



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**CIVIL NO. 149 OF 2012**

**SHAYONA TIMBER LIMITED.....APPLICANT**

**VERSUS**

**KENYA NATIONAL HIGHWAY AUTHORITY.....RESPONDENT**

**JUDGMENT**

*(Plaintiff suing defendant for interfering with its land; the land having been purchased from the previous owner when the Government developed interest to compulsorily acquire it; defendant arguing that the process of compulsory acquisition was completed and the former owner fully paid for the value of the land; process of compulsory acquisition having been stopped by court; previous owner having by consent allowed the plaintiff ownership of the suit land and writing to the Government informing them to deal with the plaintiff on the intended acquisition; no proof of any payment having been made either to the previous owner or to the plaintiff for the acquisition of the suit land; defendant cannot therefore claim that the land was compulsorily acquired; judgment entered for the plaintiff and defendant restrained from the suit land)*

1. This suit was commenced through a plaint which was filed on 26 April 2012. The plaintiff is a limited liability company whereas the defendant is a State Corporation established under the Kenya Roads Authority Act, 2007. It is the case of the plaintiff that she is the owner of the land parcel LR No.9950/8 (original LR No. 9950/1/3) measuring 1.171 Ha which it purchased from one Richard Ingram Crawford (Mr. Crawford) through a sale agreement drawn on 18 December 2008 and a further sale agreement dated 25 September 2009. It is pleaded that on 13 March 2009, the Government purported to compulsorily acquire the suit land but the plaintiff challenged this in Nakuru High Court Judicial Review Application No. 2 of 2010, and the process was halted through a ruling delivered on 24 September 2010. It is pleaded that on 28 March 2012, the defendant through its agents, invaded the plaintiff's suit property and claimed ownership of it which the plaintiff considers to be unlawful. In this suit, the plaintiff wishes to have a declaration of ownership of the suit land and an order of permanent injunction to restrain the defendant from the suit property.

2. In her statement of defence, the defendant pleaded that following a request by the Chief Engineer (Roads), the Commissioner of Lands published Gazette Notice No. 2401 on 13 March 2009, of intention to acquire 1.1909 Ha from the land parcel LR No. 9950/1 belonging to Mr. Crawford. The acquisition was meant for the rehabilitation of the Lanet-Njoro turn-off road. The valuation and inspection was done and an inquiry set for hearing on 16 April 2009. During the inquiry, the plaintiff was identified as an interested party to the land being acquired. The value of the land was identified as Kshs. 7,797,690/= and the Commissioner of Lands requested the Chief Engineer Roads to prepare an individual payment cheque to Mr. Crawford and the plaintiff. On the advice of the Commissioner of Lands, the Chief Engineer (Roads) prepared one cheque of Kshs. 7,797,590/= being cheque No. 25347 dated 30 June 2009, and forwarded it to the Commissioner of Lands through a letter dated 6 June 2009. It is contended that the plaintiff was aware that the suit land was being compulsorily acquired and is thus not entitled to the orders sought. The defendant denied that the plaintiff is the owner of the suit land and averred that the land was registered in the name of Mr. Crawford at the time it was acquired by the Government. It pleaded that the land was acquired and compensation paid out to Mr. Crawford, and that if the plaintiff feels aggrieved, she should seek compensation from Mr. Crawford.

3. The plaintiff called Mr. Jayen Motichand Dodhia, its Managing Director, as her witness. Mr. Jayen testified inter alia that the plaintiff company purchased the land from Mr. Crawford on 18 December 2008, when the land was marked "B" in subdivision plan of LR No. 9950/1. The purchase price was of Kshs. 7,000,000/= and the company paid Kshs. 1,500,000/= on signing of the agreement. The balance of Kshs. 5,500,000/= was to be paid on completion of the subdivision and transfer of the land. On 15 April 2009, the plaintiff received a letter from M/s Githiru & Company Advocates, the vendor's lawyers, informing the plaintiff that the Government wished to acquire the land and that they will not proceed with the sale. The plaintiff however attended the inquiry meeting and argued that they have already purchased the property and thereafter proceeded to file suit against Mr. Crawford being Nakuru HCCC No. 110 of 2009 for specific performance of the sale agreement. That suit was compromised by consent and the parties entered into a further agreement on 25 September 2009. The plaintiff also filed the suit Nakuru High Court Judicial Review Case No. 39 of 2009, against the Commissioner of Lands and Mr. Crawford, where the plaintiff sought orders of prohibition to stop the state from negotiating or paying Mr. Crawford for the suit land. Leave to commence Judicial Review proceedings was granted on 30 April 2009 by Koome J, and together with leave, an order of stay was granted. A second suit, Nakuru High Court Judicial Review No. 2 of 2010 was also filed, seeking orders to stop the compulsory acquisition, and orders were granted on 24 September 2010. Upon obtaining judgment, the suit land was transferred to the plaintiff by the estate of Mr. Crawford.

4. The plaintiff wished to develop the plot but the defendant objected stating that the land had already been compulsorily acquired. He denied being aware of a letter dated 30 April 2009, where the Commissioner of lands wrote to the Chief Engineer (Roads) to have two cheques, one of Kshs. 1,500,000/= to the plaintiff, not that he would have collected the money, for by then the plaintiff had purchased the land. He further testified that Mr. Crawford's estate dispute receiving any money from the Government for the compulsory acquisition. He also mentioned that they fully paid Mr. Crawford for the purchase of the suit land.

5. The defendant called James Okwaro Obura, a surveyor working with the defendant as her witness. He testified that he used to work with the Ministry of Lands at the time that the suit property is said to have been acquired. He stated that the Ministry of Roads identified the suit land for expansion of the Lanet-Njoro Turn off Road and thus wrote to the Commissioner of Lands which was the acquiring authority. The process of acquisition was thus being undertaken by the Commissioner of Lands. The land was gazetted and an acquisition hearing was held of which he was present. In the meeting the plaintiff was identified as an interested party. He stated that the land was owned by Mr. Crawford and that the Ministry of Roads prepared a cheque to Mr. Crawford as compensation. The cheque is dated 30 June 2009. The defendant has however to date not been able to use the land. Cross-examined, he had no evidence that this cheque was ever cashed and paid. He also had no evidence of any cheques being forwarded to Mr. Crawford or to the plaintiff as payment for compulsory acquisition of the suit land.

6. With the above evidence, the defendant closed her case and I invited counsel to file submissions which they did. I have taken note of these before arriving at my decision.

7. At the outset, I wish to lay down what I consider to be an important chronology of events. On 18 December 2008, the plaintiff did enter into a sale agreement with Mr. Crawford through his appointed attorney, Ms. Sarah Joslyn, for the purchase of the suit land. It does appear that Mr. Crawford owned a huge parcel of land which he was subdividing and selling the subdivided plots. At the time of the sale agreement, the suit land was identified in a subdivision plan as plot "B". On 13 March 2009, before the sale agreement was completed, the Government Gazetted the suit land for purposes of compulsory acquisition. An inquiry on the acquisition was held on 16 April 2009 and I observe that on 15 April 2009, the vendor's advocates purported to cancel the sale agreement on the premise that the suit land has been compulsorily acquired. It does appear that arising out of the inquiry, the Commissioner of Lands valued the suit land at Kshs. 7,797,690/= and thought fit to compensate Mr. Crawford with the sum of Kshs. 6,297,690/= and to pay the plaintiff the sum of Kshs. 1,500,000/= being the deposit that the plaintiff had paid Mr. Crawford on their sale agreement. On 20 April 2009, the plaintiff sued Mr. Crawford for specific performance of the sale agreement through the suit Nakuru HCCC No. 110 of 2009. On 30 April 2009 a letter was written by the Commissioner of Lands to the Chief Engineer (Roads) requesting the latter to prepare individual cheques to the two persons. On the same day, 30 April 2009, the plaintiff filed the suit Nakuru High Court, Judicial Review Case No. 39 of 2009, against the Commissioner of Lands, seeking orders to prohibit the Commissioner of Lands from negotiating with Mr. Crawford on issues related to acquisition of the suit land. Leave to commence the judicial review proceedings was granted on the same day, 30 April 2009, by Koome J (as she then was) and the court further granted orders of stay pending hearing of the suit. On 30 June 2009, the Ministry of Roads drew a cheque for the sum of Kshs. 7,707,590/= to Mr. Crawford and the Ministry forwarded the cheque to the Commissioner of Lands through a letter dated 6 July 2009. On 25 September 2009, the suit Nakuru HCCC No. 110 of 2009 was compromised by consent. In that consent, the parties agreed that the plaintiff be declared owner of the suit land subject to the plaintiff paying the balance of the purchase price within 3 days. It was further agreed that upon payment of the balance, any issue relating to compulsory acquisition of the suit land would vest in the plaintiff and that Mr. Crawford would not have any interest or claim. On 24 September 2009, M/s Githiru & Company Advocates, acting for Mr. Crawford, wrote to the Chief Valuer, Commissioner of Lands, informing him that the suit land has been sold to the plaintiff, and that they should deal with the plaintiff in respect of the suit land. On 26 January 2010, the plaintiff filed another judicial review motion, being Nakuru HCCC No. 2 of 2010, again seeking orders of prohibition to stop the Commissioner of Lands from continuing with compulsory acquisition of the suit land. Through a ruling delivered on 24 September 2010, Ouko J (as he then was), issued the orders of prohibition, and forbade the Commissioner of Lands from continuing with the process of compulsory acquisition until all laid down procedures are fully complied with and the terms of the consent order between the plaintiff and Mr. Crawford are respected.

8. It was argued by Mr. Kariuki, learned counsel for the defendant, that the contract between Mr. Crawford and the plaintiff was frustrated by the acquisition of the land by the Government. He submitted that Mr. Crawford and the plaintiff entered into the consent on 25 September 2009 after the suit property had already been compulsorily acquired and he thought that the consent was a fraud. He also thought that the orders of Ouko J, had been overtaken by events.

9. With respect, I do not agree with the submissions of counsel for the defendant. It is apparent that the process of compulsory acquisition of the suit land had been stopped through the stay order of Koome J issued on 30 April 2009. It was thus improper for the Ministry of Roads to purport to draw a cheque of Kshs. 7,707,590/= to Mr. Crawford, for there was already an order stopping the intended acquisition. In any event, that payment of Kshs. 7,707,590/= did not follow the instructions of the Commissioner of Lands, that the sum of Kshs. 1,500,000/= be paid to the plaintiff. Be that as it may, there is absolutely no evidence of any cheque being handed over to Mr. Crawford or being paid into Mr. Crawford's account. I have no evidence that the cheque of Kshs. 7,707,590/= was ever given to Mr. Crawford or paid into his account. The bank account of Mr. Crawford was displayed and there is no indication of any deposit of this money. Prior to the commencement of this case, the plaintiff did issue a Notice to Produce under Order 16 Rule 7 to the defendant, to avail proof that the cheque was delivered and paid, but no response was made to this Notice to Produce and no evidence was tendered of delivery and cashing of the cheque. The defendant has not offered to say where this money went, who was paid this money, when it was paid, and to which account it was paid to. If at all there was any payment, there would have been nothing easier than to table evidence of the same. What happened to this cheque of Kshs. 7,707,590/= is anybody's guess and my finding is that no payment was ever made by the Government to Mr. Crawford, or to the plaintiff, for the compulsory acquisition of the suit land.

10. It will be noted that through the consent entered into on 25 September 2009, between Mr. Crawford and the plaintiff, in the suit Nakuru HCCC 110 of 2009, Mr. Crawford ceded all interest in the suit land to the plaintiff. The defendant and the Commissioner of Lands were duly notified by counsel for Mr. Crawford to deal with the plaintiff in respect of the compulsory acquisition. I have no evidence that the Commissioner of Lands, or the defendant, ever engaged the plaintiff in respect of the intended acquisition. I have already mentioned that the process of acquisition was stopped by Ouko J, and it cannot be said that the Government or the defendant have ever acquired the suit land. They have never paid for it and they cannot now claim it. My own view of the case of the defendant, is that the defendant has resisted this suit, not because it acquired the suit land, but because it cannot account for the sum of Kshs. 7,707,590/= and is hoping to have judgment in its favour in this case, to cover up for these missing funds. I am sorry to tell the defendant that I cannot help its unworthy cause.

11. I see nothing wrong with the title of the plaintiff and the plaintiff is thus fully entitled to the order that he be declared the rightful and legal owner of the suit land. I grant the plaintiff this order. I also issue an order of permanent injunction stopping the defendant from interfering in any way with the quiet possession and use of the suit land by the plaintiff. If the defendant is of the opinion that it needs the suit land for any of its purposes, it has to commence the process of compulsory acquisition of the suit land, and be ready to pay appropriate compensation to the plaintiff. Until that is done, the defendant must respect the proprietary rights of the plaintiff over the suit land.

12. The plaintiff has succeeded and the defendant will therefore shoulder the costs of this suit.

13. Judgment accordingly.

**Dated, signed and delivered in open court at Nakuru this 1<sup>st</sup> day of October 2019.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of: -**

Mr. Kibet present for the plaintiff.

Ms. Cheruto holding brief for Mr. Kariuki for the defendant.

Court Assistants: Nancy Bor & Alfred Cheron

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**