



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT THIKA

ELCA NO. 34B OF 2020

NANCY MUTHONI WAIRAGU.....APPELLANT

VERSUS

NATIONAL LAND COMMISSION.....1ST RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY.....2ND RESPONDENT

JUDGEMENT

1. The Appellant is the registered proprietor of all that freehold land known as **MUGUGA/GITARU/2437** (suit land) measuring **0.0465 hectares** and situate on the left hand side at KM 33 +300 on the Nairobi –Nakuru Highway at Gitaru area, Kiambu County. The parcel of land abuts the James Gichuru-Rironi A104 tarmac Road. According to the Valuation report dated the 21/8/2020 the property comprises of 5 floor block of Flats namely Jabrose Apartments situated at the junction of Naivasha Highway and road to Kikuyu Township in Gitaru Sub-Location, Muguga Location in Kiambu County.

2. The 1st Respondent is the National Land Commission (hereinafter referred as the NLC), an independent Commission established under Article 67 (1) of the Constitution and is operationalized under the National Land Commission Act No. 5 of 2012 and charged with the constitutional mandate to *inter alia*, manage public land on behalf of the National and County governments. Under Part VIII of the Land Act, No. 6 of 2012, the commission has authority to carry out compulsory acquisition of private land required for public purposes and for a public institution in accordance with the provisions of Article 40(3) of the Constitution.

3. The 2nd Respondent, pursuant to the provisions of the Roads Act No 2 of 2007, is established as a corporate body with exclusive mandate and responsibility to manage, develop, rehabilitate and maintain national roads in Kenya. In exercise of its mandate under the Act, the 2nd Respondent undertook the rehabilitation and capacity enhancement of the **James Gichuru- Rironi A104 road (hereinafter called the project)** which *inter alia* involves upgrading the highway to create additional capacity through the construction of extra lanes, reconstruction of existing pavements, construction of new traffic interchanges, new bridges and foot bridges among other improvements.

4. To facilitate the completion of the above works, it is averred by the 2nd Respondent that it became necessary for the 1st Respondent in exercise of its constitutional mandate to acquire privately owned land abutting the project road for the 2nd Respondent for purposes of public use as set out in para 3 above.

5. It is contended by the 1st Respondent that vide a gazette notice No 6961 of 13/8/2018 it published the notice of intention to acquire a number of parcels of land for the project, one of which included the suit land.

6. Pursuant to No 5 above the 1st Respondent issued an award in the sum of Kshs. 55,451,200/-- to the Appellant as fair compensation for the plot on the 7/8/2020.

7. Aggrieved by the above award, the Appellant filed this appeal against the entire award on the following grounds *inter alia*; the 1st Respondent did not notify it of the inquiries, not afforded the opportunity to make representations before the award was made and that the award is not only inadequate but unjust and unfair and contrary to the provisions of Article 40 of the Constitution.

8. The grounds of appeal advanced by the Appellant are set out as below;

a. The Respondents and more specifically the 1st Respondent failed to serve the Appellant with the Notice of Inquiries thereby denying her an opportunity to prepare for the inquiries and prepare a written claim for compensation as required under Section 112 (1) (b) of the Land Act.

b. The 1st Respondent failed to conduct inquiries prior to making an award as required under Section 112(1) of the Land Act thereby denying the Appellant an opportunity to be heard and to present her claim for compensation for compulsory acquisition of the property by the 2nd Respondent for AIDA JAMES GICHURU JUNCTION – RIRONI JUNCTION (A 104/B3) ROAD PROJECT.

c. The 1st Respondent failed to take into account the value of the property and as such arrived at a unilateral and erroneous amount as compensation which was lower than the actual value of the property.

d. The 1st Respondent failed to take into account the value of the improvements on the property and as a result no compensation was given for the improvements made by the Appellant on the property.

e. The 1st Respondent failed to take into account that the Appellant has loans with a financier and she will incur costs upon acquisition of the property.

f. The 1st Respondent failed to take into consideration that the Appellant has loss of income since 2017 when the plots were marked for demolition and thus led to all tenants to vacate the premises developed on the property which actions have adversely affected the Appellant's earnings.

g. The 1st Respondent gave an award based on its own opinion which was not backed by any known and reasoned valuation and which resulted in the drastic undervaluation of the property.

h. That the 1st Respondent applied an arbitrary and unknown compensation assessment in violation of the principles of the just compensation under Article 40(3) of the Constitution.

i. The 1st Respondent failed to consider the factors listed in Rules 3 and 4 of The Land (Assessment of Just Compensation) Rules 2017 while assessing compensation and market value of the property.

j. The Respondents failed to consider the damage sustained by the Appellant as a result of acquisition of the property which has affected her earnings and all the developments made on the property.

k. In the circumstances, the Award is unfair and unjust in the context of Article 40 of the Constitution.

9. Further the Appellant sought the following orders;

a. The appeal be allowed with costs.

b. The award of compensation dated the 7/8/202 be set aside.

c. The value of the property and improvements as contained in the valuation report dated the 24/8/2020 in the sum of Kshs 112,721,400/- be awarded as the market value of the suit land.

d. The Respondents be ordered to pay the Appellant

e. Pending the hearing and determination of the appeal, the Respondent be barred from taking possession of the property and the improvements.

The Appellant's Case

10. The Appellant's case is contained in the memorandum of appeal filed pursuant to Section 128 of the Land Act and is supported by the affidavit of Nancy Muthoni Wairagu, the Appellant herein sworn on the 8/9/2020. The appeal is supported by several documents marked as NMW 1-6b.

11. The Appellant averred that the suit land is developed with 27 flats with a monthly rental yield of Kshs. 398,250/- prior to the marking of the property for demolition.

12. The Appellant faults the 1st Respondent for not communicating the date for the inquiries as set out in the Gazette notice No 6961 of 2018. Despite the publication of the Gazette notice, it is the Appellant's case that she was not served with the copy of the notices of inquiries as required by Section 112(1) of the Land Act notwithstanding her proprietary interest in the suit land. She is convinced that the 1st Respondent failed to conduct inquiries as required under the Act thus disentitling her the opportunity to present her claim for compensation for consideration. Inter alia, that it was her legitimate expectation that the 1st Respondent would conduct the inquiries and consider all the factors affecting the land including her representation as to the market value and developments on the land before arriving at its award of compensation.

13. As to the award of Kshs 55,421,200/- by the 1st Respondent, she was of the view that the same was defective as it is not based on any professional valuation, did not take into consideration the improvements on the property and that the property was grossly undervalued. It is her case that her property commanded a valuation of Kshs 112, 721,400/- broken down as follows;

- a. Market value of land & improvements – Kshs 62,146,000/-
- b. Add 15% disturbance allowance – Kshs 9,321,900/-
- c. Loan repayment (rule 3 c of the land compensation rules, 2017 – April 2017-August 2020 – Kshs 16,500,000/-
- d. Alternative accommodation for the caretaker- (rule 3(d)) of the land compensation rules) Kshs 635,500/-
- e. Lost income (rule 3(d) of the land compensation rules- 24,118,000/-

The case of the 1st Respondent

14. Vide a replying affidavit sworn on the 5/10/2021 by **Isabel Njeru**, the 1st Respondents Chief Valuation Officer, the 1st Respondent confirmed the acquisition of the property for the 2nd Respondent for the road project. That the property was listed among other properties in the inquiry notice for hearing of claims for compensation at the Gitaru Chiefs camp at 9.30 am on 23/8/2018. That the Appellant did not attend the said inquiry.

15. With respect to the award of Kshs 55.3 million the deponent averred that the same was arrived at in accordance with the provisions of Part VII of the Land Act No 6 of 2012, Land Act Regulation 2017 and legal notice 280 of 2017. She annexed a valuation report dated the 7/5/2018.

The 2nd Respondents case

16. Daniel Mbuteti, Senior Surveyor of the 2nd Respondent in a replying affidavit sworn on the 20/8/2021 deponed that the 2nd Respondent is charged with the exclusive mandate to manage develop and maintain national roads, the project road included. He reiterated the process of the acquisition of the land as given by the 1st Respondent. That vide a written request by the 1st Respondent dated the 6/5/2020 the 2nd Respondent transferred the compensation monies to the account of the 1st Respondent to meet the claims of the property owners, the Appellant included. That the 2nd Respondent having fulfilled its obligations under Section 111(1) of the Land Act, issued a notice of taking possession and vesting date on the 7/1/2021 to the Appellant to allow for construction works to continue. He disputed the valuation of the Appellant prepared by a private valuer on the grounds that the body mandated in law to acquire and determine the land values is the 1st Respondent. He urged the Court to dismiss the appeal.

The Preliminary Objection.

17. On the 30/11/2020, by consent of the parties, the 2nd Respondent was enjoined into the suit.

18. On the 28/6/2021 the 2nd Respondent filed a preliminary objection on the grounds that;

- a. **The Appellants appeal and suit as a whole is fatally defective as it does not comply with the mandatory provisions of Section 67 (a) of the Roads Act, 2007 requiring 30 days' notice to the Director General prior to filing of a suit.**

19. The Court directed that the Preliminary objection and the appeal be heard together.

The written submissions

20. Through the law firm of **Mbugua Ndiritu & Co. Advocates**, the Appellant filed submissions on the 22/9/2021.

21. As to whether the Preliminary Objection is merited, the Appellant avers that the 2nd Respondent was enjoined by orders of the Court on its own motion and in exercise of its discretion and therefore it cannot be faulted. Quoting the Court of appeal case of **William Kiprono Towett & 1597 others Vs Farmland Aviation Ltd & 2 others (2016) eKLR**, the Appellant submitted that matters discretionary are outside the purview of the objection. Further that order 1 rule 9 of the Civil Procedure Rules provides that misjoinder or non joinder cannot be a ground to defeat a suit. That having been enjoined through a Court order, the necessity of notice was taken away and urged the Court to dismiss the preliminary objection.

22. As to whether the applicable principles and procedures of computation of the award was followed by the 1st Respondent, the Appellant submitted that this issue will answer grounds 1-11 of the grounds of appeal. The Appellant has argued that the 1st Respondent failed to serve the Appellant with the notice of inquiry thus denying the Appellant the opportunity to make representations as to her claim. Further she accused the Respondents of failing to adhere to the requisite principles and procedure in assessing a fair and just award. She opined that fair and just compensation should encompass the general market value together with the economic injury caused in relation to the land taken as a consequence of acquisition. In addition she faulted the award on the following grounds; no proper inquiries were conducted; no such minutes were produced to support that any inquiry took place; the Respondent was not served with the notice of the inquiry; no written reasons and or sufficient data and analysis that were considered in reaching the award; failure to provide written reasons created a rebuttable presumption of a substantial error or defect in the procedure it adopted in assessing the compensation; 1st Respondent failed to consider the damage sustained by reason of the acquisition affecting the Appellants actual earnings, reasonable expenses incidental to change of residence, diminution of profits between the gazettement and the date of taking actual possession; the property was undervalued; no inspection and valuation was undertaken thus basing the compensation on its opinion without a valuation being undertaken by an expert valuer.

23. Relying on the case of **John Macharia Vs Commissioner of Land (2014) eKLR** where the Court set out the factors to be factored in arriving at a value of the land as market value of the land, damage sustained by the land owner, actual earnings reasonable expenses with respect of change of residence or place of business and damages resulting from diminution of profits of the land between the date of gazette and date of actual possession, she urged the Court to set aside the award.

24. As to whether the award was just and fair value of the property, the Appellant submitted that the award failed to take into account the fact that the property was charged to the bank. That the property yielded the sum of Kshs 398,250/- which was used to service the loan facility with the bank, which loan was acquired to purchase and develop the property. Further she submitted that the property had been valued at the sum of Kshs 50 Million in 2016 and cannot remain the same value 4 years later.

25. Arguing that the 1st Respondent has failed to defend its award and or even file a valuation report to impugn her valuation, she urged the Court to allow the appeal and set aside the award.

26. The 1st Respondent submitted and denied any statutory and constitutional gaps in the acquisition of the suit land. It reiterated the contents of the Replying affidavit sworn by Isabel Njeru that it complied with the law fully by issuing the intention to acquire the land vide gazette notice dated the 13/7/2018, notice of inquiry including the dates, venue and time of the inquiry. Further that it carried out inspection and valuation of the property as per the annexed valuation report dated the 7/5/2018. That the values in the said report complied with rules on compensation.

27. The award complied with the provisions of the Land Act including the compensation Rules and was reached after taking into consideration the following factors; actual rent provided on the ground; construction of the suit property was not complete at the time of inspection; the incomplete flats on the 3rd and 4th Floors were included in calculating loss of income; 2-year period was included as the period the proprietor will take to reconstruct the developments after actual possession of the property.

28. The 1st Respondent did not oppose the preliminary objection.

29. Ms Merlene Alogo, the Learned Counsel of the 2nd Respondent submitted that the Appellant failed to serve the 2nd Respondent with one month's notice contrary to Section 67 of the Roads Act 2007. That the essence of the said notice is to give the 2nd Respondent an opportunity to deal with the issues raised and to resolve them in an amicable and appropriate manner. That the provisions of Section 67 of the Roads Act is a mandatory procedural law which calls for compliance and as such the Appellant cannot hide under Article 159 (2) (d) of the Constitution to evade a statutory provision. Indeed, that the requirement of notice enables the 2nd Respondent to consider and explore an out of Court settlement in line with the provisions of Article 159 (2) (d) of the Constitution which encourages alternative forms of dispute resolution.

30. With respect to the issue as to whether the Appellant is entitled to the orders sought in the appeal, the 2nd Respondent submitted that the suit land was inspected and valued by the 1st Respondent in line with its mandate under the Constitution and the Land Act and arrived at the award of Kshs 60,825,000/-. Further, it submitted that the said award was based on market value and was in agreement with comparable land of similar character and was therefore fair and just in the circumstances.

31. That on advise of the 1st Respondent it transferred the sum with respect to the award to the 1st Respondent's account on the 23/8/2020 for onward transmission to the project affected persons, the Appellant included. That following the said compensation, the process of acquisition came to an end and was given vacant possession of the land free from any encumbrances to construct the road. It faulted the valuation of the Appellant on grounds that it was carried out by a private valuer and not the 1st Respondent as mandated by law.

32. That public interest tilts in favour of the members of the public in enjoying a newly constructed road that frees the smooth flow of traffic. It relied on the case of **Kenya National Highways Authority Vs Shalien Masood Mughal & 5 others (2017) eKLR** where the Court held that wider public interest overrides private claims.

Analysis and determination

33. Having read and considered the grounds of appeal, the rival responses, the written submissions, the issues framed by the parties and case law, the issues for determination are;

- a. Whether the Preliminary objection is merited.**
- b. Whether the process of acquisition complied with the law.**
- c. Whether the award of compensation was valid.**
- d. Who meets the cost of the appeal?**

34. Before I delve into the above issues, I note that the appeal is filed pursuant to Section 128 of the Land Act which provides as follows

“Any dispute arising out of any matter provided for under this Act may be referred to the Land and Environment Court for determination.”

35. My reading of the above provision shows that the disputes filed pursuant to the above provisions are references and not an appeal. The Court was not addressed on this issue by the parties. That said I note that neither the Act nor the Minister in charge has made provisions on

the framework of the reference under the Act. That said this Court has determined the suit as presented before it as an appeal in line with Order 3 rule 9 of the Civil Procedure Rules which states as follows;

“No suit shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make a binding declaration of right whether any consequential relief is or could be claimed or not.”

36. I shall now turn to the merit of the preliminary objection. The parameters for consideration of a preliminary objection are now well settled. A preliminary objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696** as follows;

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

At page 701 Sir Charles Newbold, P added:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion...”

37. I shall now turn to the impugned Section 67 of the Kenya Roads Act which form the basis of the objection. It states as follows;

“Where any action or other legal proceeding lies against an Authority for any act done in pursuance or execution, or intended execution of an order made pursuant to this Act or of any public duty, or in respect of any alleged neglect or default in the execution of this Act or of any such duty, the following provisions shall have effect-

(a) the action or legal proceeding shall not be commenced against the Authority until at least one month after written notice containing the particulars of the claim and of intention to commence the action or legal proceedings, has been served upon the Director-General by the Appellant or his agent; and

(b) such action or legal proceedings shall be instituted within twelve months next after the act, neglect, default complained of or, in the case of a continuing injury or damage, within six months next after the cessation thereof.”

38. It is not in dispute that the 2nd Respondent is a creature of law. Section 3 of the Kenya Roads Authority establishes the 2nd Respondent as an Authority to be known as the Kenya National Highways Authority, which shall be a body corporate with perpetual succession and a common seal, and which shall, subject to this Act, be capable in its corporate name of inter alia, suing and being sued.

39. Section 67 requires a claimant to give a 30 day written notice to the 2nd Respondent before commencing legal action. The second limb is that the legal action should be instituted within 12 months next after the act complained of or if it is a continuing injury or damage after 6 months of the cessation of the same. I have perused the record and it is not in dispute that the appeal was filed on the 9/9/2020 against the 1st Respondent. The Appellant has justified in her submissions that her case was against the 1st Respondent and that explains why she sued it alone. That it is the Court that enjoined the 2nd Respondent after the suit had been filed and on its own volition and discretion.

40. The record shows that on the 30/11/2020, Ms Masinde learned counsel for the 1st Respondent (Respondent then) informed the Court that the project was being undertaken by Kenya National Highways Authority and therefore should be enjoined as a party. Mr Kahare, learned counsel for the Appellant informed the Court that he had no objection to the application. The Court based on the consent proceeded to order the joinder of the 2nd Respondent to the suit.

41. It is not in dispute that the 2nd Respondent is empowered by law to manage, develop and rehabilitate national roads on behalf of the Government. It is also not in dispute that the project involves the development, expansion and rehabilitation of a major public road at the outskirts of the city of Nairobi and therefore it is not in doubt that the 2nd Respondent was a necessary party because any orders made would definitely affect it in the completion of the project and as a user department charged with developing the road.

42. The 1st Respondent did not oppose the objection.

43. The 2nd Respondent has argued rather vigorously that the Appellant has failed to comply with a mandatory provision of the law which require a disputant to issue 30 days' notice upon the 2nd Respondent. See the case of **Sumac Development Company Limited Vs George Munyuri Kigathi & 2 others (2017) eKLR**.

44. In the case of **Charles Kamuren Vs Grace Jelagat Kipchoim & 2 others (2013) eKLR** the Court of Appeal stated that failure to serve the petition within the statutory period ought to have been treated as a procedural lapse and extend time of service as sought.

45. The essence of service was stated in the case of **Boru Dika Vs Gulsan Insaat Turizm & Anor (2018) eKLR** and the case of **Simonash Investments Limited Vs Kenya National Highway Authority & 2 others (2019) eKLR** where the Courts sitting separately stated that the

notice is important to enable the 2nd Respondent to carry out its mandate efficiently and effectively and also to afford it the opportunity to address the Company or claim before legal action can be commenced in line with Article 159 (2) (c).

46. I have perused the pleadings in this case and it is undisputable that none of the parties have pleaded this objection. That said it is true that the 2nd Respondent was enjoined midway at the request of the 1st Respondent and not the Appellant. It is also true that this party is a necessary party given its role in the impugned acquisition. I have carefully looked at the rational of the notice and its mandatory wording- that it is to afford the 2nd Respondent the opportunity to settle the matter out of Court. Given that by the time of its enjoinder the suit was already in Court, the question I ask is what use will it serve if the same is upheld? One of the criteria to be met in a Preliminary objection is that it should determine the suit in finality. In this case upholding the objection will only lead to hardship and unnecessary expenses to the parties because the Appellant would have to refile the suit once 30 days' notice expire. I have keenly perused the pleadings of the 2nd Respondent and clearly it has not explained the hardship/prejudice it stands to suffer if the objection is declined. I say so because it has not asked for additional time to settle the matter out of Court, which if it did would be within its discretion. I have also taken note that the 2nd Respondent has fully addressed itself to the suit in its pleadings.

47. In the end and for the above reasons I find that the objection is unmerited and the same is hereby dismissed.

48. Now on to the 2nd issue which is whether the process of acquisition complied with the law. In her sworn affidavit dated the 8/9/2020 the Appellant's case is that the 1st Respondent gazetted its intention to acquire the property for a public road vide gazette notice No 6961 and invited all property owners for inquiries which were to take place at the Respondent's office but never communicated the date. That in addition to the publication of the notice of inquiry, the 1st Respondent was legally required under Section 112(1) (b) of the Land Act to serve a copy of the same upon her, thus failing to afford her the opportunity to present her claim.

49. The Respondents in unison agreed that the appropriate notices were duly issued.

50. The Constitution contains the legal framework governing state power to compulsorily acquire private land. The provisions of Article 40 of the Constitution offer protection of the right to land. Compulsory acquisition in particular is articulated under Article 40 (3) as follows;

“(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.’

Further Article 47 of the Constitution states as follows:’

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a Court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.’

51. The process of compulsory acquisition of land is clearly set out in Sections 107 – 133 of the Land Act. The 1st Respondent is required to publish the notice of intention to acquire land. After 30 days it is obligated to set a date to conduct inquiries into issues of propriety and claims of compensation to the property owners. It should publish a notice of inquiry in the Kenya Gazette and in addition serve on every claimant the said notice.

52. In both situations, the Act stipulates that the notices must be served on the registered owners and such other parties as are interested in the proposed properties for compulsory acquisition both on notification and inquiry stages. The procedure for compulsory acquisition has been aptly laid down in the case of **Patrick Musimba Vs National Land Commission & 4 others (2016) eKLR**, which is quoted below;

“In summary, the process of compulsory acquisition now runs as follows-

Under Section 107 of the Land Act, the National Land Commission (the 1st Respondent herein) is ordinarily prompted by the national or county government through the Cabinet Secretary or County Executive member respectively. The land must be acquired for a public purpose or in public interest as dictated by Article 40(3) of the

Constitution. In our view, the threshold must be met: the reason for the acquisition must not be remote or fanciful. The National Land Commission needs to be satisfied in these respects and this it can do by undertaking the necessary diligent inquiries including interviewing the body intending to acquire the property.

Under Sections 107 and 110 of the Land Act, the National Land Commission must then publish in the gazette a notice of the intention to acquire the land. The notice is also to be delivered to the Registrar as well as every person who appears to have an interest in the land.

As part of the National Land Commission's due diligence strategy, the National Land Commission must also ensure that the land to be acquired is authenticated by the survey department for the rather obvious reason that the owner be identified. In the course of such inquiries, the National Land Commission 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: see Section 108 of the Land Act.

The foregoing process constitutes the preliminary or pre-inquiry stage of the acquisition.

The burden at this stage is then cast upon the National Land Commission and as can be apparent from a methodical reading of Sections 107 through 110 of the Land Act, the landowner's role is limited to that of a distant bystander with substantial interest.

Section 112 of the Land Act then involves the landowner directly for purposes of determining proprietary interest and compensation. The Section has an elaborate procedure with the National Land Commission enjoined to gazette an intended inquiry and the service of the notice of inquiry on every person attached. The inquiry hearing determines the persons interested and who are to be compensated. The National Land Commission exercises quasi-judicial powers at this stage.

On completion of the inquiry the National Land Commission 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. It could also be land in lieu of the monetary award, if land of equivalent value, is available. Once the award is accepted, it must be promptly paid by the National Land Commission. Where it is not accepted then the payment is to be made into a special compensation account held by the National Land Commission: see Sections 113- 119 of the Land Act.

The process is completed by the possession of the land in question being taken by the National Land Commission once payment is made even though the possession may actually be taken before all the procedures are followed through and no compensation has been made. The property is then 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: see Sections 120-122 of the Land Act.

If land is so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined: See Section 111 of the Land Act. This is in line with the Constitutional requirement under Article 40(3) of the Constitution that no person shall be deprived of his property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation”.

53. In this case, Gazette notice No 6961 dated the 13/7/2018 was issued pursuant to Section 162 (2) of the Land Act and further the Gazette Notices No. 810 of 2016 and 2532 and 2533 of 2018. For this particular property the suit land, the inquiry date was set for 23/8/2018 at Gitaru Chief's camp at 9.30 am. It is therefore not true that the inquiry notice did not communicate the dates and the venues. The notice annexed by the applicant contain the dates as well. The said notice required the property owners to deliver to the National Land Commission on or before the day of inquiry a written claim together with other documents to its offices at Ardhi House 3rd Floor, Room 305 Nairobi.

54. Section 112 (1) (b) obligates the 1st Respondent to serve the Appellant with the notice of inquiry. The 1st Respondent has not provided any evidence of service upon the Appellant save the publication of the notice of inquiry which would be in compliance with Section 112 (1) (a). If the Act did not find it necessary to effect service of the inquiry on the land owner, it would have said so. Service of notice is important to notify the landowner that the land is being acquired and offer the land owner the opportunity upfront to prepare and present his claim on compensation.

55. Did the 1st Respondent condemn the Appellant unheard in holding the inquiry in the absence of notifying the Appellant? The principles of natural justice were affirmed in the case of **Local Government Board Vs Arlidge [1915] A.C. 120, 132-133** where the Court held that;

“...those whose duty it is to decide must act judicially. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must come to the spirit and with the sense of responsibility of the tribunal whose duty it is to meet out justice”.

56. In the case of **Sceneries Limited Vs National Land Commission (2017) eKLR**, the Court held that ‘... *Failure to give proper notice is in itself a denial of natural justice and fairness...*’. In the present case the 1st Respondent contends that the gazette notice is adequate notice to the Appellant. I disagree with the 1st Respondent in respect of the issue of service. The manner in which the 1st Respondent proceeded in the absence of notice neither qualifies as adequate notice under the Land Act nor complies with the principles of natural justice.

57. Article 40 (2)(a) of the Constitution, Part VIII of the Land Act , 2012 as read together with the saved provisions of the now repealed

Compulsory Acquisition Act, Cap 295 does not permit the Respondent to engage in any arbitrary acts in both the procedure and the compensation in respect of the compulsory acquisition of land. The owners of the land as well as those interested must be notified in writing. It is not enough to post a notice in the Kenya Gazette. Their views must be sought as to the compensation as well. The 1st Respondent is obligated to obey the rules of natural justice in all their actions by affording the parties a hearing. These rules have been fortified in the Constitution under Articles 40, 47 and 50 and the Fair Administrative Actions Act.

58. Evidence was led by the Appellant that the suit land is charged to the Bank of Baroda. The bank therefore by virtue of the charge became an interested party for which the 1st Respondent was obligated by Section 112 (1) (b) of the Land Act to effect service of the notice of intention to acquire the land as well as the notice for inquiries. There is no evidence that this was complied with. The bank will be called upon to discharge the title once the loan is redeemed. The more reason it should be notified of the compulsory acquisition of its security.

59. It is the finding of the Court that the Appellant was not served with the notice of inquiry in line with Section 112 (1) (b) of the Land Act. No evidence was tabled to show that the 1st Respondent served the inquiry notice pursuant to Section 112(1) (b) of the Land Act. It is clear that the Appellant was aware of the notice of inquiry. The 1st Respondent informed the Court that pursuant to the notices inviting land owners to make representations on the compensation many obliged and participated but the Appellant is one of those who did not turn up. There is no evidence to demonstrate in form of minutes that the 1st Respondent conducted the inquiries.

60. With respect to the last issue on compensation, it is the view of the Court that having followed a flawed process the validity or otherwise of the award is in question. Having determined that the process is tainted this Court must not usurp the powers of the 1st Respondent to comply with the law. I find that there is no basis for the Court to inquire into the award and compensation by the 1st Respondent which award was arrived at through a flawed process.

61. In the end the appeal partially succeeds and I make the orders as follows;

- a) The Preliminary Objection fails. It is dismissed with costs.**
- b) The appeal hereby is partially allowed.**
- c) The award of compensation in the sum of Kshs. 55 million be and is hereby set aside.**
- d) The 1st Respondent be and is hereby ordered to conduct a fresh inquiry in respect to the suit land belonging to the Appellant within 60 days from the date hereof.**
- e) The 1st Respondent to pay the costs of the appeal.**
- f) Parties be at liberty to apply where appropriate.**

62. Orders accordingly.

DATED, SIGNED AND DELIVERED AT THIKA 8TH DAY OF FEBRUARY 2022 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

DELIVERED ONLINE IN THE PRESENCE OF;

NJUGUNA HOLDING BRIEF FOR MS. NDIRITU FOR THE APPELLANT

MS. MASINDE FOR THE 1ST RESPONDENT

2ND RESPONDENT - ABSENT

MS. PHYLLIS MWANGI – COURT ASSISTANT