



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO.94 OF 2018

DOMINIC MBUGUA WAINAINA.....1ST PLAINTIFF

JULIUS KIIRU MWAURA.....2ND PLAINTIFF

VERONICA MBUTU NJUNGE (Suing as the legal representative

of the Estate of the late WILLIAM NGUGI).....3RD PLAINTIFF

VERSUS

NATIONAL LAND COMMISSION.....1ST DEFENDANT

THE KENYA RURAL ROADS AUTHORITY....2ND DEFENDANT

JUDGMENT

By a Plaint dated 21st March 2018, the Plaintiffs herein brought this suit against the Defendants seeking for the following prayers:-

a) An order of Declaration declaring that the Plaintiffs herein are entitled to just and fair compensation for their parcels of land compulsorily acquired by the Defendants.

b) Compensation to the plaintiffs in the sum of kshs. 26,048,525/= as particularized in paragraph 16 of the Plaint.

c) Interest on (b) above at court rates from the date of filing this suit.

d) Any other relief that this Honourable Court may deem appropriate to grant.

In their statement of claim, the Plaintiffs averred that they are registered as the lawful, bonafide and absolute proprietors of all those parcels of land known as **Muguga/Gitaru/1745, Muguga/Gitaru/143 and Muguga/ Gitaru/2108**, all situated within Muguga areas of Kiambu County. Further that the suit properties border link road **E1507**, and that the subject titles were granted and/or transferred to the Plaintiffs with a demarcated boundary and beacons clearly placed by a Government surveyor. That they had always enjoyed exclusive proprietary rights over the suit properties until they were served with a letter dated **17th August 2016**, directing them to remove their developments bordering **link road E1507**, though they have been occupying their respective properties without encroaching on the link road. Further that on **4th August 2016**, the 1st Defendant illegally purported to make an order to the effect that the Plaintiffs have encroached on the **link road** and further directed them to remove their developments thereon. It was the Plaintiff's contention that the 1st Defendant's actions were illegal as it acted beyond its powers and mandate in seeking to review the boundaries between the suit land and the link road which function is a preserve of the Kiambu Land Registrar.

They further averred that the 1st Defendant's actions went against their legitimate expectation. Further that vide **Judicial Review No. 4 of 2017**, the Court quashed the 1st Defendant's decision on **27th October 2017**. However, the 1st Defendant ignored the **status quo** orders and constructed the said road through their parcels of land. It was their contention that the Defendants maliciously and illegally encroached and interfered with the boundaries of the suit properties and demolished their properties while constructing the said road.

They particularized malice and illegality by the Defendants under paragraph 15 as trespassing and encroaching on their properties, illegally reestablishing boundaries, failing to heed to **status quo orders**, destroying their properties, refusing to offer just compensation, breaching their rights and acting with impunity. That as a result, the Plaintiffs have suffered loss and damage.

The 1st Plaintiff's loss and damage was particularized in a Valuation Report dated **9th August 2016**, estimated at **Kshs.8,181,525/=**, 2nd

Plaintiff's is particularized in a Valuation Report dated **31st August 2016**, estimated at **Kshs.9,688.750/=** and the 3rd Plaintiff's loss and damage is particularized in a Valuation Report dated **29th November 2013**, estimated at **Kshs. 8,178,250/=**. The Plaintiffs contended that they are claiming for just and fair compensation of their properties.

The suit is contested and the 2nd Defendant filed a Defence dated **24th April 2018**, and denied all the allegations made in the Plaint. It was its contention that the titles issued on land that was falling within the **Road Reserve** were revoked in their entirety and the land reverted to public use of an administrative center for Kikuyu residents, vide a determination by the 1st Defendant entered on **4th August 2016**. It was further averred that the Plaintiffs encroached on the road reserve which encroachment hindered proper maintenance and development of the road. It was contended that at the time of the alleged cause of action, **Road E1507**, was under its mandate and that the decision vide **Judicial Review No. 4 of 2017**, concerned the mandate of the National Land Commission and that the Court made no determination on the liability as to the issues of compensation to the Plaintiffs by the 2nd Defendant. The 2nd Defendant denied causing any loss and damage to the Plaintiffs and contended that the suit is vexatious and discloses no cause of action.

Despite being served, the 1st Defendant did not enter appearance, nor file any defence. The matter proceeded by way of viva voce evidence wherein the Plaintiffs called two witnesses and the 2nd Defendant called one witness and closed their case.

PLAINTIFF'S CASE

PW1 Dominic Mbugua Wainaina who had authority to act on behalf of the other plaintiffs, adopted his witness statement dated **21st March 2018**. He also produced the list of documents as Exhibit 1 and the 2nd bundle as exhibit 2. It was his testimony that the government destroyed their properties and that they were seeking compensation as their structures which were on the suit properties were also demolished.

He further testified that the destructions were done by **Kenya Rural Roads Authority**, 2nd Defendant herein as he had seen the **KERRA's** witness at the site and he was the one who had erected the beacons since the year **2013**. It was his further testimony that the destructions were done in the year **2017**. That they had correspondences with **KERRA**, but he did not have knowledge of any Gazette Notice.

PW2 John Njoroge Karuri a Property Valuer working with Precision Valuers Ltd, stated that he was instructed to prepare Valuation Reports for the purpose of claiming compensation since the parcels of land had been earmarked for acquisition by the government. That he went to the ground and observed the developments on the marked area and estimated the loss and the figures in the Reports.

It was his testimony that the reports were made in anticipation of compensation for compulsory acquisition of the suit properties by **KERRA**. He further testified that he got the information from the Plaintiffs and he was not aware about the Kenya Gazette that transferred the land to the County Government of Kiambu.

DEFENCE CASE

DW1 Kenneth Wando Odhiambo, a Land Surveyor and the Deputy Director of Survey, adopted his witness statement dated **25th April 2018**, and produced the list of documents as Exhibits 1 to 6. He further testified that as at the time the subject road came up in **2013**, they noticed that there were encroachments upon the Road Reserve which road was classified as **E1507**. That the 2nd defendant used their survey knowledge and re-established the road boundary and informed the National Land Commission in **January 2016**. Therefore, the road was transferred to the Kiambu County Government. Further that **KERRA** wrote to the **National Land Commission** and informed it that the road no longer fell under its purview and 2nd Defendant transferred all the documents to the County Government of Kiambu. He denied any knowledge of the demolition allegations by the Plaintiffs.

However, he acknowledged that the road was under KERRA and that KERRA made the complaint to the 1st Defendant alleging encroachment. That they resurveyed the road in **2011** and they re-established the boundaries as per the cadastral plan. It was his evidence that the road was maintained, but not improved and the contractor was contracted by KERRA and that they did not deal with the contractor as the land had already been transferred to the **Kiambu County Government**. He further testified that there were correspondences between **KERRA** and the **National Land Commission** and that the residents were copied the same. That the National Land Commission made a decision which was quashed by the Court and that he was not aware of any appeal.

It was his testimony that the Schedule of classification of roads could be obtained by anyone and that he had forwarded the documents to the National Land Commission to know that there was encroachment on the road. Further that the quashing of the **National Land Commission** decision was on procedure and not the merit of the case.

The parties filed written submissions which the Court has carefully read and considered and renders itself as follows:-

It is not in doubt that the suit properties belong to the Plaintiffs herein. Further the suit properties bordered link road **E1507**. It is further not in doubt that as at the year **2011**, the 2nd Defendant had the mandate over the link Road. The 2nd Defendant embarked on a process that in their contention included the mapping of the road and that is when they made a determination that the parties had encroached on the link

road. Further that the Notices were issued to the Plaintiffs to vacate the properties which they had allegedly encroached on. However, the Plaintiffs objected to the same.

It is then that the 2nd Defendants filed a complaint with the 1st Defendant who in its Ruling dated **4th August 2016**, made a determination that the Plaintiffs had encroached on the **Link Road** and that they needed to move out. However, the Plaintiffs being dissatisfied, filed Judicial Review Proceedings against the 1st Defendant's decision and on **27th October 2017**, the Court made a determination that the 1st Defendant had acted **ultra vires** in seeking to re-establish the boundaries and therefore quashed its decision.

However, the Plaintiffs have alleged that the Court's orders were ignored and their structures were demolished and their parcels of land were illegally acquired and the road built on them, but that they were never compensated for the acquisition of their parcels of land. Though the Plaintiffs are of the view that the Defendants are responsible for compensating them, the 2nd Defendant has averred that though from the onset it had the mandate over the **Link Road**, on **22nd January 2016**, the roads were re classified and therefore the mandate of the road rests with the Kiambu County Government as the 2nd Defendant had relinquished the said mandate to them

The above being the undisputed facts, the Court finds that the issues for determination are;

- 1. Whether the Plaintiffs' parcels of lands were compulsorily acquired***

- 2. if so whether they are entitled to be paid compensation and at how much***

- 3. Who should pay the Compensation***

- 4. Whether the Plaintiffs are entitled to the orders sought***

- 5. Who should bear the Costs of this suit.***

1. Whether the Plaintiffs' parcels of land were compulsorily acquired

As already stated above, it is not in doubt that the Plaintiffs were the registered owners of the suit properties. Though there was contention on

whether they held the said suit properties legally, it is important to note that there has been no determination by any legally competent body that the Plaintiffs had encroached upon the said parcels of land. Further the Court notes that the only determination that sought to make such a finding was quashed by the Court on the **27th October 2017**. One of the reasons was that the 2nd Defendant acted **ultra vires** by seeking to re-establish boundaries which is a preserve of the functions of the **Land Registrar** and given that the Land Registrar has never reestablished the said boundaries and the fact that the 1st Defendant's decision was quashed and there being no evidence to challenge the proprietorship of the Plaintiff's title, it is the Court's considered view that the Plaintiffs titles were protected by **Section 26(1) of the Land Registration Act**, which provides that the registered owner of a property is **prima facie** the absolute and indefeasible owner of the said property.

Being the indefeasible owners of the suit properties, it would therefore mean that the Plaintiffs were entitled to all the rights, privileges and liabilities over the suit properties.

Compulsory acquisition is the power of government to **acquire** private rights in **land** without the willing consent of its owner or occupant in order to benefit society. This power is often necessary for social and economic development and the protection of the natural environment.

It is not in doubt that though the **Land Act** provides for the elaborate process through which the Government, be it the **County Government** or the **National Government** should compulsorily acquire land. It is evident that in this instant case, the laid down process was not done. Though there was existence of **status quo orders** that required the Government not to interfere with the suit properties, it is not in doubt that the suit properties have since been repossessed and the road built therein. With the definition of compulsory acquisition in mind, and having held that the Government illegally and forcefully acquired the suit properties without the consent of the Plaintiffs, this Court holds and finds that there was indeed compulsory acquisition of the suit properties.

2. If so, whether the Plaintiffs are entitled to be paid compensation and at how much

Section 111 (1) of the Land Act provides that;

“If land is acquired compulsorily under this Act, just compensation shall be paid promptly in full to all persons whose interests in the land have been determined.

The Court has already held that the suit properties were compulsorily acquired and it therefore follows that automatically compensation must be paid. Forceful and illegal take over of the Plaintiffs' suit properties cannot take away their rights of compensation as provided under the **Land Act 2012**. See the case of **Arnacherry Limited ...Vs...Attorney General (2014) eKLR** where 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.”

Further in the case of Isaiah Otiato & 6 others v County Government of Vihiga [2018] eKLR the Court held that;

“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, the Respondent has not proved in any way shown how their actions are in accordance with the law hence their actions are illegal. The Respondent’s actions are in contradiction with 2, 2(4), 3, 10, 40 and 47 of the Constitution of Kenya. The Respondent also has not produced any Environmental Impact Assessment report to prove that their actions does not infringe the rights of the Petitioners accrued under article 42 of the Constitution of Kenya. The law as discussed above, provides for compensation in cases of compulsory acquisition hence they have a right to compensation. The Respondent is yet to comply or even make an inquiry. The Petitioners have a right to be compensated find that the petition is merited and I grant the following orders”

Taking into account the available evidence and the above decided cases, the Court finds and holds that the Plaintiffs are entitled to compensation. PW2 testified that he is a Valuer and that he was instructed to value the suit properties before the structures thereon were demolished. To this effect he produced the Valuation Reports as exhibits in court. The Valuation Reports have not been controverted and consequently, the Court finds that the Plaintiffs are entitled to compensation in the tune of **Kshs.26,042,525/=** as pleaded and particularized in paragraph 16 of the Plaint and proved in Court

3. Who should pay the Compensation

It is the Plaintiffs’ contention that the 2nd Defendant is responsible for the compulsory acquisition of the suit properties. However the 2nd Defendant has contended that at the time the Plaintiffs properties were allegedly being demolished and the suit properties being taken over, they had already relinquished their mandate over the said **Link Road** and handed it over to the Kiambu County Government. Indeed the Court has seen the letter dated **30th September 2016**, in which the 2nd Defendant forwarded all the documents that pertained to the suit properties to the County Executive Secretary for Infrastructure of Kiambu.

The Court has also seen correspondence by the 2nd Defendant indicating to the 1st Defendant that they no longer had the mandate over the link road. Though the Plaintiffs have not specifically stated the exact date in which the status quo orders were defied, the Court notes that the Judicial Review Proceedings were filed in the year **2017**, and it automatically follows that the **status quo orders** were defied in the same year. The 2nd Defendant having relinquished their mandate in 2016, then it was therefore not responsible for the said road.

From the provisions of the **Land Act 2012**, the 1st Defendant are tasked with coming up with a system in which the persons who have interest over suit properties are to be compensated. Further **Section 115. (1) of the Land Act** provides that;

“After notice of an award has been served on all the persons determined to be interested in the land, the Commission shall, promptly pay compensation in accordance with the award to the persons entitled thereunder, except in a case where—

(a) there is no person competent to receive payment; or

(b) the person entitled does not consent to receive the amount awarded;

(c) there is a dispute as to the right of the persons entitled to receive the compensation or as to the shares in which the compensation is to be paid.

The Director General being a government employee, it then follows that his actions have a bearing on the compensation to the Plaintiffs. The Court therefore finds and holds that the 1st Defendant bears the responsibility of ensuring that the Plaintiffs have been compensated and for that reason is obligated to compensate the Plaintiffs herein.

4. Whether the Plaintiffs are entitled to the orders sought

From the foregoing analysis of the facts of the case, the Courts finds and holds that the Plaintiffs are entitled to the orders sought as the Court has already held that their properties were compulsorily acquired and they are consequently entitled to compensation.

5. Who should bear the Costs of this suit

It is very clear from the provisions of **Section 27 of the Civil Procedure Act** that the court has discretion to grant costs. However, it is not in doubt that costs usually follow the event and is normally granted to the successful litigant. The Plaintiffs being the successful parties are therefore entitled to costs of the suit.

Having now carefully considered the available evidence and the written submissions, the Court finds that the Plaintiffs have proved their case

on the required standard of balance of probabilities and consequently, the court enters judgment for the Plaintiffs against the 1st Defendant as pleaded in prayers no (a), (b) and (c) of the Plaint dated 2nd March 2018.

It is so ordered.

Dated, signed and Delivered at Thika this 15th day of June 2020

L. GACHERU

JUDGE

15/6/2020

Court Assistant – Jackline

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

By Consent of:

No consent for the 1st Plaintiff

No consent for the 2nd Plaintiff

No consent for the 3rd Plaintiff

No consent for the 1st Defendant

No consent for the 2nd Defendant

L. GACHERU

JUDGE

15/6/2020