



Mwavumbo Group Ranch v National Land Commission & 3 others (Environment & Land Case 164 of 2021) [2022] KEELC 4897 (KLR) (6 July 2022) (Ruling)

Neutral citation: [2022] KEELC 4897 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 164 OF 2021**

AE DENA, J

JULY 6, 2022

BETWEEN

MWAVUMBO GROUP RANCH PLAINTIFF

AND

NATIONAL LAND COMMISSION 1ST DEFENDANT

KENYA RAILWAYS CORPORATION 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

ATTORNEY GENERAL 4TH DEFENDANT

RULING

Background

1. This suit was commenced by way of a plaint filed on October 1, 2019 and the subject matter parcel No Kwale/Mavumbo/1 (hereinafter referred to as the suit property) which the plaintiffs claim it is the registered proprietor. It is pleaded that the suit property is among the parcels of land affected by construction of phase 1 of the standard gauge railway (SGR). That the suit property was compulsorily acquired by the 2nd defendant and to date no payment for compensation has been effected. It is stated that the 1st and 2nd defendants who are responsible in effecting the compensation have not been keen on their obligation and the 2nd defendant has denied any responsibility on their part necessitating the filing of this suit. The plaintiff craves the following orders;
 - a. A declaration that the plaintiff is entitled to the compensation for the portion of its land compulsorily acquired for the construction of the standard gauge railway
 - b. Kshs 1,011,947,000/=compensation for the suit property compulsorily acquired for the construction of the standard gauge railway



2. The 1st defendant did not file appearance though served.
3. The 2nd defendant has denied the allegations raised in the plaint through their defence dated November 18, 2021. The 2nd defendant's case is that the compensation over the suit property was remitted to the 1st defendant for onward transmission to the plaintiff as required by law. They totally deny any liability on their part with regards to acquisition of the suit property.

The Application

4. The application before court is the notice of motion dated November 18, 2021 brought inter alia under the provisions of order 1 rule 10[2] and 51 rule 1 of the [Civil Procedure Rules 2010](#) and seeks the following orders;
 - a. The claim against the 2nd defendant in the plaint dated September 30, 2019 and filed on October 1, 2019 be dismissed with costs.
 - b. Costs of this application be provided.
5. The application is premised on the following grounds;
 - a. section 125[1] of the [Land Act](#) imposes the obligation to pay compensation for compulsory acquisition on the National Land Commission.
 - b. further, section 117[1] of the [Land Act](#) imposes the obligation to pay interest for unpaid compensation on the National Land Commission.
 - c. The 2nd defendant does not have any legal liability to compensate the petitioner or pay interest arising from the compulsory acquisition.
 - d. The plea for compensation and other reliefs sought on compulsory acquisition do not lie against the 2nd defendant.
 - e. The 2nd defendant remitted to the National Land Commission, the 1st defendant herein, all the funds required to compensate persons affected by the standard gauge railway project.
 - f. The 2nd defendant having already remitted the funds, the claim for compensation lies squarely against the National Land Commission and not the 2nd defendant
 - g. The standard gauge railway [SGR] project has already been completed.
 - h. The 2nd defendant is a state corporation established under the [Kenya Railways Corporation Act](#) with no legal duty to pay compensation or interest arising from compulsory acquisition.
6. The application is supported by the affidavit of Christine Macharia senior legal officer of the 2nd respondent. She depones that the obligation to pay compensation for compulsory acquisition is imposed on the National Land Commission by section 125[1] of the [Land Act](#). Further that section 117[1] of the [Land Act](#) imposes the obligation to pay interest for unpaid compensation on the National Land Commission. That the 2nd defendant does not have any legal liability to compensate the petitioner or pay any interest arising from compulsory acquisition. That the 2nd respondent has already remitted the funds and hence the claim for compensation lies squarely against the 1st defendant.

Response To The Application

7. The plaintiff filed a replying affidavit sworn by William Chimega on January 25, 2022 the current chairman of the plaintiff. He stated that the 2nd defendant has not annexed any documentary evidence



to support the position with regards to the averments it's raising. That acquisition of the land for construction of the SGR was in the year 2014 as evidenced by gazette notice No 4096 issued on June 20, 2014, long before the amendment No 28 of 2016 which introduced the clause requiring the acquiring body to deposit with the 1st defendant the compensation funds.

8. It was stated that the suit was necessitated by the 2nd defendant's letter dated June 6, 2015 where it was denied that there was compensation due to the plaintiff. The deponent asked the court to dismiss the application as it lacks in merit.

Submissions Of The Parties

9. Parties filed and exchanged submissions by order of this court.

2nd Defendant's Submissions

10. It is submitted that the 2nd defendant does not have any liability towards compensation of the plaintiff as section 125[1] of the Land Act 2015 imposes liability solely on the 1st defendant. Three issues for determination were summarised as follows; -

Whether the 2nd defendant has any legal duty to pay the Kshs 1,111,947,000/- sought under paragraph [a] and [b] of the plaint

11. Counsel argued that the law imposes obligation to pay compensation for compulsory acquisition exclusively on the 1st defendant which is affirmed by section 125[1] of the Land Act 2015. Reliance was placed in Republic v National Land Commission & 2 others exparte Samuel M N Mweru & 5 others [2018]eKLR. That the 2nd defendant being the acquiring authority had already remitted funds to the 1st defendant to compensate the affected persons who include the plaintiff.
12. It is further submitted that the obligation to pay interest for unpaid compensation falls on the 1st defendant as provided for under section 117[1] of the Land Act 2015 and enunciated in Kipkai Enterprises Limited v Kenya Urban Roads Authority & 2 others [2019] eKLR, Geyser International Assets Limited v AG & 3 others [2021]eKLR.

Whether The 2nd Defendant Is A Necessary Party To This Suit

13. It is contended that the plaint does not disclose any cause of action against the 2nd defendant making the 2nd defendant not a necessary party to the suit. It is submitted that the plaint should be dismissed as against the 2nd defendant and the 2nd defendant discharged from the present proceedings. Counsel cited the cases of James Kimathi v Inspector General of Police & 3 others [2020] eKLR and Victor Mabachi & another v Nartun Bates Ltd [2013] as cited with authority in Investments and Mortgages Bank Limited v Nancy Thumari & 3 others [2015] eKLR.

Plaintiffs Submissions

14. The plaintiff's submissions were filed on April 19, 2022. It is submitted that the 2nd defendant application is premised on wrong assumptions that the 2nd defendant is a wrong party, that an award was prepared and served upon the plaintiff and that the 2nd defendant released the awarded sum to the 1st defendant. It is submitted that the 2nd defendant is properly joined in the suit as the suit arose out of compulsory acquisition of the plaintiff's land in which the 2nd defendant was the acquiring body.



15. Counsel submits that the provisions upon which the application is premised only refer to striking out names of a party improperly joined. In the instant case the provisions being order 1 rule 10[2] of the Civil Procedure Rules do not apply.
16. It is also submitted that the acquisition was done in 2014 before amendment of section 107[4] of the Land Act 2012. That the 2nd defendant cannot therefore refer to the 1st defendant as the body tasked with the same. Referring to the 2nd defendant's letter dated July 6, 2015 which stated that the affected persons had already been compensated, it was clear that the decision to compensate was by both the 1st and 2nd defendants. It is also stated that the 1st defendant has not filed any document in the proceedings and in the event that they do not enter appearance and deny having ever received funds to compensate, the 2nd defendant will then require to illustrate by evidence that the funds were indeed sent.
17. It is submitted no award was prepared and no notice was served upon the plaintiff as contemplated under sections 113 and 114 of the Land Act 2012. That no evidence has been tabled by the defendants to show the award for the suit property. Further that section 117 of the Land Act relied upon by the 2nd defendant is in relation to where an award has been prepared and notice issued upon the affected land owner. In the instant case no award was prepared. That the award made by the 1st defendant is the evidence of the value of the suit property as per section 113[2][a] [ii] of the Land Act 2012.
18. The plaintiff states that the 2nd defendant should prove to the court that indeed funds were forwarded to the 1st defendant for onward transmission to the plaintiff. The plaintiff asked for the application to be dismissed with costs for lacking in merit.

Analysis and Determination

19. I have considered the rival submissions plus the material placed before me. I have identified the main issue for determination is whether the 2nd defendant is a necessary party in these proceedings or their presence is a misjoinder.
20. The application to have the suit struck out as against the 2nd defendant has been brought pursuant to the provisions of order 1 rule 10(2) of the Civil Procedure Rules 2010 which provides as follows: -

“The court may at any stage of the proceedings, either upon or without application to either party and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to be joined whether as plaintiff or defendant, or whose presence before court may be necessary in order to enable court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added”
21. It is the applicant's case that they are under no obligation to pay compensation for compulsory acquisition of land since it is the duty and obligation of the 1st defendant as provided for under section 125[1] of the Land Act. They further state that funds were already remitted to the 1st defendant for compensation of all persons affected by the standard gauge railway project the plaintiff included.
22. In order to clearly comprehend the compulsory acquisition process and the necessary parties in facilitating the same, the court is guided by the statutory framework of compulsory acquisition which is founded on part viii of the Land Act No 6 of 2012. Initially the same was based on the provisions of the Land Acquisition Act repealed on February 15, 2012 paving way for the Land Act 2012. This was



aptly put by Mutungi, J in the case of *Virendra Ramji Gudka & 3 others v Attorney General* [2014] eKLR when he asserted; -

“Rights of compulsory acquisition are conferred by specific provisions of the law being article 40 of the *Constitution* and sections 107 to 133 of the *Land Act*, No 6 of 2012 which replaced the provisions previously contained in the *Land Acquisition Act*”

23. The High Court in *Patrick Musimba v National Land Commission & 4 others* [2016] eKLR elaborated the whole compulsory acquisition process from paragraph 85-89 as here below;

process of compulsory acquisition

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*.

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

24. Based on foregoing provisions of case law and statutes, it is the 1st defendant that is mandated with the whole compensation process and procedure. However, the plaintiff indicates that the suit property was acquired in 2014 before amendment of section 107[4] of the *Land Act* 2012. Initially it was the acquiring body that was mandated to compensate the persons from whom they had acquired land from, that it was after amendments to the Act that the National Land Commission was solely tasked with compensation. The plaintiff further states that in the 2nd defendants letter dated July 6, 2015 it is stated that all persons affected by the compulsory acquisition had been compensated. However, the plaintiff state that they are yet to receive payment and this is the reason they have filed this suit. They are wary that in the event that the 2nd defendant is struck off the suit as a party, it will be left with no one liable in answering the question as to whether the funds for their compensation were forwarded to the National Land Commission or not. If anything, The National Land Commission who are the 1st defendant are yet to respond to the suit.



25. I find it necessary to re-visit the [Land Act](#) before the amendments herein were effected to establish who was tasked with the mandate and obligation to compensate the plaintiffs at the time of acquisition of the suit property. section 111 of the [Land Act](#) 2012 provided that;
- compensation to be paid
- 111[1] if land is acquired compulsorily under this Act, just compensation shall be paid promptly in full to all persons whose interest in the land have been determined.
26. By an amendment made *vide* the [Land Laws\[amendment\]Act 2016](#) at section 78, amendments were made to section 111 of the [Land Act](#) 2012. The same were more specific on the mandate to effect compensation. It is stated thus;
- section 78 the [Land Laws \[Amendment\] Act 2016](#)
- section 111 (is amended) by inserting a new subsection immediately after subsection [1]-
- 1[A] the acquiring body shall deposit with the commission the compensation funds in addition to survey fees, registration fees and any other costs before the acquisition is undertaken.
27. The above provisions of the law illustrate that before the amendment to the Act, the 1st defendant was not the only body mandated to effect compensation. It automatically follows that the acquiring body in this case the 2nd defendant was involved with compensation of persons from whom land had been acquired. For now, the 2nd defendant have only stated in their pleadings that funds were released but have not tendered proof thereof as regards the plaintiff's compensation. The gazette notice clearly shows the plaintiff Mwavumbo group ranch 1 174.646 ha was acquired. The 1st defendant on the other hand has not confirmed whether the said funds were indeed received and if so what became of the same as regards the plaintiffs compensation. I have read the ruling in [Geysler International Assets Limited v Attorney General & 3 others](#) (2021) where the learned judge was faced with a similar situation where the petitioner was concerned that letting the acquiring body off the hook would frustrate them in attaining their full payment and also access information. The judge retained them as amicus curie. It is also noteworthy that in *Geysler* compensation had been received which the judge took cognizance of in finding it difficult to apportion liability to the acquiring body. Part of the claim was on interest for delayed payment. In the present case no compensation has been received by the plaintiffs, they are also not claiming interest and the defendant's argument in this regard I respectfully agree is not supported by the facts.
28. Based on the process of compulsory acquisition it is the acquiring body that instigates the request through their cabinet secretary and they are the ones who undertake the preliminaries to inform which land and who is to be compensated. Infact the letter dated May 6, 2015 from the NLC which triggered this suit states that '...please note Kenya Railways Corporation as the acquiring body is the one undertaking survey of land and you should consult them for advice on whether there is any land compensable to the ranch for the commission to expedite.' The 2nd defendant must have answers as to what happened, they should set the record straight and not hide under the law. In any case they are expected to receive a statement of how the funds were applied otherwise how do they account for money that has left the corporation. It is this court's view that the 2nd defendant is a necessary party to these proceedings whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit as was elucidated in [Zephir Holdings Ltd v Mimosa Plantations Ltd, Jeremiah Maztagaro and Ezekiel Misango Mutisya](#) (2014) eKLR, In the event that they remitted funds to the 1st defendant for payment to the plaintiff, an opportunity for them to prove the same will be granted at



the hearing where they will table evidence to that effect. I'm not letting them off the hook. The upshot is that the application dated by the 2nd defendant is lacking in merit and the same is dismissed with costs to the plaintiff.

It is so ordered.

DELIVERED AND DATED AT KWALE THIS 6TH DAY OF JULY, 2022.

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Odongo holding brief for Siminyu for the Plaintiff

No appearance for 1st Defendant

Mr. Mwai Holding brief for Mr. Karina for 2nd defendant

No appearance for 3rd & 4th Defendants

Mr. Denis Mwakina- Court Assistant

