenya Railways Corporation and in compliance with the law and with the approval of relevant statutory bodies has put up the aforesaid buildings and improvements on which the petitioner's family resides and from which she derives income. The 2nd respondent has compulsorily acquired the whole of the suit properties



pursuant to the provisions of the [Land Act](#), (No 6 of 2012) for purposes of the construction of a public road project namely the Port Reitz Moi International Airport Access Road by the Kenya National Highway Authority.

4. On diverse dates the respondents through the local liaison committee and also at the inquiry for compulsory acquisition stage made a finding for compensation of the suit properties separately at the rate of Kshs 7,571,600/= in respect of plot 'A' and Kshs 7,304,000/= in respect of plot 'B' in concordance with the valuations submitted by the petitioner. Contrary to legitimate expectation for full and just compensation for all the suit properties as with neighbouring affected property owners the petitioner has been subjected to apparent discrimination and the 2nd respondent has made a global award that is not adequate and does not meet the statutory requirement of a full, just and prompt compensation for the acquired properties. That as the petitioner has not received a full, just and prompt compensation for the affected suit properties, it is only fair and just that the implementing agency on the ground being the 1st respondent be restrained from demolishing the suit properties until such compensation has been effected. The petitioner contends that if the court does not intervene as the respondents are currently implementing the said public road project she will be exposed to risk of substantial loss as the suit properties will be permanently removed. Reasons wherefore the petitioner prays for;
 1. A declaration that the 2nd respondent's decision to arbitrarily make a global award in respect of the petitioner's suit properties namely adjacent unsurveyed plots each measuring 0.031 hectares or thereabouts situated about 500 meters off Magongo Road due north west of Pwani Oil Factory and about 500 meters to Magongo Road and Mombasa-Nairobi Highway junction in Jomvu Area of Mombasa Mainland West, Mombasa County. is in breach of articles 10, 27, 40 47 and 50(1) of the [constitution](#) of Kenya and the provisions relating to compulsory land acquisition as set out in the [Land Act](#) (Act No 6 of 2012).
 2. An order of prohibition be issued prohibiting and restraining the 1st respondent from demolishing and or in any manner interfering with the petitioner's buildings and structures comprising the suit properties namely adjacent unsurveyed plots each measuring 0.031 hectares or thereabouts situated about 500 meters off Magongo Road due north west of Pwani Oil Factory and about 500 meters to Magongo Road and Mombasa-Nairobi Highway junction in Jomvu Area of Mombasa Mainland West, Mombasa County until a proper full, just and prompt payment has been made in terms of the valuation submitted by the petitioner to the 2nd respondent.
 3. A determination of the fair and just compensation due and payable by the respondents to the petitioner inclusive of interest, if any.
 4. Costs of the proceedings
5. This court has considered the petition and submissions therein. Compulsory acquisition by the state is a limitation to article 40 of the [Constitution](#) on the right to property. The constitutional framework for compulsory acquisition is article 40 (3) of the [Constitution](#) and the process is provided for by part VIII of the [Land Act](#). The petitioner contended that the respondents violated her constitutional rights during the process of compulsory acquisition of land for the dualling of the Magongo Road Phase II Project. The petitioner claimed ownership to the buildings and improvements on plot A and B (referred as the suit properties) situated about 500 meters off Magongo Road in Jomvu area having leased the same from the Kenya Railways Corporation.



6. The process of compulsory acquisition is well defined in law, Section 107 of the *Land Act* is to the effect that when the National Government, in this case the 1st respondent requires land for construction of roads, they request the National Land Commission to acquire the land as dictated by article 40 (3) of the *Constitution*. The section goes further to state that the 2nd respondent must publish a notice of the intention to acquire the land, which is delivered to the registrar as well as any person who appears to have interest either legal or equitable in the land. Besides authenticating the true owners of the land or developments on the land to be acquired, the 2nd respondent must conduct due diligence on the value of the same in order to make a just award of compensation for every person with interest.
7. Section 111(1) of the *Land Act* provides that where land is acquired compulsorily, just compensation shall be paid promptly in full to all persons whose interest in land has been determined. The Land (Assessment of Just Compensation) Rules, 2017 (The Land Compensation Rules), pursuant to section 111 (2) of the *Land Act* focus on the assessment of compensation payable to persons who possess an interest in land. The factors to consider include:-
 - a) The market value of the land,
 - b) The damage sustained or likely to be sustained by persons interested at the time the commission takes possession of the land,
 - c) Reasonable expenses incidental to the relocation of any of the persons interested,
 - d) Damage genuinely resulting from the diminution of the land between the date of the publication in the gazette of the notice of intention to acquire land and the date the commission takes possession of the land.
8. The petitioner contended that despite presenting to the respondents a valuation report that valued both plots at Kshs14, 875,600/=, the 2nd respondent undervalued the suit property to Kshs 10,943,030/= contrary to her legitimate expectation for a full and just compensation. Therefore, it is the petitioner's case that the amount compensated by the 2nd respondent was not a fair and just compensation due and payable. She argued that the 2nd respondent discriminated her and awarded a global award that is not adequate and does not meet the statutory requirement of a full, just and prompt compensation for the acquired properties.
9. In the case of *Patrick Musimba vs National Land Commission & 4 Others (2016) eKLR* the court found that compensation of compulsory acquired property ought to be qualified in accordance with the principle of equivalence. It held that,

In our view, a closer reading of article 40 (3) of the *Constitution* would reveal that the *Constitution* did not only intend to have the land owner who is divested of his property compensated or restituted for the loss of his property but also sought to ensure that the public treasury from which compensation money is drawn is protected against improvidence. Just as the owner must be compensated so too must the public coffers not be looted. It is that line of thought that, under article 40 (3), forms the basis for 'prompt payment in full, of just compensation to the person' deprived of his property through compulsory acquisition.'

The court in *Patrick Musimba* (supra) further held that;

In our view, 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. Both the Land Act as well as the Constitution have laid a basis for this. The Land Act expects the state and in this respect the National Land Commission to be astute enough and detect any collusive attempts by land owners to manufacture artificial high compensatory prices on compulsory acquisition.'

10. The 2nd respondent through Dennis Kariuki has filed a further replying affidavit on May 30, 2022 and stated that after the public inquiry, the 2nd respondent awarded the petitioner Kshs 10, 943,030/= on April 15, 2019 (DK-2) and on May 6, 2019 the petitioner acknowledged the award of Kshs 10,943,030/= (DK-1). The 2nd respondent further demonstrated that the award was paid into the petitioner's bank account at Equity Bank, Changamwe Branch Account No XXXXXXXX on January 5, 2021 (DK-3). Therefore, the compulsory acquisition process has been completed and the compensatory award paid to the petitioner.
11. I find that the petitioner was promptly, fully and justly compensated for the developments made on the suit properties by the National Land Commission prior to the 1st respondent taking possession of the same for road construction. The payment that the petitioner received was an equivalent value not the speculative value that was declared in her valuation report. I find that the 2nd respondent applied the constitutional and statutory requirements when acquiring the said suit property for the construction of the road. The petitioner has failed to establish that any substantive section of the Land Act has been violated by the respondents in the process of compulsory acquisition.
12. The petitioners have generalized allegations of violations of rights enshrined in articles 27, 40, 47 and 50 of the Constitution. The petition dated January 19, 2021 and amended on March 15, 2022 is not supported by any affidavit, therefore the allegations made by the petitioner have not been proved to the court. The petition failed to fulfill the principles of drafting constitutional petitioners as set out in the celebrated case of Anarita Karimi Njeru vs Republic (1979) eKLR, where the court held that:-

We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.'

13. The principle in Anarita Karimi was emphasized by the Court of Appeal in Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others [2013] eKLR where the court of Appeal held that;

However, our analysis cannot end at that level of generality. It was the High Court's observation that the petition before it was not the 'epitome of precise, comprehensive, or elegant drafting.' Yet the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to article 159 of the Constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (Cap 21) and section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in



Anarita Karimi Njeru (*supra*) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.'

14. Consequently, I find that there is no evidence tendered by the petitioner to show that article 27, 40, 47 and 50 of the Constitution has been violated. The petitioners were given an offer which they excepted and were paid and are now estopped from turning around and saying they were not adequately compensated. The petitioners failed to discharge the burden to the required standard, to the contrary the respondents have demonstrated through sufficient evidence that they observed the relevant provisions of the Constitution and Land Act. For these reasons the petition filed on January 19, 2021 and amended on March 15, 2022 is hereby dismissed with costs to the respondents.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF OCTOBER 2022.

NA MATHEKA

JUDGE

