

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC SUIT NO. 147 OF 2017

MAURICE OWUOUR ANYANGO.....1ST
PLAINTIFF
ROSEMARY AWUOR OMOL.....2ND
PLAINTIFF

VERSUS

THE NATIONAL LAND COMMISSION.....1ST
DEFENDANT
TOTAL SEC. SERVICE COMPANY LTD.....2ND
DEFENDANT

JUDGMENT

The Plaintiffs brought this suit against the Defendants on 2nd May 2017. The Plaintiffs averred that at all material times, they were the registered owners of all that parcel of land known as Title No. Kisumu/Kogony/4433 (hereinafter referred to as “the suit property”). The Plaintiffs averred that the 1st Defendant, being a statutory body, had been mandated by the Government of Kenya to acquire various parcels of land within Kisumu West Constituency for the construction of Kisumu Northern By-pass Road (hereinafter referred to as “the road project”).

The Plaintiffs averred that the 1st Defendant published in the Kenya Gazette a list of various parcels of land, including the suit property, which they intended to acquire for the project. The Plaintiffs averred that the ownership of the said parcels of land was to be ascertained, after which the same were to be valued. The Plaintiffs averred that despite the records at the land offices in Kisumu and Nairobi, showing that the Plaintiffs were the owners of the suit property, the 1st Defendant in collusion with the 2nd Defendant indicated in the said Kenya Gazette that the 2nd Defendant was the registered owner of the suit property and proceeded to prepare a cheque for payment of compensation for the property in its favour. The Plaintiffs averred that the 2nd Defendant had never been registered as the owner of the suit property. The Plaintiffs averred that they were strangers to the 2nd Defendant, which was unknown to them. The Plaintiffs averred that the suit property and the developments thereon, although affected by the compulsory acquisition, were not valued. The Plaintiffs sought judgment against the Defendants for;

- a) A permanent injunction restraining the 1st Defendant from paying out any compensation to the 2nd Defendant for the acquisition of the suit property.

- b) An order that the 1st Defendant carry out a proper valuation on the suit property together with the developments thereon to ascertain its proper value.
- c) A declaration that the Plaintiffs are the registered owners of the suit property, hence entitled to compensation.
- d) Costs of this suit.

The 1st Defendant filed a defence on 21st January 2019. The 1st Defendant averred that the suit property was identified for compulsory acquisition and included in the list of the parcels of land to be acquired published in the Kenya Gazette No. 8331 of 6th November 2015 as an addendum to the previous Gazette Notice No. 1320 of 27th February 2015 pursuant to provisions of the Land Act 2012 and Land Acquisition Act Chapter 295 Laws of Kenya (now repealed). The 1st Defendant averred that the amount of compensation determined for the suit property was for vacant land as at the time of inspection on 16th April 2015. The 1st Defendant averred that if the suit property was developed after the inspection had been done, such development could not be compensated under the Land Act 2012 and the Land Acquisition Act, Chapter 295 Laws of Kenya (now repealed).

The 1st Defendant averred that it did not have any cheque in the name of the 2nd Defendant. The 1st Defendant averred that it did not have the funds for the suit property as the same had not been remitted to it by the implementation agency/acquiring entity, which was the Kenya National Highways Authority (KENHA). The 1st Defendant prayed that the suit against it be dismissed with costs.

The 2nd Defendant was served with the Summons to Enter Appearance, but neither entered an appearance nor filed a defence.

At the trial, the 1st Plaintiff, Maurice Owuor Onyango (PW1), told the court that it was the 2nd Plaintiff (PW2) who had recorded a statement and, as such, the one to give evidence in the matter. The 2nd Plaintiff, Rosemary Awuor Omol (PW2) adopted her witness statement dated 2nd May 2017 as her evidence in chief, and produced the documents attached to the Plaintiffs' list of documents filed on 2nd May 2017 as a bundle as P.EXH. 1. PW2 stated that the Plaintiff had also filed a supplementary list of documents on 18th March 2019. She produced the documents attached to the list as P.EXH. 2. She stated that when the Gazette Notice No. 8331 was published on 6th November 2015, they had already acquired the suit property. She stated that they

were issued with a title deed for the suit property on 25th July 2007. PW2 stated that the suit property was registered in the names of the 1st Plaintiff and her, but in the said Gazette Notice, the name of the registered owner of the suit property was given as the 2nd Defendant, Total Sec. Services Company Ltd. She stated that she did a search on the suit property upon seeing the Gazette Notice, which confirmed that the property was registered in their names.

The 2nd Plaintiff stated that she went to the 1st Defendant's office over the issue. She stated that the 1st Defendant told her that the payment of compensation for the suit property to the 2nd Defendant would be stopped, and the property would be inspected and valued. She stated that the payment was stopped, but the suit property was not inspected and valued. She stated that the 1st Defendant should value the land and the developments thereon and pay them just compensation, after which they would surrender the land to the 1st Defendant. She denied that the suit property was not developed as at 6th November 2015. She stated that she had a development approval from the Municipal Council of Kisumu dated 21st September 2011. She stated that the approval was for the construction of their house on the suit property, which they put up in the same year. She stated that

she has produced, as part of her exhibits, photographs of the house. She stated that during the construction, the works were inspected by the Town Planning Department of the Municipal Council of Kisumu. She stated that the building inspection sheet was part of her exhibits. The 2nd Plaintiff stated that she had valued the land together with the developments thereon and had produced a valuation report as an exhibit. She stated that she had perused the 1st Defendant's valuation report dated 22nd June 2017. She stated that the 1st Defendant's valuer had noted that the property was overgrown with weeds and not developed. She stated that the valuer, however, acknowledged that they were the registered owners of the suit property. She stated that the 1st Defendant did not explain where the name of the 2nd Defendant came from.

On cross-examination by the advocate for the 1st Defendant, the 2nd Plaintiff stated that the Gazette Notice published on 6th November 2015 was an expression of intention to acquire land. She stated that she attended the inquiry session but could not remember the exact date. She stated that she lodged a claim and was told to submit a valuation report. She stated that she submitted the report to the 1st Defendant in 2015. In her valuation report, it is indicated that the

valuer inspected the suit property on 9th October 2018. She stated that she did not present the valuation report to the 1st Defendant in 2015. The 2nd Plaintiff stated that they constructed a house on the suit property in 2011. She stated that she was not made aware of the award by the 1st Defendant of Kshs. 1,136,660/=. She stated that she was aware that the land was being acquired by KENHA for the construction of a road. She stated that she was not aware that it was KENHA who was to give the money for compensation. She stated that she was aware that the 1st Defendant had received money for compensation from KENHA. She stated that from the Building Inspection Sheet she produced in evidence, it appeared that as at 27th September 2011, only the beacons of the suit property had been located and the foundation for the house excavated. The 2nd Plaintiff denied that she put up the building in anticipation of the compulsory acquisition and compensation.

On examination by the court, the 2nd Plaintiff stated that she was the one who took the photographs that she produced in evidence. The 2nd Plaintiff also confirmed that they were still in occupation of the building on the suit property.

Juma Peter Kaunda (DW1) gave evidence on behalf of the 1st Defendant. He told the court that he was employed by the 1st Defendant as a Principal Valuation Officer. He stated that he was employed in 2017. He stated that he was familiar with the report and valuation dated 22nd June 2017, although he was not the one who prepared it. He stated the report was part of a project that was handed over to him. He stated that he was the one attending to the public on their queries. He stated that he was standing in for Fidelis Mburu, the employee of the 1st Defendant who prepared the report. He stated that Fidelis Mburu left the service of the 1st Defendant, and that was how he came to take over the project. He told the court that the report was a statutory valuation in which they considered among others, the instructions from the acquiring body and the Gazette Notices issued which were usually two. He stated that the first Gazette notice was for the intention to acquire, and the second was for the public inquiry. He stated that they carry out a ground inspection of the area earmarked for acquisition, and thereafter make an award.

DW1 stated that in this case, his concern was to check if all the pertinent details to support the award were present. He stated that

he confirmed that the Gazette notices were issued. He stated that he also checked if the valuation report supported the amount awarded, and whether the valuation and the award tallied. He stated that he also checked if the property was in the handing-over notes passed to him. He stated that the 1st Defendant was acquiring the suit property on behalf of KENHA. He stated that according to their report, the suit property was vacant. He stated that the property had no development. He stated that an award cannot take into account a development that is not in place at the time of the valuation. He produced the 1st Defendant's Report and Valuation dated 22nd June 2017 as D.EXH.1.

On cross-examination by the advocate for the Plaintiffs, DW1 stated as follows: Before land is acquired, there are internal procedures to be undertaken. The acquisition is based on the needs of the acquiring body. A notice of intention to acquire a property cannot be published in the Kenya Gazette before the inspection of the property. The acquiring body is the one who does the preliminary processes. Once they identify the land they need, they request the 1st Defendant to acquire the same on their behalf. The acquisition is done by the 1st Defendant on behalf of the entity in need of the land. The Gazette

notices are published by the 1st Defendant. He was aware of Gazette Notice No. 8331 published on 6th November 2015. The suit property was indicated in the notice to be owned by the 2nd Defendant.

When undertaking a valuation, they are accompanied by surveyors. In this case, the surveyors were from KENHA. Before a valuation is done, they normally meet the affected persons and hand over the Gazette notices to them. That takes place before they proceed to the ground. According to the Gazette Notice in question, the land to be acquired measured 0.05Ha. That was the area that was valued. From his file, he had not seen any award that was made in respect of the suit property. The compensation payment is normally made after the property owner has accepted the award. The award was in the name of the 2nd Defendant. The award was not collected. The award was made in 2015 after the public inquiry and valuation. They did a mass valuation in this case because several properties were affected.

The valuation was done on 22nd June 2017. According to their report, the owners of the suit property were the Plaintiffs herein. He had not seen any award made in their favour. The valuation report indicated that the property was not developed as of the date of inspection. The

date of inspection is not given in the report. There was no indication as to who accompanied the valuer. The area to be acquired was 0.05Ha. and this was also the measurement given in the Kenya Gazette. According to the report, the property measured 0.0272HA. There was a problem with the area. He was not aware of the developments the Plaintiffs had undertaken on the land. He was not informed of the developments. There was no problem with another valuation being undertaken in view of the errors they had noted.

After the close of evidence, the court directed that closing submissions be made in writing. The Plaintiffs filed submissions dated 28th February 2025, while the 1st Defendant had not filed submissions as at the time of writing this judgment.

The Plaintiffs' Submissions

In their submissions, the Plaintiffs framed the following issues for determination;

1. Whether the Plaintiffs or the 2nd Defendant is the registered proprietor of the suit property.
2. Whether there was a valuation of the suit property.

3. Whether the Plaintiffs are entitled to the orders sought in the
plaint.

The Plaintiffs submitted that they were not disputing or challenging the compulsory acquisition. The Plaintiffs submitted that their complaint was about the way the process was undertaken. The Plaintiffs submitted that the inspection, valuation, and the award were undertaken in respect of the parcel of land owned by the 2nd Defendant, and not on the suit property. The Plaintiffs submitted that this fact is clear from the measurement of the land that was acquired, which was given as 0.05 Ha., which was twice the size of the suit property.

The Plaintiffs submitted that the 1st Defendant did not provide any documents in support of the award in favour of the 2nd Defendant. The Plaintiffs submitted that they produced a copy of the title deed for the suit property in their names, which was not disputed. The Plaintiffs submitted that they had demonstrated that by 2015, when the intention to acquire the suit property was published in the Kenya Gazette, they had already constructed their home on the suit property.

Analysis and Determination

I have considered the pleadings, the evidence, and the submissions filed by the Plaintiffs. I am of the view that the following issues arise for determination in this suit;

1. Whether the Plaintiffs are the registered owners of the suit property.
2. Whether the 1st Defendant expressed an intention to acquire the suit property compulsorily.
3. Whether a proper valuation of the suit property was carried out to determine a just and fair compensation payable to the Plaintiffs, if they own the property.

The suit property was registered under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed). Sections 27 and 28 of the Registered Land Act provide as follows:

“27. Subject to this Act -

a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

Sections 24, 25 and 26 of the Land Registration Act 2012, which repealed the Registered Land Act, provide as follows:

24. Subject to this Act—

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and**
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.**

25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

I am satisfied from the evidence on record that the Plaintiffs were at all material times the registered proprietors of the suit property. The Plaintiffs produced in evidence a copy of their title deed for the suit property issued on 25th July 2007 and a copy of a certificate of official search on the property dated 20th April 2017, both showing that the Plaintiffs are the registered proprietors of the suit property, having been registered as such on 24th July 2007. The 2nd Defendant did not defend the suit. The 1st Defendant, which had indicated in its Gazette Notice published on 6th November 2015 that the suit property was registered in the name of the 2nd Defendant, did not tender any evidence in court to prove that fact. It is therefore my finding that the Plaintiffs are the lawful registered owners of the suit property.

It is common ground that the 1st Defendant, through Gazette Notice No. 8331 published in the Kenya Gazette of 6th November 2015, expressed an intention to acquire, among others, the suit property compulsorily on behalf of the Kenya National Highways Authority (KENHA) for the construction of the Kisumu Northern By-pass Road. It is therefore not disputed that the 1st Defendant expressed an intention to acquire the suit property. As the owners of a property to

be acquired compulsorily by the government for public use, the Plaintiffs were entitled to just compensation for their land.

Article 40(3) of the Constitution provides that:

“(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.”

Section 111 (1) of the Land Act provides as follows;

“(1) 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.”

There are elaborate procedures provided in the Land Act 2012 and the regulations/rules made thereunder for the determination and payment of just compensation.

Section 113 (1), (2) and (4) of the Land Act provides that:

“(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.

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

Section 114 (1) of the Land Act provides that:

“(1) On making an award, the Commission shall serve on each person whom the Commission has determined to be interested in the land, a notice of the award and offer of compensation.”

Section 119 of the Land Act (As amended in 2016) provides as follows:

“Payment of compensation shall be made only upon the exercise of due diligence which shall include final survey and the determination of the acreage, boundaries, ownership and value.”

In Mwangi v. Kenya National Highways Authority & another (Environment & Land Petition 1 of 2021) [2022] KEELC 13712 (KLR) (25 October 2022) (Judgment), the court stated as follows;

“Section 111(1) of the Land Act provides that where land is acquired compulsorily, just compensation shall be paid promptly in full to all persons whose interest in land has been determined. The Land (Assessment of Just Compensation) Rules, 2017 (The Land Compensation Rules), pursuant to section 111 (2) of the Land Act focus on

the assessment of compensation payable to persons who possess an interest in land. The factors to consider include:

-

- a) The market value of the land,**
- b) The damage sustained or likely to be sustained by persons interested at the time the commission takes possession of the land,**
- c) Reasonable expenses incidental to the relocation of any of the persons interested,**
- d) Damage genuinely resulting from the diminution of the land between the date of the publication in the gazette of the notice of intention to acquire land and the date the commission takes possession of the land.”**

It is clear from the foregoing that to determine just compensation, it is of paramount importance that the land to be acquired is properly identified on paper and on the ground, its owners are identified, and a valuation is carried out to ascertain its value. This is the sort of due diligence required of the 1st Defendant under Section 119 of the Land Act, and which would justify the finality of the award under Section 113 (2) of the Land Act. After the land is identified, inspected, and valued, the 1st Defendant is required to make an award in writing to the land owner.

In the case before me, I am of the view that everything appears to have gone wrong for the 1st Defendant. When the 1st Defendant issued a notice of its intention to acquire the suit property through Gazette Notice No. 8331 published on 6th November 2015, the suit property was indicated in the notice as owned by the 2nd Defendant. Although the whole of the suit property measures 0.0272 Ha., the 1st Defendant indicated in the Gazette Notice that it intended to acquire a portion of the suit property measuring 0.0500Ha. The only conclusion this court can make is that the 1st Defendant did not conduct a search on the suit property and did not inspect the same for the purposes of physical identification on the ground. Having got the ownership and the measurement of the suit property wrong, the Plaintiffs' submission that the 1st Defendant was seeking to acquire a parcel of land different from the suit property is not far-fetched.

Although the 1st Defendant claimed to have inspected and valued the suit property in 2015 and made an award to the Plaintiffs that was not collected, this claim is not supported by evidence. This suit was filed on 2nd May 2017. The valuation report produced by the 1st Defendant in evidence, which is alleged to have been prepared in 2015, is dated 22nd June 2017. The report itself does not mention when the valuer

visited the suit property. There is also no evidence of the award that was made by the 1st Defendant to the Plaintiffs following the purported valuation. The 1st Defendant claimed that when they inspected the suit property, it was undeveloped, and for that reason, it was valued as vacant land. The 1st Defendant claimed that the suit property was developed by the Plaintiffs after they had inspected it. The 1st Defendant claimed that the development was carried out in anticipation of compulsory acquisition and, as such ineligible for compensation. Photographs produced in evidence by the Plaintiffs depicted a residence that had been in place for some years. I doubt that anyone would put up such a building as his residence with the sole aim of getting compensation. I wonder what more compensation the Plaintiffs would have expected after the property had already been inspected and valued by the 1st Defendant. The Plaintiffs' land measured 0.0272 Ha. only and the 1st Defendant purportedly wanted to compensate them for land double the size of their land, 0.0500Ha. If what the Plaintiff wanted was more compensation, why would they bother putting up a 3-bedroom bungalow on the property? They would have simply gone for the double compensation. I am not persuaded that the Plaintiffs built their residence on the suit property

after the 1st Defendant and KENHA had inspected and valued the suit property. As I have stated above, chances are that they inspected and valued some other parcel of land measuring more than 0.0500Ha. owned by someone else.

From the foregoing, it is the finding of the court that the suit property was not inspected and valued for the purposes of giving the Plaintiffs just compensation for their land in accordance with the dictates of the Constitution and the Land Act. Even if the 1st Defendant were to be given the go-ahead to compensate the Plaintiffs, on what basis would that compensation be paid? There is no evidence that any award was made. There is no evidence that the portion of the suit property that was acquired was identified and measured. Would such compensation be based on the erroneous acquired area of 0.0500Ha.? I am convinced that the Plaintiffs have proved their case against the Defendants to the required standard. If the 1st Defendant wants to complete the compulsory acquisition of the suit property, it will have to go back to the drawing board. Let it go back to the land, identify the portion required for KENHA's purposes, value it and make an award of compensation to the Plaintiffs.

Conclusion

It is my finding that the Plaintiffs have proved their case against the Defendants on a balance of probabilities. I therefore enter judgment for the Plaintiffs against the Defendants for;

1. A declaration that the Plaintiffs are the proprietors of all that parcel of land known as Title No. Kisumu/Kogony/4433.
2. A permanent injunction restraining the 1st Defendant from paying out compensation to the 2nd Defendant in respect of the compulsory acquisition of a portion of all that parcel of land known as Title No. Kisumu/Kogony/4433.
3. An order that, if the 1st Defendant wishes to proceed with the compulsory acquisition of a portion of all that parcel of land known as Title No. Kisumu/Kogony/4433, the 1st Defendant shall carry out a proper valuation of the portion of land it intends to acquire together with the developments thereon and shall thereafter make an award of compensation to the Plaintiff in respect thereof in accordance with the provisions of the Land Act.
4. The cost of the suit to be paid by the 1st Defendant.

**Delivered and signed at Kisumu on this 11th day of November
2025**

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Anyul for the Plaintiff

N/A for the 1st Defendant

N/A for the 2nd Defendant

Ms. Anne-Court Assistant

ORIGINAL COPY