



**Bidding and Lots Investment Limited v National Land Commission & 2 others; Republic (Exparte) (Judicial Review Miscellaneous Application E005 of 2021) [2022] KEELC 2182 (KLR) (5 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2182 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E005 OF 2021**

**CA OCHIENG, J**

**MAY 5, 2022**

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR  
ORDERS OF CERTIORARI**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010,  
ARTICLES 19, 20, 21, 22, 23, 24, 40, 47, 50, 60, 61, 62, 63 AND 64**

**AND**

**IN THE MATTER OF: NATIONAL LAND COMMISSION ACT (NO. 5 OF  
2012)**

**AND**

**IN THE MATTER OF: THE LAND ACT (NO.6 OF 2012)**

**AND**

**IN THE MATTER OF: ENVIRONMENT AND LAND COURT ACT (CAP  
12A)**

**AND**

**IN THE MATTER OF: FAIR ADMINISTRATIVE ACTION ACT(NO.4 OF  
2015)**

**AND**

**IN THE MATTER OF: GAZETTE NOTICE NO. 9536(29TH SEPTEMBER,  
2017)**

**AND**

**IN THE MATTER OF: GAZETTE NOTICE NO. 11424 (17TH**



NOVEMBER, 2017)

AND

IN THE MATTER OF : GAZETTE NOTICE NO. 11104 (26TH OCTOBER,  
2018)

AND

IN THE MATTER OF: GAZETTE NOTICE NO. 11105 (26TH OCTOBER,  
2018)

AND

IN THE MATTER OF: GAZETTE NOTICE NO. 1916 (6TH MARCH,  
2020)

BETWEEN

BETWEEN

BIDDING AND LOTS INVESTMENT LIMITED ..... APPLICANT

AND

NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT

KENYA NATIONAL HIGHWAY AUTHORITY ..... 2<sup>ND</sup> RESPONDENT

ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT

AND

REPUBLIC ..... EXPARTE

## JUDGMENT

1. What is before Court for determination is the Applicant's Notice of Motion application dated the 29<sup>th</sup> March, 2021 brought pursuant to Order 53 Rule 3 and 4 of the Civil Procedure Rules. The Applicant seeks the following orders:
  - i. A Declaration that the Applicant's fundamental rights and freedoms as enshrined under Articles 40 (1), 40 (2) (a), 40 (3) (b) (i), 47 (1) and 47 (2) of *the Constitution* of Kenya of Kenya 2010, have been contravened and infringed upon by the Respondents herein;
  - ii. A Declaration that the Applicant herein is entitled to prompt, just and adequate compensation in full within the meaning and tenor of Article 40 (3) (b) for the compulsory acquisition of its proprietary interests in Athi River/ Athi River Block 6/564 and 6/565 (the suit properties) within Machakos County;
  - iii. A Declaration that the Respondents herein review and issue prompt, just and adequate compensation to the Applicant for the suit properties being Athi River/ Athi River Block 6 /564 and Athi River/ Athi River Block 6/565 that are subject to compulsory acquisition;



- iv. A Declaration to quash the award by the 1<sup>st</sup> Respondent to the Applicant dated 8<sup>th</sup> January, 2021, of Kenya Shilling One Million Eight Hundred and Fifty Five Thousand, Twenty Nine Shillings (Kshs. 1,855,029.00/=) for property Athi River/Athi River Block 6/564;
  - v. A Declaration to quash the award by the 1<sup>st</sup> Respondent to the Applicant dated 8<sup>th</sup> January, 2021, of Kenya Shilling Seven Hundred and Fourty Three Thousand, Three Hundred and Seventy-Six Only (Kshs. 743, 376.00 /=) for property Athi River/Athi River Block 6/565;
  - vi. General, exemplary and aggravated damages under article 23 of *the Constitution* of Kenya 2010, for the unconstitutional conduct of the Respondents;
  - vii. Any other directions and orders that this Honourable Court may deem appropriate; and
  - viii. Costs of this Application.
2. The application is premised on the grounds on the face of it and the supporting affidavit of Stanely Thaara Mugacha. The Applicant is aggrieved with the action of the 1<sup>st</sup> Respondent where it revised two Awards downwards in respect to its land parcel numbers Athi River Block 6 /564 and Athi River/ Athi River Block 6/565 hereinafter referred to as the ‘suit properties’. It explains that on 29<sup>th</sup> September, 2017, the 1<sup>st</sup> Respondent expressed its intention to compulsorily acquire the suit properties on behalf of 2<sup>nd</sup> Respondent, for construction of second carriageway of Athi River Machakos Turnoff (A109) Road Project and issued a Gazette Notice No. 9536 to that effect. Further, on 17<sup>th</sup> November, 2017, Gazette Notice No. 11424 was issued on the said acquisition. It contends that the 1<sup>st</sup> Respondent had initially made an Award dated 1<sup>st</sup> February, 2019 of Kshs. 3, 091,715/= for land parcel number Block 6/564 and another Award dated 20<sup>th</sup> January, 2019, of Kshs. 1,238,969/= for Block 6/565 respectively. It avers that the 1<sup>st</sup> Respondent revised the said Awards downwards to wit; one dated 8th January, 2021, of Kshs. 1,855,029.00/= for Athi River/Athi River Block 6/564 and another dated 8th January, 2021, of Kshs. 743, 376.00 /= for Athi River/Athi River Block 6/565 respectively. It hence seeks an order of Court to quash the latter Awards after which it should be compensated promptly.
  3. The 1<sup>st</sup> Respondent though duly served did not file a response to controvert the Applicant’s averments.
  4. The 2<sup>nd</sup> Respondent filed two affidavits sworn by one Daniel Mbuteti, its Senior Survey. It insists the claim against it, is not legitimate as the Applicant failed to serve its Director General, with the Thirty (30) days mandatory notice. It denies having a role to play in determining compensation Awards and/ or variation of the same and insists this is the mandate of the 1<sup>st</sup> Respondent. Further, that liability cannot be attached to it. It insists the dispute herein ought to be determined between the ex parte Applicant and the 1<sup>st</sup> Respondent pursuant to the principles of valuation as set out in the *Land Act (Assessment of Just Compensation Rules) 2017* Legal Notice No 283. It reiterates that the prayers sought against it, are moot and incapable of any legal enforcement. Further, it explains the process of how the ex parte Applicant’s two properties were acquired. It contends that sometime in 2019, the Ethics and Anti Corruption Commission (EACC) made a recommendation to the 1<sup>st</sup> Respondent herein to withhold payments for properties along the project road and carry out a re – valuation of the all the properties acquired for the project, culminating in the 1<sup>st</sup> Respondent preparing a revised compensation schedule with revised Awards.
  5. This matter was canvassed by way of written submissions but it is only the ex parte Applicant, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents that filed theirs.



## Analysis and Determination

6. Upon consideration of the Notice of Motion application dated the 29<sup>th</sup> March, 2021 including the respective affidavits, annexures and rivaling submissions, the only issue for determination is whether the ex parte Applicant is entitled to orders sought in the instant application.
7. In the Applicant's submissions, it reiterates its averments herein and contends that the proceedings herein are not subject to the provisions of section 67 (a) of the [Kenya Roads Act](#) as alleged by the 2<sup>nd</sup> Respondent. It insists that the decision by the 1<sup>st</sup> Respondent was in excess of jurisdiction, unlawful and illegal. Further, this culminated in the violation of its rights. It submits that the doctrine of legitimate expectation was properly appreciated, invoked and applied by the 1<sup>st</sup> Respondent in favour of the ex parte Applicant. Further, that the 1<sup>st</sup> Respondent had no power to re-open the matter once there was a determination and by doing so, it acted illegally including without jurisdiction to sit on its own appeal. It claims the 1<sup>st</sup> Respondent became functus officio on the matter, upon the issuance of the first Awards. To support its averments, it relied on the following decisions: [Benson Ruivi Njane v Kenya Rural Roads Authority & 36 others](#) (2016) eKLR; [Pastoli v Kabale District Local Government Council & others](#) (2008) EA 300; [Raila Odinga & 2 others v Independent Electoral & Boundaries Commission and 3 others](#) (2013) eKLR; [Republic v National Land Commission & 2 others ex parte Archdiocese of Nairobi Kenya Registered Trustees \(St Joseph Mukasa Catholic Church Kabawa West\)](#) (2018) eKLR; [Republic vs Attorney General & another ex parte Waswa & 2 others](#) (2005) 1KLR 280 and [R v Devon County Council ex parte P Baker](#) (1955) 1All ER.
8. The 2<sup>nd</sup> Respondent reiterated its averments in the two affidavits and insists that an implementing agency cannot be held responsible for the revaluation and determination of a compensation Award by the National Land Commission. Further, that it was an implementing agency and not an acquiring entity. To buttress its averments, it relied on the following decisions: [Nightshade Properties Ltd vs National Land Commission & 3 others](#) (2021) eKLR and [Republic v National Land Commission & 2 others ex parte Samuel M N Mweru & 5 others](#) (2018) eKLR.
9. The 3<sup>rd</sup> Respondent in its submissions insists the 1<sup>st</sup> Respondent's decision to revise the Awards downwards was justified. It contends that the Ex parte Applicant has not denied that the 1<sup>st</sup> Respondent followed the legal procedure for compulsory acquisition in respect to the initial Awards. As regards the revised Awards, it submits that the Ethics and Anti-Corruption Commission (EACC) has powers under section 23 of the [Anti-Corruption and Economics Crimes Act](#) 2003 to conduct investigations into complaints received at the said Commission and make recommendations pursuant to such investigations. Further, that the said Commission was within the law in undertaking investigations and making recommendation for re – valuation of the suit properties among others and review of the compensation amounts payable. It reiterates that in the event the Ex parte Applicant was dissatisfied with the new Awards, it had recourse under section 128 of the [Land Act](#). To support its arguments, it relied on the decision of [Stanley Munga Githunguri vs National Land Commission](#) (2016) eKLR.
10. Lord Diplock in the case of [Council for Civil Service Unions v Minister for Civil Service](#) [1985] AC 374, at 401D clearly set the standards of judicial review when he stated that:-

“Judicial review has I think developed to a stage today when...one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call ‘illegality’, the second ‘irrationality’ and the third ‘procedural impropriety’...By ‘illegality’ as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power



and must give effect to it...By ‘irrationality’ I mean what can now be succinctly referred to as “Wednesbury unreasonableness’...it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it...I have described the third head as ‘procedural impropriety’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.”

11. Further, the Court in the case of *Kingdom Kenya 01 Limited v the District Land Registrar, Narok & Fifteen (15) others* [2018] eKLR observed as follows: “Judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. See the *Commissioner of Lands v Hotel Kunste* [1997] eKLR. The purpose of JR is to ensure that the individual is given fair treatment by the Authority to which he has been subjected. JR as a remedy is available, in appropriate cases, even where there are alternative legal or equitable remedies. See *David Mugo t/ a Manyatta Auctioneers v Republic* – Civil Appeal No 265 of 1997 (UR). JR being a discretionary remedy, it demands that whoever seeks to avail itself/himself/herself of this remedy has to act with candour or virtue and temperance. See *Zakayo Michubu Kibwange v Lydia Kagina Japheth and 2 others* [2014] eKLR. JR as a remedy may also be invoked where the issues in controversy as between the parties are contested. See *Zakayo Michubu Kibwange case (supra)*. The remedy of judicial review is only available where an issue of a public law nature is involved. Further, that a person seeking mandamus must show that he has a legal right to the performance of a legal duty by a party against whom the mandamus order is sought or alternatively, that he has a substantially personal interest and that the duty must not be permissive but imperative and must be of a public nature rather than of a private nature.’
12. In this instance, the Ex parte Applicant has sought for orders of judicial review including exemplary damages. It is trite that judicial review is about the administrative process but not concerned with the merits of the decision. In line with the standards set in the aforementioned decisions, I will proceed to decipher whether the Ex parte Applicant is entitled to the orders of judicial review as sought. The Applicant confirmed that on 29<sup>th</sup> September, 2017, the 1<sup>st</sup> Respondent expressed its intention to compulsorily acquire the suit properties on behalf of the 2<sup>nd</sup> Respondent and issued a Gazette Notice No. 9536. Further, on 17<sup>th</sup> November, 2017, Gazette Notice No. 11424 was issued on the said acquisition. It explained that the 1<sup>st</sup> Respondent had initially made an Award dated 1<sup>st</sup> February, 2019 of Kshs. 3, 091,715/= for land parcel number Athi River/Athi River Block 6/564 and another Award dated 20<sup>th</sup> January, 2019, of Kshs. 1,238,969/= for Athi River/Athi River Block 6/565 respectively. However, these Awards were revised as follows: For Athi River/Athi River Block 6/564 to Kshs. 1,855,029.00/= and for Athi River/Athi River Block 6/565 to Kshs. 743, 376.00 respectively. It emerged in evidence that an inquiry had been undertaken after which the 1<sup>st</sup> Respondent presented the Ex parte Applicant with two initial Awards in respect to the suit properties. The Ex parte Applicant’s main contention is that the Awards were revised downwards and this was in total violation of its rights to property, hence the instant judicial review application. From perusal of the annexures herein, I note the 1<sup>st</sup> Respondent indeed adhered to the process of compulsory acquisition as stipulated in the law by undertaking gazettement, inquiry, valuation and thereafter presenting the Awards to the Ex parte Applicant. In terms of revision of the two Awards, it has emerged that the EACC exercised its mandate under section 23 of the Anti-Corruption and Economics Crimes Act 2003 to conduct investigations into complaints received at the said Commission and made recommendations to pursuant to the said investigations. Further, that it is EACC that recommended to the 1<sup>st</sup> Respondent the need for re – valuation of the suit properties among others and review of the compensation amounts payable. I note the Ex parte Applicant had recourse under section 128 of the *Land Act* to file a reference to the Environment and Land Court to challenge the revised Awards but instead opted to file these



proceedings. The Ex parte Applicant further claimed the 1<sup>st</sup> Respondent was functus officio and could not revise the said Award.

13. In terms of administrative action, Article 47 of *the Constitution* provides that: ‘(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’.
14. While Section 7 of the Fair Administrative Actions Act provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to — (a) a court in accordance with section 8; or (b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law. Subsection (2) provides that a court or tribunal under subsection (1) may review an administrative action or decision on any of the grounds listed in the said section.

Further, Section 128 of the *Land Act*, 2012 provides that:-

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

15. In the case of *Dupoto Farms Limited v Kenya Electricity Transmission Company Limited & 121 others* [2021] eKLR the Court of Appeal observed as follows:’ However, under Article 40(3) (b) where the State requires land for a public purpose or in the public interest, it may lawfully deprive a person of his land, provided that there is payment in full, of just compensation to the person. The right to property is therefore not absolute. From the affidavits that were filed before the trial court, it is evident that the 1st respondent genuinely required an easement over the suit property and was prepared to pay just compensation to the applicant and to many other persons whose properties were also affected by the public interest project it was undertaking. There are on-going negotiations regarding the quantum of compensation payable. If no agreement on the quantum is eventually arrived at, the law grants the National Land Commission power to determine the amounts payable.’
16. From the facts as presented including my analysis above while associating myself with the aforementioned decisions as well as the cited legal provisions, I find that the 1<sup>st</sup> Respondent indeed adhered to the proper legal process including administrative action while undertaking the process of compulsorily acquiring the suit lands, hence I am unable to make a finding that its actions of presenting the initial Awards amounted to ‘procedural impropriety’. I further do not find that the Ex parte Applicant’s property rights were violated as claimed and that the 1<sup>st</sup> Respondent was functus officio as averred as it is not a Court of competent jurisdiction. The Ex parte Applicant has not demonstrated how the 1<sup>st</sup> and 2<sup>nd</sup> Respondents contravened the Rules of Natural Justice as it was offered revised Awards based on the valuations of the suit properties which it declined and commenced these proceedings. Further, since EACC which is mandated to commence investigations recommended the revision of the Awards which was undertaken by the 1<sup>st</sup> Respondent, I do not find that this contravened the provisions of Section 7 of the *Fair Administrative Action Act* including Articles 40, 47 and 50 of *the Constitution*. I find that the Ex parte Applicant actually seeks to unjustly enrich itself by seeking orders to quash the revised Awards without any justifiable cause. It is my considered view that the *Land Act (Assessment of Just Compensation Rules) 2017* Legal Notice No. 283, sets out the principles of valuation and where a party is aggrieved as in this instance, it should proceed as outlined therein.



17. To my mind, I find that the 1<sup>st</sup> Respondent acted within the law. I concur with the 2<sup>nd</sup> Respondent that it had no role to play in determining compensation Awards and/ or variation of the same as this is the mandate of the 1<sup>st</sup> Respondent. I opine that the ex parte Applicant used a wrong forum seeking to quash the revised Awards. It is my considered view that the ex parte Applicant still has a recourse to file a civil claim, present viva voce evidence to enable the court make a proper determination on the right amounts of compensation.
18. It is against the foregoing that I find the Notice of Motion dated the 29<sup>th</sup> March, 2021 unmerited and will strike it out.

Each party will bear its own costs.

**DATED SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 5<sup>TH</sup> DAY OF MAY, 2022**

**CHRISTINE OCHIENG**

**JUDGE**

