



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT OF KENYA AT MAKUENI**

**ELC NO. E0011 OF 2020**

**REUBEN KIOKO KAKYEMA ..... PLAINTIFF/APPLICANT**

**-VS-**

**KIOKO WAMBUA ITINGA**

*(Sued as the Legal Representative of the Estate of)*

**NATHAN KIIO ITINGA ..... 1<sup>ST</sup> DEFENDANT/RESPONDENT**

**JAMES KYALO WAMBUA**

*(Sued as the Legal Representative of the Estate of)*

**NATHAN KIIO ITINGA ..... 2<sup>ND</sup> DEFENDANT/RESPONDENT**

**THE NATIONAL**

**LAND COMMISSION..... 3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The application for determination is dated 26<sup>th</sup> November, 2020 and was filed under certificate of urgency. It is brought under Sections 1A, 1B & 3A of the Civil Procedure Act, Order 51 Rule (1) of the Civil Procedure Rules 2010 (CPR) and all other enabling provisions of the Law. It seeks;

a) Spent.

b) **THAT** the Honourable Court be pleased to grant an order directing the National Land Commission to pay to the Plaintiff/Applicant Kenya Shillings Three Million Two Hundred and Seventy Thousand Four Hundred and Thirty Five Only (Kshs. 3,270,435) being the assessed compensation awarded to the Plaintiff/Applicant for the immovable assets and extensive developments on the properties known as Mavindini/Mavindini/1238 and Mavindini/Mavindini/1239 (the “suit properties”) for compulsory acquisition of the suit properties for development of the Thwake Multi-purpose dam project pending the hearing and determination of the suit.

c) **THAT** costs of this application be borne by the Respondents jointly and severally.

2. The application is supported by the grounds on its face, the Applicant’s affidavit sworn on the same date and his further affidavit sworn on 18<sup>th</sup> January, 2021. His deposition is that he bought the suit properties from Nathan Kii Itinga in 2002 but the seller suddenly fell sick and died before transferring the properties to him. The agreement, its transcription and translation are exhibited as **RKK1, 2 & 3** respectively. The search certificates are exhibited as **RKK4 & 5** respectively.

3. The deceased had been sued in Machakos Civil Suit No. 555 of 1998 and together with his wife; they approached the Applicant for loans in order to cover the expenses of the case. In return, the deceased and his wife agreed to sell their land in Makueni to the Applicant. The plaint & summons in the Machakos case are exhibited as **RKK 6** and the loan agreements as **RKK 7(a), (b), (c) & RKK 8 (a), (b), (c)**. The deceased’s defence is exhibited as **RKK 10** and his Notice of Appointment of Advocates (D.M Ndugi Advocate) as **RKK 9**.

4. In the agreement for sale of the suit lands, the Applicant and deceased agreed that the Applicant would pay a purchase price of Kshs 174,100/= which was the remainder after subtracting kshs 45,900/=, the loan taken by the deceased to finance his Court case.

5. The suit properties were later compulsorily acquired by the National Land Commission (NLC) for the development of the Thwake Multipurpose Dam. Compensation was assessed and awards made which clearly indicated that the Applicant should be paid. Copies of the Gazette Notice and awards have been exhibited as **RKK 11, 12 & 13** respectively.
6. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a Succession Cause in the Makueni Court and failed to disclose that the Applicant is a liability to the estate. The petition and affidavit in support are exhibited as **RKK 14 & 15** respectively. The Gazette Notice in which the cause was advertised is exhibited as **RKK 16**. The Court notice leading to the Gazettment is exhibited as **RKK 17** and the grant of letters of administration is exhibited as **RKK 18**.
7. Further, the Applicant deposed that he is yet to receive the awards which were made on 26<sup>th</sup> May, 2016 and he needs the compensation urgently in order to relocate his family to another place. He is also apprehensive that if the grant is confirmed without his involvement, the beneficiaries will share the awards amongst themselves to his detriment.
8. The application is opposed through the 1<sup>st</sup> & 2<sup>nd</sup> Respondents Replying Affidavit sworn on 7<sup>th</sup> January, 2021. Their deposition is that the Applicant obtained a grant of the deceased's estate through collusion with Mboya Wambua Itinga, Joyce Wanza Wambua and public officers. That together with their younger sister, Anastacia Mutindi Wambua, they (Respondents) challenged the Court decision and the Court ordered *inter alia* that the compensation be released to Mboya Wambua Itinga, Kioko Wambua Itinga and James Kyallo Wambua. A copy of the consent is exhibited as **KW1**. The Applicant appealed against the orders through Makueni Succession Appeal No. 34 of 2018 but the same was summarily dismissed. The ruling has been exhibited as **KW2**.
9. That following the High Court orders, the Respondents recommenced the matter and it was subsequently gazetted (**KW3 & 4**) and a grant issued (**KW5**). Further, they deposed that the suit properties were never disposed to a third party during the lifetime of their father. That the purported sale agreement between the deceased and Applicant cannot be valid as the deceased's signatures are significantly dissimilar. The sale agreement is exhibited as **KW6**.
10. Further, they deposed that in obtaining the special limited grant *ad colligenda bona defuncti*, their mother and brother colluded with the Applicant to deny their (Respondents') existence hence cannot be trusted. The special grant has been exhibited as **KW7**. They deposed that the Applicant has continually facilitated their mother and brother in an attempt to disinherit the real beneficiaries. An affidavit by Mboya Wambua Itinga has been exhibited as **KW8**. They deposed that the suit properties were used as a ranch by the deceased hence it is untrue for the Applicant to say that it was his family home. They have exhibited a gazette notice (**KW11**) to show that the suit properties are still in the deceased's name.
11. In rejoinder, the Applicant puts the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to strict proof with regard to the allegation that the deceased's signature was forged. In response to the issue of collusion he deposed that together with the other mentioned persons, they were laymen and their actions were in accordance to the instructions issued by the Advocate. He deposed that the objection proceedings, which he has registered jointly with Joyce Wambua and Mboya Itinga, will help in resolving the real issues in dispute. He has exhibited the objection summons as **RKK1**.
12. Further, he deposed that he has been in quiet and notorious use, ownership and occupation of the suit properties since 2002 and has extensively developed the same. He deposed that the delay in having the properties transferred to his name was due to the deceased's sickness and nothing else. It is also his deposition that the NLC gave compensation for the immovable assets and extensive developments as well as the land. Accordingly, he deposed that he is entitled to compensation for the immovable assets and extensive developments pending the hearing and determination with regard to ownership of the suit properties.
13. Directions were given that the application be canvassed by way of written submissions. The parties complied and filed their respective submissions.
14. The Applicant in his submissions identified the following as the issues for determination;
- i. Whether the NLC should be compelled to pay the applicant the award for compensation for improvements he has done on the suit properties?*
  - ii. Who bears the costs?*
15. On the first issue, he submitted that the NLC conducted due diligence on the suit properties, established that he was in actual possession and expressly awarded him compensation for the improvements. He contends that if at all he was not in possession, the compensation would have been given to any other person who would have been found in possession and use. He relied on the case of **Patrick Musimba -Vs- National Land Commission & 4 Others (2016) eKLR** for the submission that compensation must be just, commensurate to the market value of the property and must be paid out promptly.
16. He submitted that the Respondents did not attend any inquiry session or hearing during the NLC's due diligence stage despite the intended acquisition having been published in the Kenya Gazette.
17. He submitted that failure by the NLC to disburse the payment amounts is an infringement of his right to property and entitlement to just and prompt compensation.
18. Relying on section 115 of the Land Act, he submitted that, before taking possession, any unpaid compensation should be deposited in an interest earning account at the prevailing bank rates and a notice to that effect be issued to the parties. He contends that he has never been furnished with such notice and has urged the Court to apply a 15% interest on the award. He relied *inter alia* on the case of **Five Star Agencies Ltd -Vs- National Land Commission (2014) eKLR** where an interest rate of 15% P.A was adopted.

19. On the contestation with regard to ownership of the suit properties, he submitted that the NLC was legally required to go further than a mere search to establish the truth. He relied on the case of **National Land Commission -Vs- Afrison Export Import Limited & 10 Others (2019) eKLR** where a 3-Judge bench held that;

***“Based on the inherent danger of the search system which is based on the Torrens system of registration, it is necessary for one to take further steps to ascertain the authenticity of the search and ownership of the land. If the Applicant (NLC) had bothered to delve into the history of the title, it would have discovered that the title ad two mortgages besides other entries in the register and the other transaction in respect of L.R No. 7879/4 which were not noted in the register.”***

20. He submitted that he has also pleaded adverse possession which is a right that cannot be revealed by searching the register.

21. On the issue of costs, he submitted that the same are awarded at the unfettered discretion of the Court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise.

22. The Respondents identified the following as the issue for determination;

**a) Whether the applicant has satisfied the Court on a prima facie basis that he is entitled to the injunctive orders.**

23. Relying on the case of **Giella -Vs- Cassman Brown & Co. Ltd (1973) EA 358**, they submitted that the Applicant should not be allowed to disinherit the true beneficiaries of the deceased through the Court process. They contend that the Applicant will lose nothing if the application is disallowed since his depositions are nothing but malicious falsehoods.

24. I have looked at all the exhibited documents and it is clear that the NLC compulsorily acquired Mavindini/Mavindini/1238 & 1239 (*suit lands*) for construction of the Thwake Multipurpose dam project. The compensation was categorized into two *to wit*, for the land and for the improvements thereon. The Applicant is seeking release of the latter which amounts to Kshs. 3,270,435/= and the awards (RKK 12 & 13) are clear that this amount should be paid to him.

25. From the succession documents exhibited by the Respondents, I do not see any opposition with regard to compensation for the improvements and I am alive to the fact that the ownership of the suit lands will be determined after a full trial in this suit. It is noteworthy that the Respondents have not filed their defence to the suit. Further, the Respondents’ submissions deal with why an injunction should not be granted yet the application before Court does not seek an injunction. In the circumstances, I do not see the reason why the award should not be released to the Applicant and having looked at precedent, the award should attract an interest of 12%.

26. The upshot is that the application has merit and I do proceed to allow it as hereunder;

**a. An order is granted directing the National Land Commission to pay to the Plaintiff/Applicant Kenya Shillings Three Million Two Hundred and Seventy Thousand Four Hundred and Thirty Five Only (Kshs. 3,270,435) being the assessed compensation awarded to the Plaintiff/Applicant for the immovable assets and extensive developments on the properties known as Mavindini/Mavindini/1238 and Mavindini/Mavindini/1239 (the “suit properties”) for compulsory acquisition of the suit properties for development of the Thwake Multi-purpose dam project pending the hearing and determination of the suit.**

**b. THAT costs of this application be borne by the Respondents jointly and severally.**

**SIGNED, DATED AND DELIVERED AT MAKUENI VIA EMAIL THIS 2ND DAY OF SEPTEMBER, 2021.**

.....

**MBOGO C.G.**

**JUDGE**

**Court Assistant: Mr. Kwemboi**