Salim & 2 others v National Land Commission & another (Environment and Land Appeal 21 of 2021) [2022] KEELC 3185 (KLR) (9 May 2022) (Judgment)

Neutral citation: [2022] KEELC 3185 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL 21 OF 2021

LL NAIKUNI, J

MAY 9, 2022

BETWEEN

MUNAA AHMED SALIM ..... 1ST APPELLANT

ABUDE SULEIMAN ABDALLA ..... 2ND APPELLANT

. ABDULKARIM AHMED SALIM... ..... 3RD APPELLANT

AND

NATIONAL LAND COMMISSION ..... 1ST RESPONDENT

KENYA NATIONAL HIGHWAY AUTHORITY ..... 2ND RESPONDENT

(Being an Appeal against compensation offer/award dated 27th May 2019 for compensation for compulsory acquisition of Land Parcel No. MN/VI/1803 Magongo, Mombasa)

JUDGMENT

I. Introduction

1. The appellants being aggrieved with the compensation award dated May 29, 2019appealed to this court vide an amended memorandum of appeal dated filed before this court on July 7, 2021. Thecontents of the memorandum of appeal read thus:-

II. The Appellant's Case

2. The appellant prayed for judgement to be entered against the respondent for:-

    a. The award dated May 29, 2019 Reference No. VAL 1563 of a sum of Kenya Shillings Twenty Nine Million Two Seventy Five Thousand One Hundred and Thirty (Kshs 29,275,130/=) be varied and enhanced to a sum of Kenya Shillings Sixty Two Million (Kshs. 62,000,000/=).

    b. Costs of the suit be borne by the respondents.

c. Any other relief deemed fit to grant by the court.

3. The appeal is founded on the premise, facts and testimony of the 10 Paragraphed supporting affidavit of the 1st appellant, Muma Ahmed Salim. He deponed that the appellants were the registered owners of all that parcel of land known as Land Reference Numbers MN/VI/1803, and annexed a provisional Certificate of title dated December 19, 2003 and four (4) annextures marked as MAS – 1 to 4. On October 12, 2018, vide a Gazette Notice No. 1642, the Respondents listed the suit property as one of the parcels of land to be compulsory acquired for construction of a road. Through a letter of offer dated May 27, 2019, the Respondents offered the Appellants an award of a sum of Kenya Shillings Twenty Nine Million Two Seventy Five Thousand One Hundred and Thirty (Kshs 29,275,130/=) as compensation for the compulsory acquisition of the suit property.

4. The deponent stated that the Appellants dispute the value of the suit property whose current market value stands at a sum of Kenya Shillings Sixty Two Million (Kshs. 62,000,000/=) as per the annexed Valuation report dated May 22, 2019. On February 24, 2020the appellants wrote to the Respondents to inform them that their proposed award was unacceptable and requested for a review. The Respondents declined to review. Instead, they issued the deponent with a statement of acceptance of rejection on October 21, 2020, which the deponent rejected. The deponent argued that the appellants rejected the compensation offer as it failed to consider the valuation report on the value of the property before making the award, which took into consideration the developments on the suit property. He further accused the Respondents of failing to demonstrate that they followed the due process in assessing the value of the property. He urged court to review the award upward to a sum of Kenya Shillings Sixty Two Million (Kshs. 62,000,000/=) as valued in the valuation report.

III. The 1st and 2nd Respondents case

5. The 1st and 2nd respondents vehemently opposed the appeal preferred by the appellant. They filed a 30 Paragraphed replying affidavit that was sworn by Daniel Mbuteti a Senior Surveyor with the 2nd respondent. He averred that the 2nd respondent under its mandate in the Kenya Roads Authority, undertook to construct the dualling of the -Magongo Road, where the appellants were identified as project affected persons (PAPs) and beneficiaries to the compensation for the land acquired for the road expansion. That the 1st respondent issued various Notices of Intention to acquire land in the gazatte Notices. The appellants were invited for inquiry as persons interested in the affected land vide gazatte Notice No. 10503 dated October 12, 2018. The notice indicated that the 1st respondent would acquire 0.048ha of the Appellant's suit property on behalf of the 2nd respondent. The 1st respondent independently inspected the suit property and made an award of Kenya Shillings Twenty Nine Million Two Seventy Five Thousand One Hundred and Thirty (Kshs 29,275,130/=) to the appellants on May 27, 2019. The award that was based on the value of the land and its improvements as well as 15% disturbance allowance.

6. The deponent claimed that the 2nd respondent dispatched to the 1st respondent's bank account the monies to compensate all the affected persons by the project in order to gain vacant possession of the suit property for the road construction. That the award of compensation is not meant to enrich the affected persons but rather to repay for the losses suffered and is acquired on the principle of equivalence subject to the limited government resources. The deponent claimed that on May 3, 2021, the 1st respondent issued the appellants with a notice of taking possession and vesting, notifying the appellants that the compensation payable was deposited in the compensation account as they had rejected the award offer. He argued that the appeal was ill advised and the same should be dismissed

since valuation and just compensation had already taken place. He urged court to reject the appeal which would subject the taxpayer to financial burden of further compensation.

IV. The Submissions

7. On November 9, 2021 while in the presence of all the parties in court, they were directed to file in their written submissions. Pursuant to that, they all obliged and court granted a Judgement date accordingly.

A. The Appellant's Written Submissions.

8. On January 28, 2022 thelearned counsel for the appellant the Law firm of Messrs. Khatib & Company Advocates filed their written Submissions. Mr. Mbwiza Advocate submitted that the preliminary objection was not merited. He argued that this was not a suit per excellence in that what was before court was a reference in form of an appeal made by theappellant being aggrieved by the award made by the 1st respondent under the provision of sections 113 and 128 of the *Land Act*. Indeed, he held that it was instituted by way of a Memorandum of Appeal. It was not a fresh suit as such he reiterated. According to him, the primary defendants in the matter were the National Land Commission who made the award to the Appellant and not the 2nd respondent. In that case no notice was required before instituting the said appeal under the provision of section 128 of the *Land Act*.

9. Therefore, he contended that to allow the objection would be re – writing the provisions of section 128 of the *Land Act*.

   Additionally, the Counsel argued that the provision ofsection 67 of the Roads Actwas no longer tenable in conformity with article 48 and 159 (2) (d) of *the Constitution* of Kenya. To support its case he relied on the decision of "*Council of Governors – Versus – The Senate of Kenya*".

   In the final analysis, he urged court to dismiss the preliminary objection with Costs.

B. The 2nd Respondents Written Submissions

10. On December 6, 2021, the learned counsels for the 2nd respondent the law firm of Messrs. Michelle Akinyi Oduor Advocates filed their written submissions. M/s. Oduor submitted that the 2nd respondent had discharged its duty and that the appellant were not entitled to the amounts sought. She averred that during the construction and dwelling of the Magongo road, the appellants herein were identified as Project Affected Persons. She submitted that the notices for the purposes of land acquisition were published in the National Gazzette on diverse dates and inquiries were held at Changamwe Deputy County Commissioner's Offices on November 15, 2018 as required by law.

11. Further the counsel stated that the National Land Commission in exercise of its statutory powers independently inspected the appellant's structures and developments and made an award of Kenya Shillings Twenty Nine Million, Two Seventy Five Thousand One Thirty Hundred (Kshs. 29,275,130.00) based on the valuation of the suit land improvements and the 15% disturbance allowances as indicated in the award dated the May 27, 2019.

    The Learned Counsel opined that the 1st respondent was obligated by law to compensate an amount that was fair and just with the paramount duty to safeguard the limited Government resources. Further, the counsel held that the role of compensation was to repay people for the losses they held suffered and based on the principles of equivalence which stated that the affected land owners should neither be enriched nor impoverished as a result of the compulsory acquisition.

12. She averred that the computation of compensation for the properties compulsory acquired by the Government was dependent on government values and not privately hired valuers for purposes of

transparrensy and accountability. They held that both the *Land Act* and *the Constitution* of Kenya laid a basis for this aspect. The *Land Act* expects the state and in this respect the National Land Commission would originally assess the value and make an offer.

In support of these averments the learned counsel relied on the decision of Constitution Petition No. 613 of 2014 – *Patrick Musimba –Versus- The National Land Commission and 2 others*.

13. She argued that due process was followed and the amounts paid were in accordance to the valuation done by the 1st respondent the body obligated to conduct valuation and make offers for awards. The appellants therefore are not entitled to the exorbitant amounts sought. Indeed, she submitted the 2nd respondent discharged its duty by making prompt and full payments to the appellants through the National Land Commission the 1st respondents herein, for these reasons, the Learned Counsel prayed that this court finds and holds that the appellants were not entitled to the amounts sought and that the 2nd respondent discharged its duty with regard to the compulsory acquisition. In addition to this, the 2nd respondents has filed and raised a notice of preliminary objection dated November 5, 2021 raising such strong issue on pure law. By the said objection, the Learned Counsel submitted that the appeal was fatally defective and failed to comply with the mandatory Provision of section 67(a) of the *Kenya Roads Act*, 2007 requiring thirty (30) days notice to be issued to the Director General prior to filing of a suit in court.

14. To buttress their point they relied on the decision of "*Mukisa Biscuits Company –Versus- West End Distributors Ltd*. (1969) E.A. 696 and Civil Appeal No. 52 of 2016 *Michael Otieno Nyaguti & 2 others –Versus- Kenya National Highways Authority* (2021)eKLR

> In other words, they argued that the Provisions of Section 67(a) was couched on mandatory terms, and by virtue of it being an Act of parliament had the force of Law. Hence they argued that their preliminary objection on noncompliance with the said section had fulfilled all the ingredients from the above quoted cases, hence they prayed that the court strikes out the Plaintiff's suit and application on these issues they extensively cited numerous cases of "Sumoc Development Company Limited –Versus- George Munyu Kigathi & 2 others (2017) Eklr" and "Kakuta Maimai Hamisi – Versus - Peris Tobiko & 2 Others 2013 eKLR", "Boru Dika – Versus - Gulsan Insaat Turizm & Another (2018) and "Simonash Investment Limited – versus - Kenya National Highway Authority & 2others (2019) eKLR"

In conclusion they urged court to strike out the appellants appeal and the application with costs for failure to comply with the mandatory provisions of law.

V. Analysis and Determination

15. I have keenly considered the application, the response thereto and written submissions made by the parties hereto, the provisions of *the Constitution*, the relevant provisions of the law and the precedents.

In order to arrive at an informed, just and fair decision, I have framed four (4) issues for determination. These are:-

a. Whether the preliminary objection dated November 5, 2021raised by the 2nd defendant meets the fundamental threshold of Law and precedents.

b. Whether the Land Compulsory Acquisition process of the parcel of land belonging to the Appellant was undertaken as required by law or there was any breach inherent for the Land Acquisition.

c. Whether the compensation offered by the 1st respondent of Kenya Shillings Twenty Nine Million Two Seventy Five Thousand One Hundred and Thirty (Kshs 29,275,130.00) for the appellants Plot No. MN/VI/1803 that was compulsorily acquired is adequate.

d. Who will bear the Costs of the Appeal.

ISSUE No. 1). Whether the Preliminary Objection dated 5th November, 2021 raised by the 2nd Defendant meets the fundamental threshold of Law and precedents.

16. According to the Black Law Dictionary a preliminary objection is defined as being:

> " In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary....."

The above legal preposition has been made graphically clear in the now famous case of Mukisa Biscuits Manufacturing Co. Limited – Versus- West End Distributors Limited. [1969] E.A. 696. Where Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure points of law. The Learned Judge then held that:-

> " The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer it raises a pure point of law which is argued 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 in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop"

19. I wish to cite the case of "*Attorney General & another –Versus- Andrew Mwaura Githinji & another* [2016] eKLR:- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a preliminary objection inter alia:-

i. A preliminary objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.

ii. A preliminary objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and

iii. The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

20. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. Certainly, the issues raised by the 2nd respondent herein are serious and pure issues of law which this court is duty bound to critically venture to be heard and determined prior to them being set down the case for full trial on its own merit. The issues are not fanciful nor remote. For these reasons, therefore, I find that the objection raised by the 2nd respondents were properly filed hereof. It constitutes matters akin to be determined at the preliminary level before embarking on the hearing of the case on its own merit in conformity to the case of Mukisa Biscuits Manufacturing Co. Limited (Supra). Therefore, I shall proceed to consider them and determine them accordingly.

Now applying the above principles to the instant case. The court reiterates that the preliminary objection raised by the 2nd respondent, dated 5th November, 2021 to be merited as it is in accordance with the ratio founded in "the Mukisa Biscuits case (Supra), the same falls within the legal confines of the said decision. The honorable court wishes to uphold the objection in that the Provisions of section 67 1(a) of the *Roads Act* 2007 which is very clear, plain and simple. It provides:-

> " Limitation of actions where any action or other legal proceedings 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.
>
> Sub-Paragraph (a)
>
> > " .....the action or legal proceedings shall not be commenced against the Authority until al 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 Plaintiff of his agent"

21. This provision is couched in mandatory terms with the term "Shall" and by virtue of it being an Act of Parliament has the force of the law – meaning it is mandatory for any party wishing to institute proceedings against the Kenya National Highway Authority to give at least 30 days' notice.

Clearly I see the appellant has failed to comply with this condition and thus by that alone the Appeal should fail. I am persuaded by the myriad decisions on the same subject matter as the one in the instant case and which the 2nd Respondent has extensively cited and relied on some of them. For instance, the cases "*Boru Dika –Versus- Gulsan Insaat, Turizon & another* (2018), *Michael Otieno Nyaguti & 2 others* (Supra), *Rianna Furaha Children Home – Versus- KNHA* (2016) eKLR *Unilever Teal Kenya Limited –Versus- National Land Commission & 2 Others* eKLR courts have held in unison that the requirements of notice to be served before commencing legal action under section 67 of the Act did not in any way hinder or curtail the Plaintiffs from pursuing their legal and constitutional rights. Instead it allows the Director General of the 1st defendant an opportunity to address the complaint or claim before legal action is commenced in line with article 159 (2) (c) of *the Constitution* of Kenya. The provision of section 67 (a) was still valid as it had not been declared unconstitutional. The notice was certainly important to enable the 1stdeendant to carry out its mandate efficiently and effectively. For this reason, the preliminary objection by the 2nd respondent succeeds.

ISSUE 2). Whether the Land Compulsory Acquisition process of the parcel of land belonging to the Appellant was undertaken as required by law or there was any breach inherent for the Land Acquisition

22. The above findings notwithstanding, I have decided to still deal with the issues under this sub heading. In order to do justice, all said and done, it's imperative to extrapolate indepth on the concept of Land Compulsory acquisition and in Kenya. The current law or statutory framework governing compulsory acquisition of interest in land is founded under Part VIII, Sections 107 to 133 of the *Land Act* No. 6 of 2012 and article 40 (1), (2) and (3) of *the Constitution* of Kenya (See *Viranda Ramji Gudka & 3 others – Vs – The AG* (2014) eKLR as read together with Part V of The *Land Regulations* of 2017. The process of the compulsory acquisition is in summary provided as follows: -

23. The article 40 (3) provides as follows: -

> 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.

24. Under the provisions of the *Land Act*, 2012, section 107 of the Act holds that, the National Land Commission - the 1st respondent herein is ordinarily prompted by the request of the National or County Government through the Cabinet Secretary or County Executive member respectively for authentication of the compulsory acquisition of land are required to submit the request to NLC providing a reason for the land acquisition which must not be remote or fanciful. Strictly, the Land must be acquired for public purpose or in public interest and not any other purpose as dictated by article 40 (3) of *the Constitution* of Kenya. In this case the threshold must be met.

Significant variation in the law includes section 107 (3) of the *Land Act*, of 2012 which gives the NLC powers to reject a request for acquisition if it establishes that the requirement prescribed in section 107 (3) of the *Land Act* and article 40 (3) of *the Constitution* of Kenya.

Under Section 108, as part of the NLC's due diligence, it must ensure that the land to be acquired is authenticated by the survey department to ascertain the real owner. It must be satisfied that the purpose for public use has been met through conducting intense inquiry that the land is suitable for the intended acquiring body. (See "Nas *Auto Spares – Vs – Land Acquisition & Compensation Tribunal & 2 others* (2015) eKLR).

25. This process is thereafter followed by a verification meeting (See section 107 (2) with the acquiring body where the latter provides a list of affected parcels of land and the respective owners, title searches details, Cadastral Maps of the affected areas, a Resettlement Action Plan (RAP) accompanied by a list or Persons Affected by the Project (PAPs) so that their applications can be put into consideration. Under the provisions of sections 107 (5) & 110 (1) of the Act, the 1st Respondent upon approval of a request for the compulsory acquisition a Notice of the intention to acquire the land is published in the gazette and County gazette. A notice must clear. Failure to give notice in itself is a denial of the natural justice and fairness. The notice is delivered to the Land Registrar as well as every person who appears to have an interest in the land. The NLC should also ensure that the land to be acquired is georeferenced and authenticated by the authority responsible for survey department both County and national governments – section 107 (8) of the *Land Act* for the identification of the legal owner. In the course of such inquiries the NLC 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 as stated out under section 108 of the *Land Act*. This preliminary or per inquiry stage of the land acquisition is merely undertaken by the NLC. The land owners plays no role at all hereof.

26. Under the provision of section 112 of the *Land Act* is where the land owner gets to be involved directly for purposes of determining proprietary interest and compensation. The section makes an elaborate

procedure where at least 30 days after the publication of the notice of intention to acquire land in gazette and at least fifteen (15) days before the actual date of inquiry of an intended inquiry. The NLC is required to serve the notice of inquiry on every person who appears to have an interest on the land in question. The inquiry hearing determines who the interested persons are based written claims for compensation received by the NLC by the date of the inquiry (See section 112 (2) of the Act. At this stage, the NLC exercises a quasi - judicial powers.

For purposes of conducting this inquiry, the NLC has powers of court to summon and examine witnesses including the interested persons and the public body for whose land is acquired and to administer oaths, affirmation and to compel production of documents and delivery of title documents (See section 112 (5) of the Act 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 or land in lieu of the monetary award of land of equivalent value is available. Once the award is accepted, it must be promptly paid by the NLC. Where it is not accepted then the payment is to be made into a special compensation account held by the NLC – as stated under the provision of Sections 113-119 of the Act.

27. If the Land is so acquired the compensation which is just, adequate, full and prompt is to be to persons affected by the project or have interest on the land under the provision of Section 111 of the Act.

Upon the conclusion of the inquiry, the NLC makes compensatory awards to every person whom it has determined to be interested in the land after serving such person with a notice of award and offer of compensation. (See. Sections 113 & 114). Adequate and conclusive compensation can also be in form of land if available, whose value is not exceed that amount of money the NLC considers should have been awarded (See. See section 142 (2). Once the award is accepted, it must be promptly paid by the NLC, after which the process of compulsory acquisition of land is completed by the taking possession of the Land in question being taken by the NLC. The property is 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.

28. Where the award is not accepted then the payment is made into a special compensation account held by NLC and which NLC shall pay interest on the amount awarded at the prevailing bank rates from the time of taking possession until the time of payment and such award is not subject to taxation. A compensation award can be successfully reviewed by court when there has been an error in assessing an award payable through the misapprehension of the nature of the user of property in question as envisaged under the provision ofsections 120-122 of the *Land Act*. In the case *Patrick Musimba* (Supra) the word compensation was viewed as carrying a corollary that the loss to the seller must be completely made up to him on the ground that unless he receives a price that fully equaled his pecuniary detriment the compensation would not see equivalent to the compulsory sacrifice. Just compensation is therefore mandatory. It should be prompt and in full, and should use principles of equivalence but must also protect coffers from improvidence.

Therefore, from the above detailed statutory analogy, its clear that the compulsory acquisition of Land by the state for public use is ordinarily a creature of statute. While this is the case, the citizens should not be deprived, disowned and/or dispossessed of their land by the state or any public authority whatsoever against their wish unless expressly authorized by law and public interest also decisively demands so. The citizen has to be protected from wanton and unnecessary deprivation of their private property. There is no doubt to the fact that deprivation of a person's private property against their will is an invasion of their proprietary rights. There is no contention that while the state is indeed entitled to compulsory acquisition rights of land for public use this fundamental rights must be keen and exercised

with circumspect to be checked lest it is being done merely as an abuse and sheer whimsical gimmick to deprive the citizen their private rights. It's a extremely delicate balance to be weighed with utmost case.

In the case of *Patrick Musimbi –VS- National Land Commission & 4 Others*" Petition No. 613 of 2014" held inter alia:-

> "As the taking of a person's property is a serious invasion of his proprietary rights, the application of constitutional or statutory authority for the deprivation of those rights require to be most carefully scrutinized. In short, in our view, there must always exist a presumption against an intention to interfere with vested property rights as the legislative and constitutional intentions is always the protection rather than interference with the proprietary rights.....the power to expropriate private property as donated in the State by both *the Constitution* and statute law (the *Land Act*) leaves the private land owner with no alternative. The power involves the taking of a person's land against his will. It is a serious invasion of his proprietary rights through the use of statutory authority. The private land owner has no alternative but wait for compensation. It is consequently necessary that the court must remain vigilant to see to it that the State or any organ of the State does not abuse the constitutional and statutory authority to expropriate private property. It is on this basis that courts have consistently held that the use of statutory authority to destroy proprietary rights requires to be most carefully scrutinized. Just compensation is mandatory"

29. Suffice to it say, the main quest in the matter is compensation. As was stated by Scott L.J. in relation to compulsory acquisition in the case of "*Horn –VS- Sunderland Corporation* [1941] 2KB 2640 "The word "Compensation" is almost of itself carried the corollary that the loss to the seller must be completely made up to him, on the ground that unless he receives a price that fully equated his pecuniary detriment, the compensation would not be equivalent to the compulsory ....."

Based on the above legal expose, the Law demands that where land has been acquired compulsory from an owner that just compensation is to be paid in full to the said affected person(s). This is in line with the Constitutional requirement underarticle 40 (3) of *the Constitution* of Kenya and that person should not be deprived of their property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation.

30. From the above observation, the facts derived from the pleadings and the law herein and the cited relevant provisions of the law, this court finds it significantly satisfactory that the Appellant entitled to a full, fair, prompt and just compensation for the compulsory acquisition of its parcel of land and indeed the payments were made accordingly.

I reiterate that Compulsory acquisition of land is a limitation to proprietary rights, provided for by article 40 (3) of *the Constitution*, which states:-

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.

31. In the instant case, the appellants' case is that they are the registered proprietors of MN/VI/1803 which therespondents have acquired through compulsory acquisition of land. The Appellants claim that on 27th May 2019 vide a letter of offer Ref. No. 156, the respondents offered them an award of Kenya Shillings Twenty Nine Million Two Seventy Five Thousand One Hundred and Thirty (Kshs 29,275,130/=) as compensation for compulsory acquisition of the suit property. The Appellants wrote to the respondents on February 24, 2020 informing them that the proposed award was below the value of the suit property and requested them to review it upwards; based on the Valuation Report dated May 22, 2019 from Musyoki & Associates, who values the suit property at a sum of Kenya Shillings Sixty Million (Kshs 62,000,000/=).

32. The respondents rejected the appellants claim, and averred that the appellants were identified as Projected Affected Persons and beneficiates to the compensation for the land acquired for the construction of the Dualling of Magongo Road/Airport Access Road. The respondents averred that on diverse dates they issued and published Notice of intention to acquire land and notice for inquiries in the Kenya Gazatte. That the appellants were invited for inquires for persons interested in the affected parcels of land vide a gazatte notice No. 1053 dated October 12, 2018, which stated that the 1st respondent would acquire the suit property on behalf of the 2nd respondent, the said inquiries were, held at Changamwe Deputy Commissioner Office on November 15, 2018.

33. The Respondents maintain that the 1st respondent, independently inspected the developments on the suit property and made an award of a sum of Kenya Shillings Twenty Nine Million Two Seventy Five Thousand One Hundred and Thirty (Kshs 29,275,130/=). The said award was based on the valuation of the land, improvements and 15% disturbance allowance. The Respondents argue that the 1st Respondent having made a determination on the amount due and payable to the Appellants, and having deposited the same amount to the compensation account, the appellants claim is absurd and cannot stand in law. The Respondents further contended that the role of compensation in compulsory acquisition of land is to repay persons affected for the loss suffered based on the principle of equivalence which states that the affected landowners should neither be enriched nor impoverished as a result of the compulsory acquisition. The Respondents indicated that the 1st Respondent has since taken possession of the suit property as notified to the Appellants vide a letter dated 3rd May 2021, the Notice of taking possession and vesting. The letter informed the appellants that the compensation payable to them has been deposited in the compensation amount because they rejected the award offer.

34. The statutory framework for compulsory acquisition as provided by article 40 (3) of *the Constitution*, is Part VII of the *Land Act*. It provides that the 1st Respondent is responsible for acquiring land for public use behalf of the National Government, in this case the 2nd respondent who is mandated to construct and maintain national highways. The first step of compulsory acquisition is the National Land Commission publishing in the gazatte a Notice of Intention to acquire land as provided by section 107 (5) of the *Land Act*. The 2nd Respondent has annexed a Gazatte Notice No. 10503 of October 12, 2018 marked DM-2, which is a Notice with the intention to acquire the suit property for KeNHA to construct Port Reitz Road/Moi International Airport Road (C110).

35. The notice also notified the Appellants that inquires for persons interested in the affected land parcels would be held on, in case of the suit land on 15th November 2018 at Changamwe Deputy County Commissioner Offices. Until the public inquiry, the role of the appellants as the registered owners was limited with the National Land Commission taking a centre - stage of the process. However section

112 of the *Land Act* creates a quasi-judicial process where all interested persons are invited to present evidence to support any claim of compensation. The Section provides that:-

3. At the hearing, the Commission shall—

   (a) make full inquiry into and determine who are the persons interested in the land; and

   (b) receive written claims of compensation from those interested in the land.

4. The Commission may postpone an inquiry or adjourn the hearing of an inquiry from time to time for sufficient cause.

5. For the purposes of an inquiry, the Commission shall have all the powers of the court to summon and examine witnesses, including the persons interested in the land, to administer oaths and affirmations and to compel the production and delivery to the Commission of documents of title to the land.

6. The public body for whose purposes the land is being acquired, and every person interested in the land, is entitled to be heard, to produce evidence and to call and to question witnesses at an inquiry.

In my view, at the point of inquiry, the appellant ought to have presented the valuation report to the NLC for consideration. The claim that the appellants have herein of the suit land being undervalued would have been best placed before the Commission at the inquiry stage as provided bysection 112 of the *Land Act*.

36. After the inquiry process has been concluded,section 113 of the *Land Act* states that the Commission shall prepare written award and make a separate award of compensation for every person deemed to have an interest in land. This award is final as provided by section 113 (2):-

> Subject to article 40 (2) of *the Constitution* and sections 122 and 128 of this Act, an award
>
> a. shall be final and conclusive evidence of—
>
> i. the size of the land to be acquired;
>
> ii. the value, in the opinion of the Commission, of the land;
>
> iii. the form of the compensation payable, whether the persons interested in the land have or have not appeared at the inquiry; and
>
> b. shall not be invalidated by reason only of a discrepancy which may thereafter be found to exist between the area specified in the award and the actual area of the land.

37. The Commission awarded the 1st appellant Kenya Shillings Twenty Nine Million Two Seventy Five Thousand One Hundred and Thirty (Kshs 29,275,130/=) as payment of the affected persons, in the compulsory acquisition of the suit property. On October 21, 2020, the 1st Appellant rejected the award, and on February 21, 2020 wrote to the Commission of their dissatisfaction with the award and their intention to appeal against the same. Where the award is not accepted, the payment of the award is made into a special compensation account held by the Commission as provided by section 115 (1) of the *Land Act*.

38. The process is completed with the land in question being physically possessed by the Commission since the land is now deemed to have vested in the National Government. This was evidenced by the

Notice of taking possession and vesting dated May 3, 2021to the 1st appellant. The notice advised the 1st appellant that his award was deposited in the Compensation account, since he rejected the award officer and also to notify him to issue to issue KeHNA with vacant possession in 30 days to pave way for road construction.

39. The Appellants are challenging the compensation award offered by the 1st Respondent. However from the material before this Honorable Court, the Appellants are not disputing the procedure adopted in the process of acquisition. There is no specific section of Part VII of the *Land Act* that is alleged to have been breached by the respondents. The various gazette notices exhibited by the respondents confirm that the appellant was aware and was involved in the process of compulsory acquisition of the suit property. The respondents has also satisfied to court that the necessary notices were issued and served upon the Appellants before possession was taken.

40. The question before court is whether there was inquiry as to compensation as envisioned in section 112 of the *Land Act*. Compensation is at the heart of compulsory acquisition, it therefore has to be prompt, just and full. The gazatte Notices No. 1642 of March 13, 2015 and No. 10503 of October 12, 2018, invited the 1st appellant as the owner of the suit property to make claim for compensation and present any evidence in support of that claim. The gazatte notices were specific and were public notices regarding acquisition of land, I have no doubt that the appellants were well made aware of the public inquiry that would take place at the office of the Deputy County Commissioner on November 15, 2018. The respondents accorded the appellants with the required notices on inquiry into compensation, the decision to oblige with the said notices remains with the appellants.

41. I now consider whether there was prompt, just and full compensation, the 2nd respondent has argued in their replying affidavit that the 1st respondent is legally obligated to pay an amount that is just and fair, at the same time safe guarding the limited government resources. Daniel Mbuteti, argued that compensation only repays the losses suffered and is based on the principle of equivalence of neither seeking enrichment of poverty. The overarching right to compensation under article 40 (3) of *the Constitution* was discussed in the case of the "*Patrick Musimba – Versus - National Land Commission & 4 others* [2016] eKLR:-

> " The law allows compensation to take the form of either an alternative parcel of land or cash in lieu: see section 114(2) of the *Land Act*.

With regard to the instant case, the compensation was to take the form of monetary payments. We can only point out what the framers of *the Constitution* had hoped to achieve by making provision for compensation.

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 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 though compulsory acquisition. As was stated by Scott L.J, in relation to compulsory acquisition, in the case of *Horn-v- Sunderland Corporation* [1941] 2 KB 26,40:

> "The word "compensation" almost of itself carries the corollary that the loss to the seller must be completely made up to him, on the ground that unless he receives a price that

fully equaled his pecuniary detriment, the compensation would not be equivalent to the compulsory sacrifice".

Effectively Lord Scott's statement gave rise to the unabated proposition that the compensation of compulsorily acquired property be quantified in accordance with the principle of equivalence. A person is entitled to compensation for losses fairly attributed to the taking of his land but not to any greater amount as "fair compensation requires that he should be paid for the value of the land to him, not its value generally or its value to the acquiring authority": see the case of "*Director of Buildings and Lands – Versus - Shun Fung Wouworks Ltd* [1995] AC 111,125.

We see no reason why the same approach should not be adopted locally. *The Constitution* decrees "just compensation" which must be paid promptly and in full. *The Constitution* dictates that the compensation be equitable and lawful when the word "just" is applied as according to *Black's Law Dictionary* 9th Ed page 881 the word "just" means "legally right; lawful; equitable". In our view, the only equitable compensation for compulsory acquisition of land should be one which equates restitution. Once the property is acquired and there is direct loss by reason of the acquisition the owner is entitled to be paid the equivalent. One must receive a price equal to his pecuniary detriment; he is not to receive less or more. This can be achieved to the satisfaction of the owner of the land by reference to the market value of the land."

42. The purpose of the 1st respondent assessing the value of the suit property and offering an award, is to weed out and discourage attempts by land owners of causing exaggeratedly high compensation prices on compulsory acquisition. The appellants have not challenged the inquiry on compensation and the respondents have confirmed the same was held. The letter dated February 22, 2021 from the 2nd respondent to the 1st respondent confirms that payment was advanced to pay other land owners.

43. From the record, the mandatory processes were followed before the suit property was acquired. The valuation report tabled before court was conducted by a private valuer, who could likely have tailored it to support the appellants claim. The report would have been best placed before the 1st respondent during the inquiry for compensation proceedings where evidence is accepted and hearings are conducted.

Issue No. 3 – Who will bear the Costs of the appeal?

44. It is trite law now that the issue of costs is discretionary. Under the provision of section 27 of the *Civil Procedure Act*, cap. 21 provides and many courts have adhered to this legal preposition to the effect that costs follow the events.

The events herein are the result or the circumstances of each case. In the instant one, the results are that the appellant has failed to demonstrate or prove its appeal on a preponderance of probability. Its appeal has failed. Therefore, the 1st and 2nd respondents have to be awarded the costs of the appeal instituted by the appellant. That is the correct position on law.

IV. Conclusion and Disposition

45. Ultimately, based on the detailed and thorough analysis made herein from the above framed issues, this honorable court is unable to disturb the award of compensation offered to the appellants by the respondent. Thus, I now proceed to order as follows:-

a. That the process and the actual compulsory acquisition of the parcel of land belonging to the appellant was lawful, procedural and the award offered was just, prompt, adequate and fair compensation.

b. That the Notice of thepreliminary objection dated November 5, 2021 raised by the 2nd respondents is meritorious and hence succeeds on grounds that it raises pure issues of law.

c. Thatthe amended memorandum of appeal dated June 30, 2021 be and is hereby dismissed with costs to the 2nd respondent.

It Is so Ordered Accordingly.

JUDGEMENT DATED, SIGNED AND DELIVERED AT MOMBASA THIS ...9TH DAY OF MAY 2022.

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT

MOMBASA

In the presence of:-

M/s. Yumna, Court Assistant.

Mr. Mbwiza Advocate for the Appellant/Applicant.

Non appearance for the Respondent.