



**Waweru v Ochieng t/a Aegis International & 3 others (Environment & Land Case 357 of 2017) [2024] KEELC 6913 (KLR) (16 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6913 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 357 OF 2017  
A NYUKURI, J  
OCTOBER 16, 2024**

**BETWEEN**

**PAUL NJOROGE WAWERU ..... PLAINTIFF**

**AND**

**JOASH OCHIENG T/A AEGIS INTERNATIONAL ..... 1<sup>ST</sup> DEFENDANT**

**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> DEFENDANT**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... 3<sup>RD</sup> DEFENDANT**

**THE HON ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. By a plaint dated 30<sup>th</sup> August 2017, the plaintiff sought the following orders against the defendants;
  - a. A declaration that the encroachment and subsequent commencement of construction of the road on the suit property is null and void ab initio.
  - b. In the alternative full and pursuant to current market value be applied in compensation of the plaintiff.
  - c. An injunction do issue to the defendants herein stopping the works till this matter is heard and determined.
  - d. Costs of this suit.
  - e. Any other relief this Honourable court may deem fit and just to grant.
2. The plaintiff averred that at all material times to this suit he was the registered proprietor of the parcels of land known as LR. No. 12648/94 and 12648/119 situated along Mombasa road, opposite Shell World (hereinafter referred to as the suit property).



3. His complaint was that in August 2017, without notice, the 1<sup>st</sup> defendant, who is the planner and designer on behalf of the 3<sup>rd</sup> defendant, moved into the suit property and commenced construction of a road without ascertaining the beacons and the boundary of the road and that the plaintiff has not been compensated despite the encroachment.
4. The suit was opposed. The 1<sup>st</sup> defendant filed his defence dated 18<sup>th</sup> December 2018. He denied the plaintiff's claim and stated that he was merely an agent of the 3<sup>rd</sup> defendant and that therefore the suit violated the legal principles of agency as the plaintiff had sued both the agent and the principal. He contended that the suit did not raise any cause of action against him, was an abuse of the court process and a waste of judicial time and ought to be dismissed with costs to him.
5. The 1<sup>st</sup> defendant further stated that he was a stranger to the plaintiff's allegations and stated that his mandate as a road designer does not entail ascertaining beacons of private properties but of the provided road map. He maintained that his duty did not include advertising or compensating properties for compulsory acquisition.
6. The 2<sup>nd</sup> and 4<sup>th</sup> defendants did not enter appearance or file defence.
7. The 3<sup>rd</sup> defendant filed defence dated 28<sup>th</sup> February 2023. It stated that land measuring 0.423 Ha of LR. No. 12648/94 and 0.1210 Ha of LR. No. 12648/119 were gazetted for acquisition upon publication of Gazette Notice Nos. 11104 of 2018 and 1639 of 2019 by the 2<sup>nd</sup> defendant for the construction of the second carriage way of the Athi River-Machakos Turn Off (A109) project. It stated that all affected persons with proprietary claims or interest in the land identified for acquisition were required to appear before the National Land Commission on diverse dates.
8. It also stated that a full inquiry and determination of the rightful owners was done and awards made as required under Section 113 of the *Land Act* 2012. That thereafter, inspections and valuations for the affected properties was done and the relevant compensation schedule sent to the 3<sup>rd</sup> defendant indicating respective amounts payable to affected persons.
9. The 3<sup>rd</sup> defendant further stated that by its letter dated 15<sup>th</sup> March 2019, it issued awards and forwarded initial schedule of compensation to the 2<sup>nd</sup> defendant requesting the latter to transfer the sums of Kshs. 47,887,485.80 and Kshs. 16,858,586/- in respect to the suit properties respectively. Further that on 22<sup>nd</sup> February 2021, the 2<sup>nd</sup> defendant forwarded to the 3<sup>rd</sup> defendant a revised schedule indicating the amount of Kshs. 29,929,678.63 and Kshs. 11,700,991.25 as compensation for the acquired land.
10. It stated that by its letter of 30<sup>th</sup> June 2020, it forwarded the compensation amount to the 2<sup>nd</sup> defendant for onward transmission to the project affected persons and on 3<sup>rd</sup> March 2021, it instructed the National Land Commission to release the compensation amounts to the respective land owners, hence bringing the acquisition process on its side to an end. It denied receiving any demand pursuant to Section 67 (a) of the *Kenya Roads Act*, 2007, before commencement of this suit.
11. The suit was heard by way of viva voce evidence. Only the plaintiff and the 3<sup>rd</sup> defendant presented evidence of one witness each.

### **Plaintiff's evidence**

12. PW1 was Paul Njoroge Waweru the plaintiff. He adopted his witness statement dated 30<sup>th</sup> August 2017 and produced documents attached on his list of documents dated 14<sup>th</sup> November 2022. His testimony was that he was the registered proprietor of land known as LR. No. 12648/94 and LR. No. 12648/119 along Mombasa Road situated near Small World. That the 1<sup>st</sup> respondent purportedly hived out his land allowing the Kenya Power and Lighting Company Ltd and other cable companies the right of way



to his land, who have commenced massive installation. That upon inquiry from the 1<sup>st</sup> defendant, the latter notified him that his land had been acquired by the Government of Kenya for construction of a road. He stated that his land has never been compulsorily acquired and he has never been compensated. He sought to be compensated at current market value.

13. The witness produced certificate of title; letter dated 26<sup>th</sup> February 2019 to the 3<sup>rd</sup> defendant; award by the National Land Commission; letter dated 7<sup>th</sup> February 2019 from the 3<sup>rd</sup> defendant; Gazette Notice No. 26 of October 2018 and a map.
14. On cross-examination, he stated that the awards made was Kshs. 47 million and Kshs. 16 million respectively for the two properties, which awards he accepted. He confirmed that he was aware that the 2<sup>nd</sup> defendant wrote to the 3<sup>rd</sup> defendant revising the award. He stated that he was paid compensation in regard to LR. No. 12648/94 and that he was aware the amount for LR. No. 12648/119 was reduced and that he complained about the reduction. He denied being given an award of Kshs. 11 million and stated that he did not know the role of the 3<sup>rd</sup> defendant in the compensation.
15. In reexamination, he stated that he did not know what was considered in the reduction of the award and was not given notification of the award. That marked the close of the plaintiff's case.

### **3rd defendant's case**

16. DW1 was Milka Muendo who was then working as a Land Surveyor with the 3<sup>rd</sup> defendant. She adopted her witness statement filed on 6<sup>th</sup> March 2023 as her evidence in chief. She also produced documents attached in the list of documents dated 28<sup>th</sup> February 2023.
17. It was her evidence that the suit properties are located along the Athi River-Machakos Turn Off (A109) Road project and that by Gazette Notice Nos. 11104 of 2018 and 1639 of 2019, 0.423 Ha of LR. No. 12648/94 and 0.1210 Ha of LR. No. 12648/119 were gazetted for compulsory acquisition for construction of the second carriageway of Athi River–Machakos Turn Off (A109) Road Project. That they complied with the law in compulsory acquisition of the suit property.
18. She further stated that vide a letter dated 15<sup>th</sup> March 2019, the 3<sup>rd</sup> defendant requested the 2<sup>nd</sup> defendant to pay Kshs. 47,887,485.80 and Kshs. 16,858,586.00 in regard to the suit properties but that later on 22<sup>nd</sup> February 2021, the 2<sup>nd</sup> defendant revised the schedule indicating the amounts of Kshs. 29,929,678.63 and Kshs. 11,700,991.25 respectively as compensation. She stated that the revised amount was sent to the 2<sup>nd</sup> defendant for onward transmission to the plaintiff vide its letter of 30<sup>th</sup> June 2020 and the 3<sup>rd</sup> defendant instructed the 2<sup>nd</sup> defendant to release the above compensation by its letter of 3<sup>rd</sup> March 2021. She maintained that the 3<sup>rd</sup> defendant had brought the acquisition process on its side to an end. She produced Gazette Notice No. 11104 and Gazette Notice No. 1639; award from the National Land Commission; letter dated 15<sup>th</sup> March 2019 from the National Land Commission to Kenya National Highways Authority; letter dated 22<sup>nd</sup> February 2021 from the National Land Commission to the Kenya National Highways Authority; letter dated 30<sup>th</sup> June 2020 from the Kenya National Highways Authority to the National Land Commission; letter dated 3<sup>rd</sup> March 2021 from the Kenya National Highways Authority to the National Land Commission and notice of taking possession.
19. On cross examination, she stated that there were some additions on the acreage of land to be acquired and that there was a reevaluation which was not based on the area which is dated 22<sup>nd</sup> February 2021 as per the schedule. She stated that she was not aware of the basis of the reevaluation and that she did not know the role of the EACC in giving the awards. In reexamination, she stated that it was the 2<sup>nd</sup> defendant who does inspection, valuation and the award and that the 3<sup>rd</sup> defendant had no role to



play in those functions. She further stated that the area valued was 0.121 Ha and that there was no change in acreage. She confirmed that from the schedule by the 2<sup>nd</sup> defendant the amount payable to the plaintiff was Kshs. 11,700,991.25 and insisted that this amount was forwarded to the 2<sup>nd</sup> defendant. That marked the close of the 3<sup>rd</sup> defendant's case.

20. On 15<sup>th</sup> May 2023, the plaintiff's counsel informed court that the plaintiff intended to withdraw the suit against the 1<sup>st</sup> defendant. However, no notice of withdrawal was filed. Subsequently, the plaintiff and 3<sup>rd</sup> defendant filed their respective submissions in support of their cases.

### **Plaintiff's submissions**

21. Counsel for the plaintiff filed submissions dated 13<sup>th</sup> September 2023 and submitted that prayers (a) and (c) in the plaint had been overtaken by events and urged the court to only consider prayer (b). Counsel argued that the plaintiff participated in the earlier award but that no reasons were given for variation of the award. Counsel submitted that the earlier award of Kshs. 16,858,586/- had not been paid to the plaintiff. Counsel submitted further that the 2<sup>nd</sup> defendant failed to give reasons for variation where the plaintiff was not involved. On that basis, counsel insisted that the sum of Kshs. 16,858,586/- be paid as the defence witness stated that she was not aware of the basis of the variation. Counsel argued that the plaintiff be granted interest at 18% with costs.

### **3rd defendant's submissions**

22. Counsel for the 3<sup>rd</sup> defendant argued that the issue before court was whether the 2<sup>nd</sup> defendant was justified in reducing the award from Kshs. 16,858,586/- to Kshs. 11,700,991.25 as compensation for the suit property. Counsel argued that the National Land Commission was the body responsible for compensation of payments emanating from compulsory acquisition. Counsel referred to the letter dated 22<sup>nd</sup> February 2012 from the National Land Commission to the 3<sup>rd</sup> defendant stating that a new master schedule verified by the Ethics and Anti-Corruption Commission showed that the plaintiff's award had been revised to Kshs. 11,700,991.25.
23. It was contended for the 3<sup>rd</sup> defendant that Section 23 of the Ethics and Anti-Corruption Economic Crimes Act 2003 mandates the EACC to conduct investigations into received complaints and make recommendations and that therefore, EACC acted within its mandate in reviewing the amounts payable. Reliance was placed on the decision in the case of *Bidding and Lots Investment Limited v. National Land Commission & 2 Others*; Republic (exparte) Judicial Review Misc. Application E005 of 2021 [2022] KEELC 2182 (KLR) (5 May 2022) to argue that the revision of an award by EACC does not violate the provisions of Section 7 of the Fair Administrative Actions Act and Articles 40, 47 and 50 of the Constitution.
24. Counsel argued that the 3<sup>rd</sup> defendant was bound by Article 10 of the Constitution to ensure that public resources are utilized in the best possible way. Counsel maintained that the plaintiff was entitled to the sum of Kshs. 11,700,991.25 and relied on the case of *Patrick Masimba v. National Land Commission & 2 Others* Petition No. 613 of 2014, for the proposition that in making awards, it must be ensured that the public treasury is protected against improvidence so as not to loot public coffers.

### **Analysis and determination**

25. The court has carefully considered the pleadings, evidence and submissions and it is clear that the 3<sup>rd</sup> defendant does not dispute the fact that the plaintiff is entitled to compensation for compulsory acquisition of his land. The only contention is that while the plaintiff argues that he is entitled to the sum of Kshs. 16,858,586/- which was an earlier award made by the National Land Commission, the 3<sup>rd</sup> defendant argues that the plaintiff is entitled to the amount revised by the EACC of Kshs.



11,700,991.25. Therefore, the only issue that arise for determination is what is the amount that the plaintiff is entitled to as compensation for the compulsory acquisition of 0.121 Ha of land along Mombasa road?

26. Article 40 (3) and (4) of *the Constitution* provides that;

- (3) 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.
- (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

27. Therefore, compulsory acquisition can only be done where there is prompt, full and just compensation. Section 125 of the *Land Act* provides that the National Land Commission shall, as soon as is practicable, pay full and just compensation to all persons interested in the land that is compulsorily acquired.

28. The suit property is a leasehold. In assessing the value for compulsorily acquired leasehold land, Section 107 B (2) of the *Land Act* provides for the matters to be taken into account as follows;

Criteria for assessing value for compulsorily acquired leasehold land.

1. Where the lessee of a public land is in breach of any term or condition of the grant, the land shall revert back to the national or county government as provided for under this Act.
2. In assessing the value of the leasehold land and determining the just compensation to be awarded for land acquired under this Act, where the lessee of a public land has complied with all the conditions of the grant, the following matters shall be taken into consideration—
  - a. The value of the land based on the unexpired term of the lease calculated on the basis of a land value index developed for that purpose by the Cabinet Secretary in consultation with county governments and approved by the National Assembly and the Senate;
  - b. The value of developments or improvements on the land and any other cost incurred on the basis of the terms and conditions of the grant; and
  - c. Any other criteria which the Commission may prescribe in Regulations in consultation with the Cabinet Secretary and county governments and with the approval of the National Assembly and the Senate

29. Therefore in assessing the value of compensation for compulsory acquired leasehold land, where the lease has complied with conditions of grant, the National Land Commission must take into account the unexpired term of the lease calculated based on land value index developed by the Cabinet Secretary in consultation with the County Governments and approved by the National Assembly and the



- Senate. In addition, the value of developments or improvements and any cost incurred on the basis of the terms and conditions of the grant and other relevant matters shall be taken into account.
30. In this case, the location of the land acquired is along Mombasa road. The acreage is 0.121 Ha. The title shows that LR. No. 12648/119 where and measuring 0.121 Ha was compulsorily acquired, was issued on 3<sup>rd</sup> October 2014 for a term of 999 years with effect from 1<sup>st</sup> January 1920. The annual rent is Kshs. 19,540/-.
  31. I have considered the master schedule attached to the letter dated 22<sup>nd</sup> February 2021 by the National Land Commission, and it shows that there was no improvement or developments on the acquired suit property. Indeed, the plaintiff does not allege that the suit property had any improvements. The master schedule was verified by EACC in regard to 168 properties. Regarding compensation due to the plaintiff, the amount indicated is Kshs. 11,700,991.25. On the other hand, the plaintiff produced an award dated 1<sup>st</sup> February 2019 for Kshs. 16,858,586/-. In the said award, a sum of Kshs. 14,158,586/- was for the land and Kshs. 2,700,000/- for improvements.
  32. Section 107 of the *Evidence Act* places the burden of proof in a case on the plaintiff. While the plaintiff maintains that he is entitled to the sum of Kshs. 16,858,586/- as per the earlier award, he has not given the basis upon which that award was made and why this court should uphold the same apart from the fact that it was an earlier award. He disputes the subsequent award of Kshs. 11,700,991.25 which was verified by the EACC.
  33. It is clear that even the National Land Commission's documents show that no improvements were on the plaintiff's property, yet the award of 1<sup>st</sup> February 2019 grants him Kshs. 2,700,000/- for developments, which in my view is irregular, unlawful, unjustified and a brazen looting of public coffers facilitated by the National Land Commission. This court takes judicial notice, in view of the many cases that have been in court, that National Land Commission officials have been exaggerating awards made to affected persons for the obvious reasons of greed and corruption, necessitating the intervention of EACC. The plaintiff having not demonstrated that the intervention of EACC was unnecessary, it is my view that the revision of EACC was legitimate and meant to protect the public treasury from the greed of National Land Commission officers. The plaintiff has not demonstrated that the value of the acquired land as verified by EACC is an under valuation of the acquired property. The argument that the plaintiff did not participate in the valuation does not hold water as Section 107B of the *Land Act* does not envisage the participation of the land owner in the valuation. What the law guarantees is the just, full and prompt compensation. Therefore, it was upon the plaintiff to demonstrate that the valuation did not amount to full and just compensation. He could only do that with proof of evidence and not merely clinging on an earlier award which is not supported by a valuation. Suppose the earlier award was less than the verified award by EACC, would the plaintiff be arguing that the earlier award stands?
  34. In the premises, I find and hold that the plaintiff is entitled to Kshs. 11,700, 991.25 as full and just compensation, from the 2<sup>nd</sup> defendant who received the compensation amount on 30<sup>th</sup> June 2020.
  35. Since the 3<sup>rd</sup> defendant only set in motion the acquisition process in 2018, months after entering into the suit property in 2017, it is clear that it contravened the law by entering the suit property even before placing a request as the acquiring authority to the National Land Commission as required under Section 107 of the *Land Act*. In addition, the 2<sup>nd</sup> defendant although having received the sum of Kshs. 11,700,991.25 from the 3<sup>rd</sup> defendant on 30<sup>th</sup> June 2020 has refused forward the same to the plaintiff. In the premises, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are liable to pay costs to the plaintiff.



36. From the pleadings and evidence, there was no cause of action demonstrated against the 1<sup>st</sup> defendant who was merely the designer of the road and not mandated to deal with compensation. Therefore, the suit against the 1<sup>st</sup> defendant is dismissed with costs to him.
37. In the end, the court finds that the plaintiff has proved his case on the required standard against the 2<sup>nd</sup> defendant and enters judgment for him as follows;
- a. The 2<sup>nd</sup> defendant to pay the plaintiff forthwith, the sum of Kshs. 11,700,991.25, plus interest thereon at court rates from the date of filing this suit.
  - b. The costs of the suit shall be borne by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants jointly and severally.
38. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 16<sup>TH</sup> DAY OF OCTOBER, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

In the presence of;

Mr. Omangi for plaintiff

Mr. Maruti for 3<sup>rd</sup> defendant

No appearance for other defendants

Court assistant – Josephine

