



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO.47 OF 2012

1. RAHIMKHAN AFZALKHAN RAHIMKHAN

2. SHAMSHAD BEGUM AFZALKHAN RAHIMKHAN

3. DANIEL MWANGI

4. PAULINE KAVINYA MWONGELA

5. SAYED MUSHTAQ HUSSAIN.....PETITIONERS

-VERSUS-

1. CHIEF LAND REGISTRAR

2. ATTORNEY GENERAL

3. COMMISSIONER OF LANDS.....RESPONDENTS

RULING

1. This Ruling is in respect of the amount of compensation payable to the Petitioners for the compulsory acquisition of a portion of their land comprised in land parcel number **Mombasa/M.S/Diani Beach Block/10** herein referred to as the suit land.

2. The matter was however placed before me pursuant to directions by the Court of Appeal in its Judgment of **21<sup>st</sup> August, 2019**. The directions were to the effect that this court reassesses the compensation due to the Petitioners for the compulsory acquisition of the parcel of land known as **Mombasa/M.S/Diani Beach Block/10**.

3. A brief history of the facts leading to those directions are that a Judgment in this matter was delivered on **27<sup>th</sup> June, 2017** wherein the court found the Respondents guilty of having infringed inter-alia the Petitioners' right to property. The court then ordered that the Petitioners' be paid a compensation of 9.855 Billion for unlawful deprivation of their property and further Kshs.60 Million as damages for loss of use of property, physical, mental and psychological torture. I will not go to the other merits of that Judgment since they are not pertinent to the question at hand.

4. Nonetheless, the Respondents being aggrieved by the Judgment appealed and the court of appeal rendered a verdict on **21<sup>st</sup> August, 2019**. The superior court agreed with this court's Judgment on contravention of the Petitioners' right to property save for the award on the amount to be compensated for compulsory acquisition and the damages for loss of use of property, physical, Mental and Physiological torture. The latter award was entirely set aside whereas as regards the former, the superior court directed that a fresh assessment be made by this court while taking into account the encumbrances registered against the title and the principles set out in the **Schedule** to the **Land Acquisition Act**.

5. On **25<sup>th</sup> November, 2019**, this court directed that the Respondents and their counsel do engage the Petitioner and the National Land Commission for valuation of the subject property. That by **3<sup>rd</sup> December, 2020**, the respondents had not complied with those directions and on the said date, the court directed that the President of the Institute of Surveyors of Kenya to appoint a valuer to appoints a joint valuer to carry out a valuation of the property in terms of the substance of which is remaining.

6. Indeed, **Boniface K. Terer** was appointed vide a letter dated **21<sup>st</sup> December, 2021** was appointed by the President of the Institute of

Surveyors to carry out the valuation of the subject property. He presented a valuation report dated **8<sup>th</sup> February, 2021**.

7. He also testified before this court on **6<sup>th</sup> May, 2021** and stated that in carrying out the valuation, he first had to acquire the requisite titles and the maps of the subject property which were presented to him by the Petitioners' counsel, **Mr. Ahmed Nassir**.

8. Secondly, and of importance was the date of valuation. His testimony was that this being a litigation matter and the Petition herein having been filed on **8<sup>th</sup> May, 2012** shortly before the expiry of the lease on **31<sup>st</sup> July, 2012**, the date of valuation had to be before the expiry of the lease.

9. Thirdly, **Mr. Terer** submitted that it was crucial that the size of the parcel of land be first determined before undertaking valuation process. On perusal of the documents availed to court, it had been claimed that the property was 328 acres but on further ground check, it was revealed that 3.36 acres were compulsorily acquired in **1968** for the expansion of the Mombasa-Lunga Lunga road and further 8 acres acquired for the construction of the present Diani Police Station. The valuation therefore proceeded with remaining parcel of land which is 317.16 acres.

10. Fourthly, **Mr. Terer** submitted that while undertaking the valuation, it was important that the characteristic of the property which in other terms is the use of the property be taken into account. He then identified that the property had three zones; one traversed by a commercial road, the second one was a high density residential and mixed use zone while the third was the low density residential areas. The comparable valuations for these zones was as follows; for zone one (1) which is the commercial section, the price for an acre was Kshs.22.8 million, for zone two (2) which is high density populated residential area would fetch Kshs.13.5 million per acre and lastly the low density populated area would fetch Kshs.3.38 million per acre. He therefore assessed the value of the property as Kshs.5.50 Billion.

11. **Mr. Terer** further added that the valuation was done based on the provisions of the **Land Acquisition Act (Cap 295)** which was applicable at the time the applicants went to court. The Key provisions in that Act provide that on and above the relevant value which is determined, a 15% is added as deliberate allowance. After adding the 15%, then the total value of property to title number: **Mombasa/M.S/Diani Beach Block/10 (Original L.R No.5004/62), Diani Complex, Kwale County** is assessed at Kshs.5,807,500,000.00.

12. **Mr. Terer** was as well cross-examined by **Mr. Wachira**, counsel for the Respondents. He admitted being privy to the government valuation report which was forwarded to him vide a letter dated **3<sup>rd</sup> June, 2020**. He submitted that the difference between his valuation and the government valuation is the date of valuation. His valuation is based on the date when the ground lease expired, that is, on **31<sup>st</sup> December, 2012**. He supported his view firstly, with reference to **Section 3** of the **Compulsory Acquisition Act(Cap 295)** which enjoins the minister through the Commissioner of Lands to publish the government's intention to acquire any land it is interested in which was not done in this case. Secondly, that under **Section 8** of the **same Act**, the government must fully compensate the subjects and in the present case, that provision was contravened.

13. When cross-examined on the 15% disturbance allowance, **Mr. Terer** submitted that the same could not have changed even if the tenancy would not have been renewed and it is allowed to mitigate the acquiring of a new residence once the government compulsorily acquires your land. He further stated that if he had valued the land as at **1979**, then he would have assessed it as if it were an agricultural land. However, it has been over 40 years and there are developments on the land which are deemed to accrue to the benefit of every citizen including the petitioners herein.

14. Counsel for both the Petitioners and the Respondents also filed submissions with each persuading the court to adopt the report they advocated for. The Petitioners vouched for the valuation report dated **8<sup>th</sup> February, 2021** while the Respondents beseeched the court to adopt the government report dated **7<sup>th</sup> June, 2020**.

15. For the Petitioners, the submissions were filed **10<sup>th</sup> May, 2021** and they mainly focused on which date this court should adopt as the date for acquisition of the suit property, whether on **1979** or in **2012** when the instant Petition was filed. It is submitted that since there was no gazetteement for purposes of compulsory acquisition, the proposed date of 1979 cannot be the presumptive date for purposes of acquisition of the land and the correct instructive date would be the date when the Judgment was first delivered in this petition.

16. The view is supported with an excerpt from the case of **Dream Camp Kenya Limited –vs- Mohamed Eltaff & 3 Others [2018]eKLR**, where the court held that the effective date to fix a fair market value is the date of Judgment. Similarly, the court in the case of **Gami Properties Ltd –vs- National Security Fund Board of Trustees & 2 Others [2018] eKLR** on the same breath held that while assessing the damages on lost property, the value should be as at the time of Judgment.

17. Further, the Petitioners have added that their lawful ownership to the subject property was interfered with by the Respondents, and were it not for the actions of the Respondents, the Petitioners would have been the beneficiaries to the present developments on the subject land. That notwithstanding the fact that the lease was set to expire in **2013**, it is submitted that under **Section 13** of the **Land Act**, the Petitioners would still have been eligible to apply for the renewal of the lease. Just compensation therefore should include both the present and potential value of the land being acquired, had the owner thereof been allowed to continue using it for the purpose he or she intended.

18. It was further submitted that **Schedule 1(1)** of the **Repealed Land Acquisition Act** provide that for purposes of compensation the calculation would be on the market value of the property as per the date of publication in the Kenya gazette of the notice to acquire the land. As such, the said Act does not embrace comparative analysis of the property as insinuated by the Respondents.

19. Those submissions were further reiterated by **M/s Asli** in her oral submissions.

20. On part of the Respondents, their submissions were filed on **29<sup>th</sup> April, 2021**. Their point of departure is the directive by the court of appeal that the assessment be done while taking into consideration the principles set out in the **Schedule to the Land Acquisition Act**. in

that view, the Respondents fault the assessment report dated **8<sup>th</sup> February, 2021** in asserting that the valuer took into consideration extrinsic factors about the suit property including an estimation on the current market value as opposed to going by the market rate as at 1979, while taking into consideration the value of the buildings and purporting the change on the user from agricultural land.

21. According to the Respondents, it would be an injustice to value the land as at **2012** as opposed to **1979**, first because the developments of commercial nature were not available as at **1979** and as such, the valuation should simply reflect agricultural land as at **1979**. The Respondents further submits that since the Gazette Notice ought to have been issued in **1979**, then the valuation should adopt the market value as at **1979**.

22. Lastly, the Respondent faulted the valuer for failing to take into account the principle of comparative analysis. Simply put, it is argued that a comparison had to be in relation to the surrounding land premises in line with the guideline notes by RCIS.

### **THE DETERMINATION**

23. Having set out each party's respective position, I find the key issue of controversy and which in my view should be determined in limine, is whether the date of valuation ought to be as at **1979** or **2012** as indicated in the valuation dated **8<sup>th</sup> February, 2021**.

24. The stand taken by the Respondents is that the gazette notice for the intention for compulsory acquisition ought to have been issued in **1979**, thus the market value of the property ought to have been assessed as at **1979** as opposed to the present date when the lease was set to expire.

25. The Petitioners on the other hand, canvassed the argument that the land was never compulsorily acquired in **1979**, and what had really happened is that the petitioners facilitated the fraudulent transfer of the property to a third party. The Petitioners have also stated that had it not been for the actions of the Respondents, then the Petitioners would have benefited from the current developments in the present property.

26. It is a common ground that no gazette notice was ever issued way back in **1979** and that failure to give proper notice is in itself a denial of natural justice and fairness. At this point, it would be moot to deliberate on whether the Respondents capriciously deprived the Petitioners of their right to property over the subject suit land since this court has already found as such. It was also confirmed by the court of Appeal that the Respondents actions were not justified and indeed the act of deprivation of the suit property caused the Petitioners to suffer loss of enjoyment of their property rights. In other terms, the court's view was that had the Respondents not interfered with the Petitioners, they would still be enjoying their property rights over the suit land until when the lease would otherwise be lawfully terminated.

27. It is my humble view that if the assessment of the value of the property was to be back-dated to **1979**, then this court would be aiding the Respondents to right the wrongs they had done back then. They are simply inviting the court to proceed on the assumption that if a gazette notice was issued, which was not the case. It is trite that equity will not grant relief where the seeker has committed a wrong and in that view the Respondents cannot seek to otherwise legitimize their unlawful acts by inviting the court to proceed on basis when the gazette notice would have been issued.

28. I am of the further view that the Petitioners are entitled to compensation of the benefits they would have drawn had they been left to continue occupying the suit land. This can only be achieved by assessing the value of suit land as at the time when the claim was filed in court.

29. Be that as it may, the court of appeal faulted the valuation report of one **Mr. Edwin** for not taking into account factors which could have affected the acreage of the suit property and further for exclusively relying on the documents supplied to him by the Petitioners. Directions were then issued for reassessment taking into account the encumbrances against the title to the suit land.

30. My interpretation of that excerpt is that the superior court had no issues with the date on which the valuation had been done but only in the manner in which the valuation exercise was done. Therefore, it would be safe to presume that the superior court had intended that a similar valuation be done while taking into account the recommendations it had given. Had that court intended the valuation to be back dated to **1979**, nothing would have been hard in saying so. The valuation report by **Mr. Edwin** is dated **28<sup>th</sup> June, 2012** and stated the date of inspection of the suit property as **25<sup>th</sup> June, 2012**. It therefore goes without saying that the proper date for assessment valuation would be in **2012** as opposed to **1979** as insinuated by the Respondents.

31. I now proceed to consider the whether the valuation report by **Mr. Boniface Terer** conformed with the directions issued by the superior court.

32. The court in the case of *Katra Jama Issa v Attorney General & 3 others [2018] eKLR* held thus;

**“...Compensation of compulsorily acquired property be quantified in accordance with the principle of equivalence. A person is entitled to compensation for losses fairly attributed to the taking of his land but not to any greater amount as “fair compensation requires that he should be paid for the value of the land to him, not its value generally or its value to the acquiring authority” (emphasis added)**

33. The value of the land is synonymous to the market value of the land and the locus classicus case is the case of **Kanini Farm Ltd –vs- Commissioner of Lands [1984] eKLR/[1986] KLR**, where the court pronounced itself on the definition of the market value of property during compulsory acquisition as hereunder:-

**“The market value as the basis for assessing compensation is the price which a willing seller might be expected to obtain**

**from a willing purchaser, a purchaser who though he may be a speculator, is neither a wild nor an unreasonable speculator.....In determining the amount of compensation which ought to be paid the court should take into account comparable sales and awards on other acquisition of land of similar character”**

34. In addition to the market value, the Land Acquisition Act provides that the compulsory purchase compensation should include compensation for injurious affection and disturbance. This is to say that in addition to the value of the land, the owner is entitled to compensation for the loss of any buildings or fixtures or timber on the land, whether or not these items are included in the overall purchase price or are a subject to separate valuation.

35. In the assessment report dated **8<sup>th</sup> February, 2021, Clause 10** provides that there is a caveat by **East Africa Power and Lighting Company Limited** claiming a grant of easement. In my view, the encumbrances were taken into account in calculating the value of each portion of the land based on the point of placement either on the high/low density residence or the commercial area. As per the report, it is however literary clear that there has been change of use from a purely agricultural land to partly commercial, residential and agricultural.

36. I am satisfied that the valuation report by **Mr. Boniface Terer** has taken into account those changes and therefore the same is grounded on the guiding principles regarding determination of the market value and award which must conform to comparable land of similar character. The details of the report are listed in preceding paragraphs of this Ruling and I need not to replicate the same here.

37. The upshot of my discussion is that this court finds that the valuation report dated **8<sup>th</sup> February, 2021** for the suit land is reasonable and not controverted. The following orders therefore do and hereby issue:

**a. The Petitioners are awarded Kshs.5,807,500,000.00 (five Billion, eight hundred and seven million and five hundred Kenyan shillings) being just compensation for a portion land title number Mombasa/M.S/Diani Beach Block/10 (Original L.R No.5004/62) Diani Complex, Kwale County measuring 317.16 acres.**

**b. Interest of (a) above to accrue at court rates from the date of delivery of the Judgment on 25<sup>th</sup> November, 2019.**

**c. Interest to be awarded from the time of filing.**

It is hereby so ordered.

**SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 6<sup>TH</sup> DAY OF JULY, 2021**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

M/S Asli counsel for the Petitioners

No appearance for and by the Respondents

Court Assistant - Winnie