



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 1252 OF 1985

MBUTHIA.....PLAINTIFF

VERSUS

NAIROBI CITY COMMISSION.....DEFENDANT

JUDGMENT

In this case, the plaintiff is seeking compensation from the defendant for a plot measuring 0.32 acres situated along Newark Road, Nairobi which the plaintiff says was unlawfully taken from him by the defendant. The facts of the matter which do not appear to be in dispute are as follows:-

By a letter dated 22nd February, 1980 the defendants town clerk and chief executive officer offered the plaintiff the plot in question under certain terms and conditions more specifically set out in the said letter. After being offered the property the plaintiff proceeded to erect several structures and started to conduct certain business thereon. On April 10, 1985, the defendant wrote to the plaintiff canceling the allocation of the plot and requiring the plaintiff to surrender the plot to the defendant within 30 days. The plaintiff seems to have treated the action of the defendant as a compulsory acquisition. In his claim therefore he does not question the right of the defendant to cancel the allocation but only asks for proper, fair, full and adequate compensation for the plot, now being compulsorily acquired by the defendant for their own purposes.

The defendant however, did not treat the case as one of compulsory acquisition. It therefore filed a defence which purported to justify the repossession of the plot on the ground that its allocation was subject to consent by the Minister for Local Government which consent was declined and also the consent of the Commissioner of Lands which consent had also not been given. Following an application by the plaintiff the defendants defence was struck out on December 13, 1985 on the ground that it did not disclose any reasonable defence, was frivolous, vexatious and an abuse of the process of court and in the event this matter came before me for assessment of damages or in my view, the fair compensation payable in the circumstances of the case.

The parties have on advice by their respective valuers agreed on the value of the plot at Kshs1.7; million and the only issues remaining to be determined by this court are the following:-

- (a) Whether the plaintiff is entitled to an addition of 15% to the value of the plot; and
- (b) Whether the plaintiff is entitled to be paid a further sum of Kshs 800,000 being the agreed value of the improvements on the plot.

Regarding the first issue, I think the position is clear. The defendant did not purport to have acquired the property compulsorily. It tried to justify its action on the ground that the consents of the Minister for Local Government and of the Commissioner of Lands having been refused, the allocation of the plot to the plaintiff was invalidated and it was therefore entitled to cancel the allocation. However, on its defence being struck out, the plaintiff's case stood unchallenged and the defendant must be deemed to have acted unlawfully in canceling the allocation and purporting to repossess the plot.

In the case of *New Munyu Sisal Estates Ltd v Attorney General* (1972) EA 88, the court when dealing with the question of full compensation in a compulsory acquisition case held that if the land was not lawfully taken over, the damages at the market value of the land plus 15% would be payable. In my opinion the same principle applies to this case. The defendant's defence purporting to justify the cancellation of the allocation of the plot having been struck out, the plaintiff claim remains unchallenged and the defendant is deemed to have acted unlawfully. The plaintiff is therefore entitled to not only the value of the plot whose value has been agreed at Kshs 1.7 million but also another 15% of the value in accordance with the law as stated in the case of *New Munyu Sisal Estates Ltd v The Attorney General*.

The question of compensation for the improvements poses more problems. No law was quoted by either counsel appearing for the parties, under which the matter could be dealt with.

I think both parties accept that the structure on the plot were unauthorized. They comprise a godown, a garage and a printing press all valued at an agreed price of Kshs 800,000. Exhibit 2, the valuation report by the defendant's chief valuer states that "the development on the subject plot have not been considered for valuation since they are illegal as the building plans were never accorded any approval by the local authority." In Exhibit 3, the joint valuation report by valuers for both parties, the plaintiff's valuers accepts that the building plans for the improvements have not been approved by the defendant. Clearly they were unauthorized under the Local Government (Adoptive By Laws) (Building Order) 1968. They are therefore illegal structures.

Mr Khaminwa for the plaintiff argued that the plaintiff was entitled to compensation for the improvements on the plot. He contended that even if the improvements were unauthorized the plaintiff was in the process of regularising the position. No evidence was produced to show the steps so far taken to regularise the position and on this question I find that at the cancellation of the allocation of the plot the improvements thereon were illegal structures. As stated earlier no law was drawn to my attention under which compensation for these unauthorized and illegal structures could be paid.

The schedule to the Law Acquisition Act contains principles on which compensation is to be determined under the Act. Paragraph 1 of the schedule provides as follows:

(2) In assessing the market value the effect of any express or implied condition of title or law which restricts the use to which the land concerned may be put shall be taken into account.

(3) (b) If the market value of land has been increased, or is currently increased, in either of the following ways, the increase shall be disregarded; an increase by reason of the use of the land or premises thereon in a manner which could be restrained by a court or is contrary to the law, or is detrimental to the health of the occupiers of the premises or to public health.

As I have stated this is not a compulsory acquisition matter. However, in the absence of any other legal provision on the matter, I must be guided by the principles on compensation set out in the schedule to the Land Acquisition Act as they appear to be a fair manner of assessing compensation in the circumstances of this case.

The improvements had not been authorized under the Local Government (Adoptive By Laws) (Building Order) 1968. They were illegal. The plaintiff could have been restrained from erecting the structures on the plot. As argued by Mr Koge for the defendant, to give any value to these illegal improvements would be tantamount to legalizing an illegality. Consequently no value can be placed on the improvement on the plot and this court finds that the plaintiff is not entitled to any compensation thereunder.

In view of what is stated above, there will be judgment for the plaintiff as follows;

9 a) Kshs 1.7 million being the value of the plot.

b) Kshs 255,000 being 15% of the value of the plot.

c) Cost of the suit.

d) Interest on a, b and c above at court rates from today.

Dated and Delivered in Nairobi this 28th day of April,1986

T.MBALUTO

JUDGE