



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC APPEAL NO E010 OF 2021**

**ENGEN KENYA LIMITED (now known as**

**VIVO MARKETING KENYA LIMITED).....APPELLANT**

**VERSUS**

**NATIONAL LAND COMMISSION.....RESPONDENT**

**RULING**

1. In the Notice of Motion dated 16<sup>th</sup> March, 2021, the Appellant has sought for the following orders:

*a) That the Respondent does deposit in bank account that is ran by the firm of Majanja Luseno & Company Advocates and counsel for the Respondent the sum of Kenya Shillings One Hundred and Twenty-Nine Million Seven Hundred and Sixty Thousand Six Hundred and Seventy-Six (Kshs.129,760,767.00) together with interest thereon at 14% per annum from 9<sup>th</sup> January 2018 until the date of deposit being security for the Award issued in favour of and/or accepted by the Appellant WITHIN TWENTY-ONE (21) DAYS from the date of the issuance of the Order and supply of the bank account details.*

*b) That there be liberty to apply.*

*c) That costs of this Application be borne by the Plaintiffs/Claimant.*

*d) That this Honorable Court be pleased to grant such further and other Orders that might be deem just and fair in the circumstances.*

2. The Application is supported by the Affidavit of the Appellant's Company Secretary who has deponed that at all material times, Vivo was running a branded petrol station on **Land Reference Number 337/3838** (hereinafter referred to as "the suit property") and that it entered into a Lease with Tinek Limited in accordance with the terms set out under the Lease for a fixed term.

3. It was deponed by the Appellant's Company Secretary that after conducting an inquiry as to the compulsory acquisition of the suit property, the Respondent issued an Award in favour of Vivo in the sum of Kshs. 129,760,767 on 23<sup>rd</sup> January 2018 and that the Award was served upon Vivo who was required either to accept the valuation or contest the decision therein.

4. It was deponed that Vivo did on 30<sup>th</sup> January 2018 accept the Award and formally disclosed the bank account to which the said sums of Kshs. 129,760,767 should be paid into and that despite taking possession of the property, the Respondent has not paid the settlement sum under the Award in accordance with its statutory obligation under the Act.

5. It was deponed by the Appellant's Company Secretary that there have been proceedings in Machakos ELC Petition Number 69 of 2018 wherein the Court made some adverse orders as against the title held by Tinek Limited over the suit property and that the said decision has been stayed by the Court of Appeal in **Nairobi Civil Application Number 124 of 2020 Tinek Limited & Another vs National Land Commission & Others.**

6. It was deponed that the sum of Kshs. 129,760,767 should be secured by either being paid into a joint interest earning accounts to be held in the names of the Advocates on record for parties or deposited in Court and that the Respondent cannot have both the property and the sums assessed under the Award.

7. It is the Appellant's case that it stands to suffer irreparable loss with the likelihood change in government owing to the scheduled General Elections on the one part while the taxpayers are likely to be burdened by an Award on interest occasioned by the delay on the other part. The Respondent did not respond to the Application. The Appellant did not file submissions.

8. According to the Record of Appeal, the Appellant is dissatisfied with the Award of compensation by the Respondent dated 8<sup>th</sup> January, 2021 for acquisition of Land Reference Number 337/3838 for the construction of the second carriageway of Athi River-Machakos turnoff road. In the meantime, the Appellant is seeking for the deposit of a sum of Kshs. 129,760,767 in an interest earning joint account held by its advocate and the Respondent.

9. According to the Appellant, the Respondent has in spite of having caused the compulsory acquisition of the suit property, refused and or neglected to pay to the Appellant the sum it had awarded it and that this court has the powers to issue the orders sought to shield the taxpayers from any further accruing interest on the settlement sum.

10. The Application has been filed pursuant to the provisions of **Sections 115, 125 and 128 of the Land Act, Section 13 (7) (a) of the Environment and Land Court Act** and the “inherent powers of this Honourable Court.” None of the cited provisions of the law mandates this court to compel the Respondent to deposit a contested Award in a joint interest earning account pending the hearing of an Appeal.

11. In any event, the Appellant has acknowledged that this court has since made a finding in Machakos ELC Petition No. 69 of 2018 that the title in respect to the suit property is null and void. Although the Court of Appeal has stayed the said decision, the decision has not been set aside.

12. That being the case, and in view of the fact that the Respondent is a state organ, it is my finding that no good reason has been given as to why the disputed amount of Kshs. 129,760,767 together with interest should be deposited in a joint interest earning account pending the hearing of the Appeal.

13. For those reasons, the Application dated 16<sup>th</sup> March, 2021 is dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 15<sup>TH</sup> DAY OF OCTOBER, 2021.**

**O. A. ANGOTE**

**JUDGE**

**In the presence of:**

Mr. Luseno and Muchiri for the Appellant

No appearance for the Respondent

Court Assistant - John Okumu