



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 504 OF 2017

KENYATTA UNIVERSITY STAFF

RETIREMENT BENEFITS SCHEME.....PLAINTIFF

VERSUS

ATHI WATER SERVICES BOARD.....1ST DEFENDANT

THE CABINET SECRETARY MINISTRY OF

ENVIRONMENT, WATER AND

NATURAL RESOURCES.....2ND DEFENDANT

NATIONAL LAND COMMISSION.....3RD DEFENDANT

THE HON. ATTORNEY GENERAL.....4TH DEFENDANT

JUDGMENT

By a Plaint dated 2nd May 2017, the Plaintiff filed this suit and sought Judgement against the Defendants seeking for the following orders:-

a) An order compelling the 1st Defendant to pay the Plaintiff the agreed sum of Kshs.135,781,650/= in respect of 17.492 acres of L.R No. 3544 Kiambu.

b) General Damages for trespass as against the 1st Defendant.

c) A permanent injunction restraining the 1st Defendant, whether by itself, or through its employees, agents, workers or servants, from entering upon, occupying, fencing excavating, constructing upon, developing alienating or in any way using any portion of L.R No. 3544 Kiambu.

d) IN THE ALTERNATIVE, an order directed to the Defendants to compulsorily acquire 17.492 acres (the relevant portion) of the Plaintiff's property and to compensate the Plaintiff for the said acquisition in accordance with the law.

e) Costs of the suit.

f) Such other and/ or further remedies as this Honourable Court deems fit.

In its statement of claim, the Plaintiff averred that it is the registered owner of the suit property known as LR No. 3544 situate in Kiambu County. That on **21st November 2012**, the 1st Defendant notified the Plaintiff of its intention to acquire **17.492 acres** of the suit property, at the proposed acquisition price of **Kshs. 64,298,800/=** for the purpose of constructing a dam. That on **10th September 2015**, the Plaintiff responded to the 1st Defendant's proposed acquisition by making a Counter offer of **Kshs. 165,848,414/=**. It was further contended that in a meeting held on **8th March 2016**, between the Plaintiff's and the 1st Defendant's professional Valuers **M/ S Losai Management Limited** and **Gen Africa Asset Manager Limited**, the price of the aforesaid acres was agreed upon at **Kshs.135,781,650/=** and a joint **Valuation Certificate** duly issued. However, the 1st Defendant has insisted on its initial offer effectively renegeing on the **joint Valuation Report** which had been duly signed off by both parties' Valuers.

It was further contended that the 1st Defendant had unilaterally and without any colour of right entered into the suit property and has desecrated and violated it by extracting stones and excavating from the earmarked **17.492 acres**, and has employed the use of heavy machinery to begin the construction of a dam. Further, that the 1st Defendant has placed concrete posts on the property evidencing an intention to fence off the suit property in effect locking out the Plaintiff from its own property.

The Plaintiff further averred that without compensating it, the 1st Defendant has trespassed on the suit property by entering thereon and materially using the suit property and as a result the Plaintiff has suffered loss and damage. The plaintiff particularized damages as; loss of quiet and peaceful enjoyment of the suit property, unlawful excavation and removal of natural materials including cutting down of trees, loss of use of the suit property.

That the 1st Defendant's unlawful acts contravened the Plaintiff's constitutional rights to property under **Article 40**. Further that the 1st and 2nd Defendants have purported to unlawfully compulsorily acquire **17,492 acres**, of the Plaintiff's land without following the acquisition procedures as set out under sections **107 to 111 of the Land Act 2012**, and without paying the Plaintiff any compensation.

The suit is contested and the 1st, 2nd and 4th Defendants filed a statement of Defence dated **2nd February 2018**, and denied all the allegations made in the Plaintiff. It was their contention that the **joint Valuation Report**, which purportedly valued the suit property at **Ksh. 135,781,650/=** did not have the necessary back up and was only to be adopted as the **fair value** of the suit property upon some conditions being fulfilled by the Valuers and the Valuation report was to be accompanied by the related Valuation reference, that **Gen Africa Asset Manager Limited**, was to compile a report and have it signed by both Valuers for submission.

That unfortunately **GenAfrica**, singularly prepared a report dated **28th November 2016**, but that it was not signed by both Valuers. It was further contended that the 1st Defendant concurrently expressed to the Plaintiff their wish to compensate the Plaintiff with the original offer of **Kshs. 64,356,700/=** since the amount was based on a Valuation report carried out for all affected persons in **2013 by AWSB**. The Defendants averred that the project implementation commenced on **15th October 2014**, and that the Plaintiff allowed the 1st Defendant to enter and implement all the works on the suit property pending compensation. It was their contention that they were still willing to compensate the Plaintiff the original offer.

The 3rd Defendant entered appearance but did not file any pleadings.

After close of pleadings, the matter proceeded for viva voce evidence wherein the Plaintiff called **two** witnesses and the Defendants also called two witnesses and closed their case.

PLAINTIFF'S CASE

PW1 Stephen Odhiambo Omwengo testified that he is a registered Valuer employed by **Tysons Limited**. It was his testimony that Tysons Ltd was engaged by **Gen Africa Assets Management Limited** on behalf of the Plaintiff. That he prepared a Valuation report jointly with **Gitonga Akotha** on behalf of **Losia Management Limited**, who were the consulting Firm of **Athi Water Services Board**. That the value of the suit property was a fair joint value which was **Kshs. 118,071,000/=** and out of that figure was added disturbance allowance of **15%** which came to **Kshs.17,710,650/=** putting the total valuation to **Kshs. 135,781,650/=**. That the said figure was arrived through a joint valuation wherein both Valuers appended their signatures. He produced the Valuation Report as **Exhibit 1**. That in preparing the joint report, it was conditional that the prepared joint report be issued within a period of **one week** and the same was issued as per the condition.

It was his further testimony that the documents that were required were stated in the minutes and that at the meeting of **10th May 2016**, it was agreed that the **fair value** was prepared by the two Valuers and that the **Gen Africa Asset** was to prepare a Valuation report. That the report on **page 97** was a culmination of all the meetings they had and a conclusion of the report on **page 35**. He further stated that the Valuation Report is dated **8th March 2016**, and the said report was signed at the **Athi River Water's offices** and that **Mr. Gitonga** was appointed by **Losai Management Ltd** as a Valuer on behalf of **Athi Water Services Board**. That the report was made in **2016**, and it did not matter when the Defendant intended to acquire the land. What mattered was when he prepared the report and that **Mr. Gitonga** never challenged the report and that the report tallied with what was in the joint certificate.

PW2 John Musa Sawaya, adopted his witness statement dated **2nd May 2017** as his evidence. He further produced the list of documents dated **2nd May 2017 as Exhibit 2**. He urged the Court to allow their claim as per the Plaintiff. He testified that the Plaintiff received a notice of intention and that the Defendant was willing to pay **Kshs. 64,298,800/=** but that the Plaintiff did not agree with the amount to which it notified the 1st Defendant. That the Plaintiff placed a counter offer which was based on the acres of land that was to be acquired and that there was a resolution on how the intended land was to be acquired. Further that he attended the meeting of **10th May 2016**, and that the Valuation was to be carried on certain conditions and as per minute 5, and the meeting was required to adopt the **joint fair value** subject to certain conditions.

It was his testimony that the report was adopted, but on condition that the documents were to be presented to the joint Valuers and **Gen Africa** was to prepare a report which was to be presented to the two valuers. He further testified that he was not aware if **Gen Africa** prepared the said report or if the documents were availed. That the 1st Defendant took possession of the suit property after the communications had began and that the 1st Defendant had expressed their intention in **2012**, and took possession in the year **2014**.

That in the meeting of **10th May 2016**, it was reported that **Kenyatta University Retirement Benefit** was not opposing the community project and that the 1st Defendant did not enter the land by force. He further testified that the Plaintiffs are now in Court as the 1st Defendant notified them that they would not pay the said amount and was only willing to pay the Plaintiff the initial figure of **Kshs. 64,000,000/=**.

In re-examination, he stated that in their joint meeting, the value was adopted as per the report and it was agreed that since the **fair value** was agreed by both Valuers, then the joint fair report was adopted and **Mr. Gitonga** would sign the report. That the 1st Defendant entered upon the suit property without paying any monies for compensation and that the 1st Defendant has fenced the said suit property.

DEFENCE CASE

DW1 Joseph Mungai Kamau a professional **Engineer** working with **Athi Water Services Board**, stated that during the construction of the Riara dam, they conducted a Valuation of the land to be acquired and that the said land was for **17.49 acres** belonging to the Plaintiff and they were to pay **Kshs. 64,298,800/=**. That the 1st Defendant had not paid the said compensation as the Plaintiff gave them a Counter offer of **Kshs. 165, 848, 416 /=-**. He further testified that the parties met on **10th May 2016**;- that is the Plaintiff and 1st Defendant and agreed to do a joint Valuation. That the Plaintiff gave them a Valuation report of **Kshs. 135,781,650/=** but that the report did not have necessary supporting documents as it was to be accompanied by Valuation references. That they received a Valuation report of **Kshs. 135,781,650/=** which was not consistent with the agreement presented by the Plaintiff and the 1st Defendant responded indicating that it was not jointly signed. That the 1st Defendant were willing to pay the Plaintiff, but that **Athi Water services** did not consult with their valuers and that it had been allowed to work on site . It was his further evidence that **compulsory** acquisition would be done through the **National Land Commission**. He produced the List of documents filed on **2nd February 2018** as **Exhibit 1**.

He further testified that **Athi Water Service Board** intended to purchase the suit property, but that the agreement was never signed and that the Plaintiff who were the vendor agreed to give vacant possession once the agreement was signed. That the agreement for compensation of the blue gum trees was never paid and he acknowledged that 1st Defendant had obligations that were never fulfilled. He further acknowledged that the minutes of **10th May 2016**, were accurately recorded and that he accepted that the Valuation report was joint and gave the value of **Kshs. 135,781,650**, being the report through the **Losai Management**. Further that in the meeting he chaired, the Valuation report was accepted as a summarised joint valuation of both parties and it was signed by both parties dated **8th March 2016**, and the Valuation report was adopted, subject to history of land and further documents of the owner of the land. He told the Court that the project commenced on **15th October 2014**, and the minutes were for **10th May 2016**. He testified that there was a summary giving a figure without giving how the figure was arrived at and that other documents needed to be forwarded and the condition was to have their Valuation principles and recognize the methodology used to arrive at the value .

DW2 Gitonga Akotta, Land Valuer running **Inter Consult Valuer Limited**, stated that he signed a joint Valuation report dated **8th March 2016**, between the two parties and that he works for **Losai Management Limited**. It was his further testimony that the document he signed was a **fair value** and not a Valuation report as a Valuation report has many components. That the document was an acknowledgement of fair value and that he signed it as acceptance of there being existence of fair value. That he was never informed of the conditions given by the parties and that he did not communicate with **GenAfrica Limited** . He denied that he gave the person who signed the document authority to produce it.

He acknowledged that **Losai Management** was the Project Manager of **Athi Water Services Board**, and that there was Agent and Principal relationship. It was his evidence that the figure was not correct and that **fair valuation** is an estimation in a financial market. He further acknowledged that he signed of his **free will** and also denied engaging in professional misconduct. That he knew that the document would form a basis of **fair value** consideration, but that the document is useless. Further that he was to review the document and say that it was useless and he disowned it and that there was no working data. That he was not in the meeting and the minutes were not captured properly.

On re-examination, he testified that he reviewed the document and he was to report at the beginning , He testified that the Valuation was for compensation sake and that other property owners acknowledged and accepted the initial valuation and were paid what was in the fair joint value . He testified that he could have reviewed the value which he did not do.

After close of viva voce evidence, parties filed their written submissions which the Court has carefully read and considered. The Court finds the issues for determination are;-

- 1. Whether there exists a valid Valuation Report binding the 1st Defendant to Compensate Plaintiff at kshs.135,178,650/=**
- 2. Whether the Plaintiff should be compensated and at how much**
- 3. Whether the Plaintiff is entitled to the orders sought**

1. Whether there exists a valid valuation report binding the 1st Defendant to Compensate Plaintiff at kshs.135,178,650/=

The Court notes that both the Plaintiff and the 1st , 2nd and 4th Defendants have submitted that the issue for determination is whether the suit property has been valued at **kshs.135,178,650/=**. However, in their pleadings and testimonies, the parties have acknowledged that there was a **fair valuation**, valuing the said suit property at the said amount. What is in contention is whether the final valuation report prepared by **Gen Africa** adhered to the conditions set out in the meeting held on **10th May 2016**. To further buttress the position that the said amount was indeed acknowledged as the Valuation of the suit property, the Court has seen the minutes of the meeting held on **10th May 2016**, wherein the **fair value** was agreed to be adopted as the true report from the joint valuers.

It is not in doubt that there was a meeting between the parties and that the minutes of the said meeting were recorded by a representative from the 1st Defendant. Though DW 2 in his evidence sought to have the Court believe that he would have reviewed the said report, there was never an indication of the same before giving his testimony either by way of documentation or verbally and he did sign the Valuation certificate. Therefore, the Court finds and holds that the parties having agreed to conduct a joint **valuation** and the parties having agreed in

their meeting that the amount of the fair valuation was proper and adopted it, then the said amount in the Court's considered view was then the properly and accepted **Valuation** of the suit property as adopted.

However, beyond the agreement that the fair valuation was proper, it was required by the parties that further conditions had to be fulfilled to make the valuation complete. From the evidence adduced as per the minutes of the said meeting, it was required that the Valuers attach certain documentations and since the **fair value** was prepared by the joint valuers, then **Gen Africa** would compile the said report and have it signed by both parties. It is not in doubt that as per the evidence of **PW1**, Gen Africa did attach the said documentations, prepared the Valuation report and forwarded it to the 1st Defendant. However, it is not in doubt that the 1st Defendant never signed the said Valuation. From the minutes of the meeting, it is not clear whose obligation was to ensure that both Valuers signed the Valuation. However it is clear that the said Valuation was never signed by both valuers as required.

Therefore, this Court finds that though it is clear that there was an adoption of the Value of the suit property at **Kshs.135,178,650/=**, the conditions as set out in the meeting required that the Valuation report be signed by the two valuers and given that it failed the test, then there existed **no proper** Valuation report that would then ensure that the Plaintiff was to be compensated by the 1st Defendant for the said amount.

2. Whether the Plaintiff should be compensated and at how much

In the case of **Chief Land Registrar & 4 Others vs Nathan Tirop Koech & 4 Others [2018] eKLR** the Court held that:-

“Land ownership and land rights is both a historical and emotive subject in Kenya. A right to hold property is a constitutional right as well as a human right and no person can be deprived of his property except in accordance with the provisions or the constitution or statute. The condition precedent to taking away anyone's property is that the authority must ensure compliance with the constitution and statutory provisions”.

It is not in doubt that the suit property belongs to the Plaintiff and that fact is not in contention. Further, it is not in doubt that the 1st Defendant has since entered into the suit property and has since constructed a **dam** for purposes of public use. Therefore, it follows that being that the Plaintiff's land has been acquired by the 1st Defendant who is a government entity, the Plaintiff is then entitled to the requisite compensation.

It is the Defendants contention that at all times they have been willing to pay the Plaintiff the compensation of **kshs. 64,298,200/=** but the Plaintiff have refused to take the said amount despite the Defendants willingness to pay the same. In the case of **National Land Commission ...Vs... Afrison Export Import Limited & 10 others [2019] eKLR** the three Judge bench held that;

“Under Section 1139(2) (a) of the Land Act, the value of the land being acquired is based on the opinion of the Applicant. In our view, the value of the land being compulsorily acquired for public purposes by the Applicant ought to be based on the price the property would fetch in the open market in an arms-length transaction in which all the parties are acting prudently. The valuation process needs to be clear to the persons interested in the land and to the public considering the fact that compensation funds are paid from public resources. The economic use to which the land being acquired was being put into would be a material factor to be considered in determining the value of the land to be acquired. The Applicant has to keep in mind that it acts in the public interest and therefore has a responsibility to ensure prudent, economical and responsible use of public funds when it is valuing land for purposes of compensation. There is need for transparency and accountability in the valuation of land for compulsory acquisition to make it sustainable and affordable.”

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

“Section 112 of the Land Act then involves the land owner directly for purposes of determining proprietary interest and compensation. The section has an elaborate procedure with the National Land Commission enjoined to gazette an intended inquiry and the service of the notice of inquiry on every person attached. The inquiry hearing determines the persons interested and who are to be compensated. The National Land Commission exercises quash judicial powers at this stage.”

From the above decided cases, it is this Court's considered view that Plaintiff has a role to play in the determination of the award to compensate it. Further in the determination of the award that the Plaintiff is to be compensated, the value of the suit property at market value ought to be the consideration in which the Plaintiff is to be compensated.

It is not in doubt that the Plaintiff is entitled to compensation of the suit property, the same having been acquired for public purpose. Though the correct procedure for compulsorily acquiring the suit property has not been followed, the Court finds that the same can be remedied by the payment of compensation to the Plaintiff with the Defendants following the due process as elaborated under **Section 107 to 115** of the Land Act. See the case of **Isaiah Otiato & 6 others ...Vs...County Government of Vihiga [2018] eKLR** where the Court stated ;

“The process is completed by the possession of the land in question being taken by the National Land Commission once payment is made even though the possession may actually be taken before all the procedures are followed through and no compensation has been made.”

From the above analysis of evidence and the law, the Court finds and holds that indeed the Plaintiff herein should be compensated and since the land is being acquired for public purpose, then value ought to be based on the price the property would have fetched in the open market.

3. Whether the Plaintiff is entitled to the orders sought

The Plaintiff in its Plaint dated **2nd May 2017**, has sought for various orders amongst them an order compelling the 1st Defendant to pay it **Kshs.135,781,650/=**. However the Court has already held that the conditions precedent that would have entitled the Plaintiff to be paid the said amount were not meant and therefore the said prayer is **not** merited.

The Plaintiff has further sought for a permanent injunction. However, it is clear that the 1st Defendant took possession of the acquired land and the said order is not tenable as the land is currently in use for public purpose. Although the Plaintiff as a private entity has its rights, at this point, the public rights supersede its rights more so as already held the Plaintiff had no objection to the project and have sought for compensation. Further the Plaintiff willingly allowed the 1st Defendant to take possession of the suit property.

As to whether the Plaintiff is entitled to General Damages for trespass, the Court finds that trespass has been defined by **Clerk and Lindsel on Torts, 18th edition at Pg.23** as;

“any unjustifiable intrusion by one person upon the land in possession.”

It is not in doubt that the 1st Defendant entered into the Plaintiff’s property with the Plaintiff’ permission and this has been acknowledged by the Plaintiff. However, it later emerged that the 1st Defendant entered into the suit property but failed to pay the compensation. It is not in doubt that the 1st Defendant had **consent** from the Plaintiff to enter into the suit property, the said entry does not amount to trespass.

The Plaintiff has further sought for an order directed to the Defendants to compulsorily acquire the suit property. The provisions of the **Land Act** requires the 1st Defendant to approach the **National Land Commission** for **compulsory acquisition** and failure to which it then can acquire. As the Court held earlier, the Plaintiff is entitled to compensation. The 1st Defendant having taken possession of the suit property, then the provisions of the law require that **due process** ought to be followed. Therefore, this Court finds and holds that the said prayer is merited and the Defendant should compulsorily acquire the suit property as per the law.

Further the Plaintiff has sought for the costs of the suit. **Section 27 of the Civil Procedure Act** gives the Court discretion to grant costs. Looking at the circumstances of the case and the fact that the 1st Defendant had an obligation to ensure that the Plaintiff was promptly paid compensation which was just, the Court finds and holds that the Plaintiff is entitled to the costs of the suit.

Having carefully considered the pleadings herein the evidence adduced and the written submissions by the parties the Court finds and holds that the Plaintiff has partially proved its case on the required standards of balance of probabilities. Consequently, the Court enters Judgment for the Plaintiff against the Defendants jointly and severally in terms of prayers no. **(d)** and **(e)** of the Plaint dated **2nd May 2017**.

The Defendants to compulsorily acquire **17.492 acres** of the Plaintiff’s suit property and then proceeds to compensate the Plaintiff for the said acquisition in accordance with the provisions of the relevant law being the **Land Act 2012** and in line with **Article 40(3)** of the **Constitution of Kenya 2010**.

The Plaintiff is entitled to costs of this suit.

It is so ordered.

Dated, signed and Delivered at Thika this 22nd day of October 2020

L. GACHERU

JUDGE

22/10/2020

Court Assistant – Lucy

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 ruling be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Darr for the Plaintiff

Mr. Mwambonu holding brief for M/s Ndundu for the 1st 2nd and 4th Defendants

No appearance for the 3rd Defendant

L. GACHERU

JUDGE

22/10/2020