



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MOMBASA

PETITION NO. 2 OF 2017

JOSEPHAT NYAMBU MWAMBU.....PETITIONER

= VERSUS =

NATIONAL LAND COMMISSION

KENYA NATIONAL HIGHWAY AUTHORITY

CHINA CITY CONSTRUCTION COMPANY.....RESPONDENTS

J U D G M E N T

1. The Petitioner instituted this suit against the Respondents on 25th January 2017 seeking redress for undervaluation of compensation due to him from a portion of the property known as Parcel No. Chawia/Wusi-Kaya/1742 which the Respondents compulsorily acquired vide Kenya gazette notice No. 13943 of 18th October 2013. He has filed the suit in his capacity as the legal administrator of Delvano Mwambingu Nyambu (deceased) who is the registered proprietor of the property and the owner of all developments erected thereon. It is pleaded that the land was acquired for construction of the Mwatate-Taveta - Holili Road. That the 1st Respondent proceeded to value the land and the developments on it without the Petitioner's involvement resulting in the undervaluation of compensation due to him at Kshs.3,704,150.

2. Being aggrieved with the award of the aforesaid sum the Petitioner conducted his own valuation by independent land valuers, Messrs Njihia, Muoka, Rashid & Company who valued the land and properties compulsorily acquired at Kshs.21,300,000. He then wrote to the 1st Respondent demanding payment as per his own privately conducted valuation which elicited no response. It is pleaded further that the 3rd Respondent is at an advanced stage of road construction having reached Mwatate Town hence the Petitioner's houses are due for demolition yet he is yet to be compensated. Consequently, the Petitioner is at risk of being rendered homeless and destitute. He seeks the following reliefs:

(i) A declaration that the compulsory acquisition of the Petitioner's land without just compensation is a violation of his constitutional rights under articles 40, 47, 43, 27 and 28.

(ii) A declaratory order that the Petitioner is entitled to be compensated for the compulsory acquisition of Plot No. Chawia/Wusi-Kaya/1742 at the current market price of Kshs.21,300,000 plus the valuation costs of Kshs.90,000.

(iii) An order of mandamus to compel the Respondents to pay the sum of Kshs.21,300,000 to the Petitioner being the compensation justly and fairly due to him for the compulsory acquisition of part of parcel no. Chawia/Wusi-Kaya/1742

(iv) In the interim, an injunction order restraining the Respondents from demolishing the Petitioner's houses standing on Plot No. Chawia/Wusi-Kaya/1742 until this suit is heard and determined

(v) Costs of the Petition

3. The Petition is opposed vide the following:

(i) 1st Respondent's response to the petition dated and filed on 29th January 2018

(ii) 2nd Respondent's response to the Petition dated 5th October and filed on 9th October 2017

4. In its response the 1st Respondent through its chief valuation officer, Mburu F. K pleaded that the acquisition process of the suit property was above board in strict compliance with Articles 40 and 47 of the Constitution and the Land Act. That the 1st Respondent published an intention to acquire the suit land vide gazette notice 13942 of 18th October 2013. Immediately thereafter, the 1st Respondent undertook physical inspection of the affected properties to determine compensation payable to their owners. A notice of inquiry was published and the inquiry conducted at the Mwatate Chief's office on 10th December 2013 at 9am with the Petitioner in attendance.

5. Subsequently, an award of Kshs.9,831,120 was made to the Petitioner and his co-owners inclusive of disturbance allowance. That the Petitioner accepted the award without reservations and executed the statement form to the award. The form accorded the Petitioner an opportunity to accept or decline the award yet the Petitioner and his co-owner, Donald Mwambingu Nyambu signed it signifying their satisfaction. The 1st Respondent avers that it took into account the structures on the property in its valuation. Donald had pointed out to them those that belonged to him as well as the Petitioner's during physical inspection. Donald was paid compensation of Kshs.4,384,950 which he accepted.

6. The 1st Respondent contends that the present petition is an afterthought and that the Petitioner is estopped from raising the issue of undervaluation at this stage. Moreover, undervaluation has not been proved as the compensation due to the Petitioner is just and fair as compared to the amounts paid out to similarly affected proprietors. That the 1st Respondent being the only statutory body mandated to determine such compensation in accordance with section 113 of the Land Act 2012 cannot be swayed by the arbitrary and unsupported figure of Kshs.21,300,000 arrived at by a private firm. Further, it is based on wrong acreage of 0.259 acres as opposed to 0.2352 ha and grossly exaggerated taking into account the time value of money between the cut-off date of October 2013 and the valuation date of March 2016.

7. The 1st Respondent also raised a jurisdictional issue. That the Petitioner ought to have lodged an appeal before the Court as opposed to a Petition. Having been wrongly moved the Court lacks jurisdiction in the first instance to entertain a claim of this nature. The 1st Respondent prayed for the Petition to be dismissed with costs.

8. The 2nd Respondent's response and replying affidavit sworn by Daniel K. Mbuteti presents a version of events that is largely in consonance with that of the 1st Respondent. It is the 2nd Respondent's case that once the 1st Respondent after assessment published an award of Kshs.3,704,150, the 2nd Respondent forwarded it in two instalments of Kshs.1,742,020 and Kshs.926,036 for onward transmission to the Petitioner. The 2nd Respondent therefore contends that the Petitioner was fully compensated hence no claim lies against it.

9. Hearing of the Petition commenced on 19th October 2017 with the Petitioner testifying as **PW1**. **PW1** testified that his father was the registered owner of Chawia/Wusi-Kaya/1742 and produced a certified copy of the title as **P.Ex 1** and Grant of Letters of Administration as **P.Ex 2**. He narrated that a chief, Msanii Mwakio accompanied by surveyors told him that a road that was to be constructed would pass through his land and he would be compensated for the portion acquired. He pointed out his buildings and tenants to them but he was not involved in assessment of the compensation pegged at Kshs.3,704,150 as per the 1st Respondent's valuation report produced as **P.Ex 3**. That strangely, the area chief of his location was not involved in the exercise.

10. **PW1** being aggrieved by the compensation amount which he deemed too little reported the same to the area Member of Parliament, Andrew Mwadime who assured him that officials from the National Land Commission would come and see him. That he had been verbally told that he was supposed to be compensated over Kshs.10 million yet he was given a letter stipulating Kshs.3,704,150. His brother had been paid Kshs.3,100,000 for his land and buildings. **PW1** continued that he instructed private valuers to conduct a valuation whereby they placed a value at Kshs.21,300,000. He stated that he gets monthly rental income of Kshs.120,000 from his houses and records to that effect are kept with estate agents adding that he also has other rental structures whose income is undocumented. Pursuant to the second valuation, **PW1** sent a demand letter to the 1st Respondent but received no response.

11. On cross-examination **PW1** admitted that the land belonging to his late father measured about one acre. The road was to take half the plot. He continued that his brother's share also formed part of the suit property but he was separately given his payment from **PW1**'s. As at the hearing date **PW1** had not received the compensation sum; his houses had not been demolished and he was still receiving rent from his tenants. It was his evidence that when this case began the title of the suit property bore his late father's name which he later had transferred to his name. **PW1** also admitted that he did not apply for a review at the National Land Commission. That he refused to accept the payment because it was an under-assessment.

12. The 1st Respondent filed additional documents after the hearing commenced prompting **PW1** to be recalled on 18th February 2019. He averred that he was not notified of the meeting of 10th December 2013 nor did he hear of any meeting that took place at the Chief's Office in Mwatate Location where the suit property is located. He was however invited to attend a meeting at Mwachabo Location. At the said meeting, he was informed that whether or not he signs the statement annexed as NLC-2 in the 1st Respondent's Affidavit, the road would still be built. **PW1** was categorical that the statement did not indicate the compensation amount. He testified further that the main house belongs to him and not his son Donald who was only a tenant. That Donald did not inform him of any payment he received from the 1st Respondent as such payment would have been illegal. **PW1** contended that Donald was compensated for his business, not the house while his brother Darius Chrispus was paid for his house and not the land.

13. It was **PW1**'s evidence that he did not have letters of administration as at 2013. That his son Donald and brother Darius were paid yet they also did not have letters of administration. He continued that the Notice to Demolish was given on 19th February 2018. That he has incurred loss of Kshs.37,000 for partial demolition of his developments. He has also not had sight of the 1st Respondent's valuation report to compare with his own.

14. On further cross-examination, **PW1** stated that the acquired land which initially belonged to his deceased father who died in 2008 now

belongs to him though the transfer is yet to be effected. That he obtained the grant ad colligenda bona on 27th October 2016. The succession Court then decided that the property be registered in his name being the firstborn. They signed a consent to that effect but he did not have a copy of the consent to present to the Court. Moreover, distribution of the estate had not been done but he maintained that his share as well as his brother's were clearly marked. **PW1** testified further that he had built houses that were rented out as a clinic and business rentals. The bar was being run by his son Donald while the clinic was run by a tenant called Mwatati. He admitted that he did not have any tenancy agreements as proof of the same and continued that part of the bar was acquired but the clinic has not been demolished.

15. When confronted with the document marked as NLC -2 annexed to the 1st Respondent's affidavit **PW1** admitted to signing it on 23rd June 2014. He denied giving the government his bank details and expected to be paid the Kshs.3.7 million in cash or by cheque. **PW1** asserted that his valuation report only included his own share of the land and buildings and he was only claiming what was due to him, exclusive of the payments made to his son and brother.

16. Shake Haron, the valuer who conducted the 2nd valuation on the suit property gave evidence as **PW2**. He stated that he is a holder of a Bachelor of Arts degree in Land Economics with a Post-graduate diploma in Valuation and Estate Management. **PW2** narrated that he conducted the valuation on 12th March 2016 and prepared a report on a portion of the suit property measuring 0.259ha. The report dated 22nd March 2016 was produced as **P. Ex 4**. He continued that he identified structures to be affected by the road expansion at page 2 -7 of the report. Page 8 reflected the gross monthly income **PW1** was receiving from the structures. The material portion of the property was assessed at Kshs.21,300,000. **PW2** stated further that he charged a professional fee of Kshs.90,000. He was paid Kshs.20,000 leaving a balance of Kshs.70,000 and also Kshs.5,000 for his court appearance. **PW2** attributed the difference in valuation between his report and the 1st Respondent's report conducted in 2013 to the time value of money.

17. On cross-examination, **PW2** admitted that he did not have receipts of his fees for both the valuation and court attendance. He gave evidence that at the time of inspection, the structures were still on the ground. That **PW1** sought his firm's services because he was dissatisfied with the 1st Respondent's valuation. Further, physical measurements as shown by **PW1** covered a 0.259ha portion of land earmarked for acquisition. **PW2** opined that the difference in acreage between the 0.259ha and the 0.235ha figure stipulated in the notice of inquiry was negligible and could not affect the value of the suit property. He confirmed that there were tenants on the ground. That he used receipts issued by **PW1** to calculate income which receipts he did not annex to the report. **PW2** continued that audited reports and income tax returns were not necessary in the preparation of the report.

18. On the valuation methodology **PW2** testified that he took comparables of land within the area but did not annex them to the report. That the structures assessed were pointed out by **PW1** himself. They did not investigate ownership as their purpose was solely valuation. For that reason **PW1** did not have a history of the developments, architectural drawings or the bill of quantities. He stated further that the said structures were identical to those in the 1st Respondent's report.

19. The defence case proceeded with two witnesses testifying on behalf of the 1st and 2nd Respondents. **DW1**, Fidelis K. Mburu stated that he is the acting director of valuation at the National Land Commission and in the list of valuers gazetted to practice for the year 2019. That he prepared the report for the suit property which he had inspected in the company of a colleague, Elias Ruigi, the area chief and Donald Nyambu. **DW1** narrated that during inspection, he identified the buildings on the land over which there were different interests. An inquiry was then held at Mwatate after which the awards were prepared. He asserted that **PW1** attended that meeting on behalf of his family. That **PW1** presented ownership documents and laid claim to the property. **PW1** was however informed that he had to acquire documents in terms of administration of the deceased's estate. He was also informed that he was entitled to the buildings only.

20. **DW1** continued that in preparing the awards, they used the market value of the properties with comparables they attached to the resultant report. Once the reports were prepared, they were issued to the interested parties and the Petitioner accepted the award by signing a statement. It was **DW1**'s evidence that in their records they had details of the Petitioner's bank records. He however could not tell whether the acceptance form was signed in the presence of any other party. According to **DW1**, once a person accepted an award it was promptly issued. If they declined the proper procedure was to approach the Environment and Land Court as per section 128 of the Land Act.

21. **DW1** testified that the area to be acquired measured 0.2352 ha. Any report objecting to the award was to be filed on or before the date of inquiry. That any report filed after the inquiry was inadmissible for purposes of determination of the award. The Petitioner's valuation report did not reach the 1st Respondent and also bore glaring inconsistencies with their report in terms of the area gazetted and the time value of money having been prepared 3 years apart. **DW1** continued that in their valuation, separate interests are captured. That in their report they provided disturbance allowance at 15% of the value of the assessed property. They did not take into account loss of income as no evidence was presented to them such as audited accounts and tax returns.

22. In cross-examination **DW1** admitted that the 2nd Respondent remitted the compensation funds to them. When challenged on the difference in his signatures on the valuation report and the 1st Respondent's replying affidavit he explained that he uses different signatures for security reasons. He also admitted that Donald did not indicate to them that he had the Petitioner's authority while identifying the structures. Further, the chief's role in the physical visit was security. The first port of entry is the District Commissioner's office who assigns the 1st Respondent's officers the chief they will work with hence they have no choice in which chief they work with.

23. On the issue of payment, **DW1** stated that cheques were prepared by the 2nd Respondent so bank details given were not necessary. He availed a list as proof. That when the cheques are not collected, they are returned and cancelled. He however could not confirm if the Petitioner had collected his cheque. **DW1** averred that his report did not have errors. The only issue was the ownership of a house belonging to the Petitioner's brother Darius whose share was contested. He denied colluding with the Petitioner's son, Donald and faulted the Petitioner for raising his compensation claim 3 years after the process was completed. That the Petitioner was aware that Donald was paid but did not raise any complaint.

24. **DW2**, Daniel Kariuki testified that he is employed by the 2nd Respondent as a senior surveyor. He confirmed that the project of

upgrading of the Mwatate-Taveta-Holili road was done and that the road is in use. He also confirmed that the monies indicated in the valuation report were remitted to the 1st Respondent. He continued that they had not taken possession of the acquired land as its purpose was for safety and service. That was the reason why the existing road was upgraded without any demolitions. He however admitted that the land acquisition process was not yet complete.

25. After the hearing was completed, parties elected to file and exchange written submissions. The only submissions on record are the 2nd Respondent's which were filed on 25th September 2019. I have considered the parties' pleadings, witness testimony, submissions and the applicable law. The following issues arise:

- (i) *Whether due process was followed in the compulsory acquisition of a portion of the suit property*
- (ii) *Whether there was undervaluation as claimed by the Petitioner*
- (iii) *What reliefs if any is the Petitioner entitled to.*

26. The Petitioner seeks redress on account of what he termed as an undervaluation of a portion of the suit property compulsorily acquired by the Respondents. In his pleadings and testimony, he indicated that the process followed was not above board on account of the following. Firstly, the area chief who came for the physical inspection and held the meeting pursuant to the statutory notice of inquiry was of a different location from which the suit property is situate. Secondly, the Petitioner was not involved in the valuation process and was only compensated for the buildings as opposed to the land acquired. He also faulted the respondents for dealing with his son, Donald Nyambu who he insisted was not an owner of any buildings on the suit property and did not act as his agent or under his authority. The Petitioner did not however contest the awards made to his son and brother.

27. The first part of call that deals with compulsory acquisition is the Land Act. **Section 107** provides for service of preliminary notice to acquire the property and **section 108** gives permission for the physical inspection. From the evidence adduced, the Respondents adhered to the provisions of both. The crux of the case is whether or not **section 112** on compensation inquiries was also complied with by the Respondents. It sates as follows:

112. Inquiry as to compensation

(1) At least thirty days after publishing the notice of intention to acquire land, the Commission shall appoint a date for an inquiry to hear issues of propriety and claims for compensation by persons interested in the land, and shall -

(a) cause notice of the inquiry to be published in the Gazette or county Gazette at least fifteen days before the inquiry; and

(b) serve a copy of the notice on every person who appears to the Commission to be interested or who claims to be interested in the land.

(2) The notice of inquiry shall call upon persons interested in the land to deliver a written claim of compensation to the Commission, not later than the date of the inquiry.

(3) At the hearing, the Commission shall-

(a) make full inquiry into and determine who are the persons interested in the land; and

(b) receive written claims of compensation from those interested in the land.

(4) The Commission may postpone an inquiry or adjourn the hearing of an inquiry from time to time for sufficient cause.

(5) For the purposes of an inquiry, the Commission shall have all the powers of the Court to summon and examine witnesses, including the persons interested in the land, to administer oaths and affirmations and to compel the production and delivery to the Commission of documents of title to the land.

(6) The public body for whose purposes the land is being acquired, and every person interested in the land, is entitled to be heard, to produce evidence and to call and to question witnesses at an inquiry.

28. The 1st Respondent was adamant that the Petitioner attended the meeting and appended his signature to the statement annexed as NLC-2 to the Respondent's replying affidavit. There is sufficient evidence presented by the Respondents that they complied with section 112. The same is contained in the gazette notices number 13942. The statement signed by the Petitioner states that he accepts the award and requests that the compensation due to him be paid into his bank account as per details provided also confirms that an inquiry was conducted.

29. The issue for the determination then is whether or not the Petitioner did not receive a just compensation for the land acquired. In stating his case, the Petitioner blamed the Respondents for doing the following;

- a) The Petitioner testified that he signed the form that did not have the amount he was to receive under duress.

- b) That his son was paid compensation for the building yet the son was merely a tenant of the petitioner.
- c) That during inspection, their area chief did not participate as the Respondents were accompanied by a chief from a different location.
- d) The Petitioner was not involved during the valuation of the property.

30. Section 113 of the Land Act provides that the mandate of valuation for purposes of compulsory acquisition rests solely with the National Land Commission. They determine the acreage based on the needs of the public body seeking to acquire land issuing a more objective report.

113. Award of compensation

(1) Upon the conclusion of the inquiry, the Commission shall prepare a written award, in which the Commission shall make a separate award of compensation for every person whom the Commission has determined to have an interest in the land.

(2) Subject to Article 40 (2) of the Constitution and section 122 and 128 of this Act, an award-

(a) shall be final and conclusive evidence of-

(i) the size of the land to be acquired;

(ii) the value, in the opinion of the Commission, of the land;

(iii) the amount of the compensation payable, whether the persons interested in the land have or have not appeared at the inquiry; and

(b) shall not be invalidated by reason only of a discrepancy which may thereafter be found to exist between the area specified in the award and the actual area of the land.

(3) If an interest in land is held by two or more persons as co-tenants, the award shall state-

(a) the amount of compensation awarded in respect of that interest; and

(b) the shares in which it is payable to those persons.

(4) Every award shall be filed in the office of the Commission.

31. PW2 stated that he based his valuation on the acreage and location as was shown by the Petitioner. DW1 stated that their report was informed by the requirements of the 2nd Respondent as per their instructions which were duly gazetted. There is a difference of 3 years when the 1st Respondent's valuation report was prepared and that of PW2 which period is significant taking into account the appreciation rate of real property and the time value of money which may have contributed to the valuation difference between the report by the 1st Respondent and that contracted by the Petitioner. The Court also noted that there were discrepancies regarding ownership of the land at the time of acquisition. The Petitioner has admitted that the suit property was registered in the name of his late father. He acquired letters of administration on 27th October 2016, after the acquisition process had been completed.

32. In his testimony, it was his evidence that the property became registered in his name as the first born implying that there are other beneficiaries whose participation or consent to bring these proceedings was necessary. Such consent was not exhibited to the Court. The Petitioner stated further that his brother Donald Nyambu is a co-owner with his own marked buildings. That brother was duly compensated in the sum of Kshs. 4,384,950. The petitioner did not call his brother or any owner of the neighbouring plots that were paid higher sums of money pursuant to the same acquisition to corroborate his case that his properties were grossly undervalued. Although the Petitioner claimed that his son was just a tenant on the suit portion of the property but he did not join him to this case to recover the sums "wrongly awarded" and paid to the said son. Thus his claim presents a real danger of double-compensation for the same building.

33. This court is satisfied by the Respondent's evidence that the Petitioner participated in the inquiry hearing and would have raised any complaints he had which he is raising now. Since the Chief played no role in the valuation process, I find nothing wrong whether the chief from another location accompanied the Respondent's officers. Further, the 1st Respondent acted within the provisions of section 113 of the Land Act in making the awards payable. The Petitioner has not proved any breach and relying on a valuation report done three (3) years after the inquiry did not in my opinion add value to his case.

34. Further, the Petitioner cited violation of his rights under article 27 yet he has not demonstrated how his award was discriminatory in light of other similar awards resulting in the purported undervaluation. On his right to property the above expose reveals that due process was followed and he was not arbitrarily deprived of his property. His compensation award was available for payment to him as provided under Article 40(3) of the Constitution. The 1st Respondent can review its records and facilitate the payment of the compensation award of Kshs.3,704,150 to the Petitioner if the same had not been paid.

35. In conclusion, I find that the 1st and 2nd Respondents followed due process and did not violate the petitioner's rights while compulsorily acquiring a portion of the suit property. As a consequence, I find that the petitioner has not made a case warranting granting of the orders

sought. I proceed to dismiss the petition with an order for each party to bear their respective costs.

Judgment Dated and signed at Busia this 15th day of July 2020.

A. OMOLLO

JUDGE

And delivered electronically by email to the parties this 16th Day of July, 2020 due to Covid-19 pandemic.

A. OMOLLO

JUDGE