



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 8 OF 2016

PETER ANDERA MASAKHALIA.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF KAKAMEGA.....DEFENDANT

JUDGEMENT

In the amended plaint the plaintiff avers that, at all material times to this suit the plaintiff is the registered owner over land parcel No. NORTH WANGA/LUNG'ANYIRO/91 measuring approximately 2.63 hectares as shown on diagram No. 9 of the land map. On or about 24/3/2016 the defendant without the consent of the plaintiff trespassed onto the L.R. NO. NORTH WANGA/LUNG'ANYIRO/91 and maliciously cut down the trees and damaged the plaintiff's food crops then growing on the suit land. By reason of the 3rd defendant's action through its agents and or servants on or about 24/3/2016 of felling down the plaintiff's 163 trees and damaging the plaintiff's food crops, the plaintiff suffered special damages. Particulars of special damages;

(a) Value of 163 trees destroyed estimated at Ksh. 1,630,000/=.

(b) Valuation fees paid for assessment of felled trees to forest officer of Ksh. 20,000/=

(c) Value of damage food crops estimated at Ksh. 23,089.80.

(d) Valuation fees paid to land valuer for valuation of portion occupied by the public road in issue in respect to suit land Ksh. 15,000/=.

Total special damages Ksh. 1,688,089.80.

And the plaintiff claims special damages totaling Ksh. 1,688,089.80. The plaintiff avers the 3rd defendant has by itself, its servants and/or agents has as from on about 24/3/2016 constructed Lung'anyiro Bulander public road passing through the plaintiff's land parcel No. NORTH WANGA/LUNG'ANYIRO/91 which road has occupied 0.275 acres of plaintiff's suit land and thus the plaintiff has suffered loss for having failed to utilize the said portion in occupation of the public road. The plaintiff seeks for a declaration that the invasion or encroachment on L.R. NO. NORTH WANGA/LUNG'ANYIRO/91 from 24/3/2016 by the defendant's agents or servants in creating a public road thereon was illegal and unlawful hence the plaintiff is entitled to compensation for the loss of 0.275 hectares that formed part of the suit land. The County Government of Kakamega, the defendant herein be ordered to compensate the plaintiff for the value of the 0.275 hectares portion occupied by the public road created on 23/4/2016 on L.R. NO. NORTH WANGA/LUNG'ANYIRO/91 at Ksh. 250,000/=. Costs of the suit with interest on special damages from date of filing the amended plaint till judgment. Special damages of Ksh. 1,938,089.80.

This court has carefully considered the case and the submissions herein. As was stated by Mutungi, J in the case of Virendra Ramji Gudka & 3 Others –v- Attorney General [2014]eKLR.

“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”.

The meaning and intent of the Article 40 (3) of the Constitution. Article 40, reads in part as follows:

40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(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.

The Land Acquisition Act (now repealed) provided for the procedure to be followed in the compulsory acquisition of property by the Government of Kenya. When the compulsory acquisition herein began, the Land Acquisition Act Cap 295 Laws of Kenya, Section 3 of the Land Acquisition Act provided as follows:-

“Whenever the Minister is satisfied that the need is likely to arise for the acquisition of some particular land under section 6, the Commissioner may cause notice thereof to be published in the Gazette, and shall deliver a copy of the notice to every person who appears to him to be interested in the land.”

The Universal Declaration of Human Rights has the force of law in Kenya. In the case of *R vs Chief Immigration Officer* (1976) 3 AER 843 Lord Denning stated thus regarding the Universal Declaration of Human Rights;

“... Among the important rights which individuals traditionally have enjoyed is the right to own property. This right is recognised in the Universal Declaration of Human Rights (1948). Article 17(1) which states that everyone has the right own property and Article 17(2) guarantees that “no one shall be deprived of his property” The contention of the State counsel negates this right. An intention to provide for arbitrary infringement of human rights cannot be attributed to the legislature unless such intention is unequivocally manifest. When Parliament is enacting a statute, the court will assume that it had regard to the Universal Declaration of Human Rights and intended to make the enactment accord with the Declaration and will interpret it accordingly...”

And Justice G.V. Odunga in *Republic v Council of Legal Education Ex-parte Nyabira Oguta* (2016) eKLR, phrased it thus:

Our Constitution embodies the values of the Kenyan Society, as well as the aspirations, dreams and fears of our nation as espoused in Article 10. It is not focused on presenting an organisation of Government, but rather is a value system itself hence not concerned only with defining human rights and duties of individuals and state organs, but goes further to find values and goals in the Constitution and to transform them into reality.

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”.

In that regard, in the case of *Raticliffe vs Evans* (1892) QB 524 with regard to damages, the Court stated that;

“...The character of the acts themselves which produce the damages and the circumstances under which those acts are done must regulate the degree of certainty and particularity with which the damages done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage as is reasonable having regard to the circumstances and to the nature of the acts themselves by which the damage is done to relax old and intelligent principles, to insist upon more would be the vainest pendency...”

In the case of *Commissioner of Lands & Another vs. Coastal Aquaculture Ltd Civil Appeal No. 252 of 1996 KLR (E&L 264)* the Court of Appeal held that in cases of compulsory acquisition the government is required to strictly adhere to the provisions of the Constitution and the Land Acquisition Act (now repealed). In *Arnacherry Limited v Attorney General* (2014) eKLR the court held that;

“This is indeed a sad and distressing Petition. It is not expected that the State, in this age and time and with a robust Constitution

such as ours, can actively participate in acts of impunity such as the forceful take-over of personal property without due compensation. The take-over has lasted 30 years and that makes the said action all the more disturbing.”

If land is so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined. 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.

From my above observations, DW1, Wycliffe Shiholo Kisenya the ward administrator admits that a portion of the plaintiff's land was hived off to create a public road. DEx 4 are minutes of a chief's baraza where residents of Munani sub location were asked to open up links roads to open up the area. Despite a court order restraining the defendant from doing so the latter went ahead and constructed the road. This appears to be a case of compulsory acquisition of private property of which the proper procedure was never followed. The plaintiff adduced evidence of damage to his crops and trees and acquisition of part of his property for the said road. His evidence has not been challenged. PW2 produced photos of the damage PEx6. PW5 the Valuer produced a report PEx4 showing the value of the land 0.275 acres that had been acquired for the public road was Kshs. 250,000/= and valuation fees in respect to suit land was Ksh. 15,000/=. PW4 the forestry officer produced a report PEx2 to confirm the extent and cost of the damage to the trees estimated at Ksh. 1,630,000/= and valuation fees was 20,000/=

PW5 the Agricultural Officer produced his report PEx3 showing the cost of the damaged agricultural crops at Ksh. 23,089.80. Total special damages Ksh. 1,688,089.80. I find that the plaintiff has established his case on a balance of probabilities and I grant the following orders;

1. A declaration that the invasion or encroachment on L.R. NO. NORTH WANGA/LUNG'ANYIRO/91 from 24/3/2016 by the defendant's agents or servants in creating a public road thereon was illegal and unlawful hence the plaintiff is entitled to compensation for the loss of 0.275 acres that formed part of the suit land.
2. The defendant is ordered to compensate the plaintiff for the value of the 0.275 acres portion occupied by the public road created on 23/4/2016 on L.R. NO. NORTH WANGA/LUNG'ANYIRO/91 at Ksh. 250,000/=.
3. Special damages of Ksh. 1,688,089.80.
4. Costs and interest of this suit.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 4TH JULY 2019.

N.A. MATHEKA

JUDGE