REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL NO 6 OF 1987

CHELELGO LIMO …….... APPELLANT

VERSUS

COMMISSIONER OF LANDS……..……. RESPONDENT

JUDGMENT

This is one of the few cases where a land owner disputes compensation paid to him in respect of compulsory acquisition of part of his land. During 1986 the Government intended to compulsorily acquire some pieces of land to enable construction of water dam to supply water to Eldoret Municipality. The dam is constructed on Ellegrini river at Kaptagat and it is called Ellegrini dam.

The Commissioner of Lands communicated his intention to acquire some portions of land for that purpose from land owners around the river. The relevant notices were issued as provided by section 6 of the Land Acquisition Act. These were gazetted in the Kenya Gazette dated 11th December 1986 and appeared as notices numbers 5331 and 5332.

Amongst parcels of land affected by the notices were those of the appellant Chelelgo Limo. Those were plot numbers 211 and 10919 in Kaptagat Settlement Scheme. Out of plot No 211 Kaptagat Settlement Scheme the Commissioner intended to acquire 10.5 hectares while out of plot No 10919 he intended to acquire 31.79 hectares. The relevant procedures were followed after the notice and the valuer by the name Moseti Moindi was sent out to carry out inspection on behalf of the Commissioner of Lands on plot numbers 10919 and 211 Kaptagat Settlement Scheme to determine the nature of the land and the extent of developments thereon with a view to assessing compensation to be paid.

He held inquiries as to the claims for compensation although he said the appellant never presented any claim as required by section 9(3) of the Land Acquisition Act. According to him he based compensation on his inspection of the land acquired over which he had taken notes of all the developments including fences, cattle dip, building, trees and vegetables. He told this Court in his evidence that the lands varied in classification. Some parts were steep rock along the river and the sides. Few portions of the land were marshy while other sections had scattered rock outcrop. He classified the land in accordance with it's arability.

Out of the 10.5 hectares of plot No 211 Kaptagat Settlement Scheme, 6.5 hectares were fairly arable while 4 hectares was rock outcrop and steep area. And out of the 31.79 hectares on plot No 10919, 15 hectares were fairly arable, 9.79 hectares rock outcrop and flay and 7 hectares was rocky and steep land.

According to him he valued fairly arable land at Kshs 20,000/- per hectare and rock outcrop and steep

area was valued at Kshs 6,000/- per hectare, on plot No 211 Kaptagat Settlement Scheme. On plot No.10919, he valued a fairly arable area at Shs 20,000/-, rock outcrop and flay at Shs 8,000/- per hectare and rock and steep land at Shs 4,000/- per hectare.

Improvements on plot No 211 were valued at Shs 11,900/- while improvements on plot No 10919 was Shs 170,540/-. Total value of the land on Plot No 10919 was Shs 406,320 – while Plot No 211 Kaptagat Settlement Scheme land was valued at Shs 154,000/-. On these figures were added 15% statutory addition which on plot No 10919 came to Shs 86,529/- and on plot No 211 the statutory addition came to shs 24,885/-. The total amount of compensation for plot No 10919 was, therefore, Shs 663,389/- while total valuation of plot No 211 was Shs 190,785/- making a grand total of Shs 854,170/-.

The appellant disputed this figure saying that when he saw the notices of the intended acquisition he wrote a letter to the Commissioner of Lands asking for compensation totaling Shs 2,318,976/. According to him the value of his land should have been Shs 17,000/- per acre and that the value of all the improvements on the land should have been Shs 626,376/ -. According to him the land is wholly arable near Eldoret Municipality and only 200 meters from the main Eldoret Chepkorio tarmac road which should have pushed up the value awarded as compensation.

The appellant was supported by 2 valuers whom he sent to value the land, namely Kurban Allibhai Bannie and Ole Keriasek whom he called as witnesses. Keriasek gave the valuation of Shs 1,671,040/- for the land and Shs 418,410/- for improvements making a grand total compensation of Shs 2,402,868/-.

On the other hand, Bannie gave the value of land as Shs 1,514,235/- while the value of improvements were put at Shs 519,069/- making a grand total of Shs 2,033,304/-.

Section 75 of Kenya's Constitution provides for a compulsory acquisition of one's property in the interest of defence, public safety, public order, public morality, public health, town and country planning for the development or utilization of property so as to promote the public benefit. Paragraph 1(c) of the section provides for prompt payment of full compensation for the property so acquired. This is enforced by section 8 of the Land Acquisition Act which also provides for the payment of full compensation for the land compulsorily acquired under that Act. No doubt the acquisition of the appellant's land for the construction of a water dam for supply of water to Eldoret Municipality is a necessary acquisition for the town and country planning or the development or utilization of the property for the promotion of public benefit. The appellant told the Court he did not dispute the acquisition but what he disputed was the amount of compensation paid to him.

The Schedule to the Land Acquisition Act provides compensation, namely:

2. (a) the market value of the property,

(b) damage sustained or likely to be sustained by persons interested at the time of the Commissioner's taking possession of the land by reason of severing the land from his other land.

(c) damage sustained or likely to be sustained by persons interested at the time of the Commissioner's taking compensation of the land by reason of the acquisition injuriously affecting his other property whether movable or immovable in any other manner or his actual earnings,

(d) if in consequence of the acquisition any of the persons interested would or will be compelled to change his residence or place of business, reasonable expenses incidental to the change, and

(e) damage genuinely resulting from diminution of the profits of the land between the date of publication in the Gazette of the notice of the intention to acquire the land and the date the commissioner takes possession of the land.

Apart from these matters, no other matters should be considered according to this Schedule.

This notwithstanding, however, courts have tended to take into consideration the nearness of the land to be acquired to the main town and it's nearness to the road of access. Mr Moindi in his testimony considered prices of other parcels of land in the neighbourhood namely:-

(i) L.R. No.733/7 100 acres which was sold on 28th March 1984 for Shs 5,500/- per acre,

(ii) U.G./Kaptagat/252 18 acres which was sold in 1985 at Shs 6,000/- per acre,

(iii) 48/Lelmolk settlement Scheme, 5 acres which was sold on 18th December 1985 at Shs 4,000/- per acre; and

(iv) Plot No. 129 Mvita Settlement Scheme, 5 acres sold on 28th March 1984 for Shs 26,000/-, average of Shs 5,200/- per acre; and

(v) Plot No 101/ Mvita Settlement Scheme, 5 acres sold on 11th March 1986 at Shs 3,000/- per acre.

The last plot was sold the same year this acquisition was made although in a different locality from Kaptagat Settlement Scheme.

The valuer offered compensation of Shs 20,000/- per hectare in respect of this acquisition which was nearly shs 8,000/- per acre and in doing so he must have taken into account the conditions in the Schedule to the Land Acquisition Act, most probably that in paragraph 2(b) and (c).

Although the appellant disputed the amount he was paid for the trees which he had planted on the acquired portion, it came out in evidence that although he was compensated for the trees, he admitted in his evidence that he took and used those trees as firewood.

There is also consideration that after the dam has been constructed the appellant will have free access to it's water for his animals and that the Municipality is likely to develop a more permanent road and bridge instead of the previous minor road and temporary bridge which the appellant had constructed on his land. In this regard he is likely to benefit more by the construction of that dam on his land than he was before.

I also noted in the evidence that Kurban Allibhai Bannie a valuer who testified for the appellant was not registered at the time of carrying the valuation. Even at the time he testified in court he was not yet registered.

That Clement Sinonka Keriasek visited the acquired plots long after the intended development by the Government had already started on the land, therefore, that he could not have noted the features necessary to enable him value the land adequately.

The cardinal principle in cases of this nature is that the appellant has the onus to prove that the valuer was wrong in his valuation although that onus is not a heavy one; See *The Collector v Kassam Shivji Bhimji and 2 others* and *The Collector v Ahmed Bin Rahim & 3 others* (1959) EA at page 1063. Has the appellant in this court discharged that onus? It would appear to me that the valuer took all the relevant conditions appertaining to compensation in this type of cases except that he said nothing about the nearness of these parcels to Eldoret Town and to the main Eldoret/ Chepkorio road which is all tarmac.

As was held in *The Collector v Abdulla Pirmohmed & Others* (1958) EA at page 616 the distance of the plots from a main road was a material factor in assessing their value. In view of the latter observation, I am of the view that even if the valuer had taken into consideration the proximity of the land acquired to Eldoret Town and it's nearness to the main Eldoret/ Chepkorio tarmac road he would still have put the valuation he did without this particular consideration.

Even then, taking into account the comparable transactions quoted by the valuer, I am convinced the value of Shs 8,000/- per acre which he put to the appellant's acquired plots must have taken this particular aspect into account considering in particular that in the quoted transactions the valuations of the land

never went beyond Shs 6,000/- per acre. Moreover, during his own evidence, the appellant admitted that he had sold 10 acres of his land in Kongasis Settlement Scheme in 1986 for Shs 90,000/- which gave the valuation at Shs 9,000/- per acre. This land was situated only 2 miles from the land in dispute.

And during cross-examination by the state counsel he admitted that the land acquired included a stony area near the river whose acreage he did not know.

All these factors taken into account, Shs 20,000/- per hectare for arable land, Shs 6,000/- per hectare for rock-outcrop and steep land on plot number 211 and Shs 20,000/- per hectare for fairly arable land, Shs 8,000/ - per hectare for rock-outcrop and flay land and shs 4,000/- per hectare for rock and steep land on plot number 10919 would surely appear to be reasonable valuation of the appellant's acquired land.

In the circumstances, therefore, I have no alternative but to dismiss this appeal with 1/2 costs to the respondent.

Dated and Delivered at Eldoret this 10th Day of August, 1990

D.K.S. AGANYANYA

……

JUDGE