



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ELC CASE NO. 5 OF 2017
IN THE MATTER OF COMPULSORY ACQUISITION UNDER THE LAND ACT 2012
BETWEEN
THOMAS KIMAGUT SAMBU.....PLAINTIFF
VERSUS
NATIONAL LAND COMMISSION.....1ST DEFENDANT
KENYA NATIONAL HIGHWAYS AUTHORITY.....2ND DEFENDANT
THE HON. ATTORNEY GENERAL.....3RD DEFENDANT
RULING

Introduction

1. By a notice of Motion dated 29th March 2018, filed under certificate of urgency the Plaintiff/Applicant seeks the following prayers:

- a. That this application be certified as urgent and service be dispensed with in the first instance
- b. That this Honourable court be pleased to grant leave to the plaintiff to further amend his amended Plaint dated 3rd May 2017
- c. That pending the hearing and determination of this suit, this Honourable court be pleased to make an order directing the 1st and 2nd Defendants to forthwith make prompt payment of Kshs. 48,620,000 to the plaintiff in respect of the third compulsory acquisition of his portions of land namely; L.R KERICHO/KIPCHIMCHIM/656 and KERICHO/KIPCHIMCHIM/3027 pursuant to Kenya Gazette Notice No. 2029 dated 2nd March 2018.

2. The application is based on the grounds stated in the Notice of Motion and the plaintiff's supporting affidavit sworn on the 29th March 2018.

Background

3. A brief background of this case is that the Plaintiff is the registered owner of that parcel of land known as L.R NO. KERICHO/KIPCHIMCHIM/656 and 3027 measuring 1.7 hectares and 0.86 hectares

respectively. The said parcels of land are situated along the Kericho/Kisumu Highway within Kericho County. The plaintiff's said parcels of land were earmarked for compulsory acquisition for purposes of rehabilitation of the Mau Summit-Kericho-Nyamasaria –Kisumu By-pass within Kericho and Kisumu counties by the 2nd Defendant.

4. The first acquisition was conducted pursuant to Kenya Gazette Notice No. 1821 dated 18th March 2016 whereby the plaintiff was notified that the 1st Defendant intended to compulsorily acquire 0.2599 hectares comprised in L.R NO KERICHO/KIPCHIMCHIM/656 and 0.1723 hectares of L.R NO.KERICHO/KIPCHIMCHIM/3027. The Defendant sent its employee to inspect the suit properties but later informed the plaintiff that the area of the land to be acquired would be 3.2 acres. The same was subsequently valued at Kshs. 134,295,000. The plaintiff claimed this amount together with Kshs. 18,273,316 being the value of building materials deposited on the land and the value of business hitherto conducted on the suit land. He also claimed Kshs. 730,000 and Kshs. 27,00 being the cost of preparing building plans and advertisements for change of user all making a total of Kshs. 153,325.316.

5. In October 2016, the 1st Defendant paid the plaintiff Kshs. 40,935,595 which he received on a "without prejudice" basis. His efforts to get clarity from the 1st defendant on how the figure was arrived at were fruitless. Instead, by a second Gazette Notice No. 10642 dated 27th September 2016 and published on 23rd December 2016 the 1st defendant notified the plaintiff that it intended to acquire a further 0.2713 hectares comprised in L.R NO KERICHO/KIPCHIMCHIM/656. The 1st defendant then proceeded with the compulsory acquisition of the plaintiff's land without making any compensation to the plaintiff.

6. It is at this point that the plaintiff filed suit against the 1st defendant in January 2017 claiming the sum of Kshs.112, 389,721 being the balance of the amount owed to the plaintiff as compensation for the suit property. In May 2017, the Plaintiff amended his Plaint to enjoin the 2nd and 3rd defendants.

7. On 16th June 2017, the plaintiff filed an application seeking an injunction to restrain the defendants from entering the suit land and carrying out ground breaking for purposes of construction of the Ahero/Kericho Interchange or dealing with the suit land in any manner prejudicial to the plaintiff's interests therein. In the alternative he prayed for an order that the 1st and 2nd defendants deposit the sum of Kshs. 112,389,721 being the balance of compensation together with costs of Kshs.1,918,450 in a joint interest earning account of the plaintiff's and defendant's advocates so as to accord with Article 40(3) (b) of the Constitution of Kenya which requires full, just and prompt compensation to person whose land has been compulsorily acquired, pending the hearing and determination of the main suit.

8. The defendants filed their responses to the application and when it came up for interpartes hearing on the 19th September 2017, counsel for the 1st defendant argued that since the main dispute was the adequacy of compensation to be paid to the plaintiff, the suit should proceed to the main hearing so as to determine the issue once and for all. The parties then agreed to abandon the application and proceed with the hearing of the main suit.

9. The parties subsequently complied with order 11 of the Civil Procedure Rules and the suit was fixed for hearing on the 13th November 2017 when it failed to take off as counsel for the 2nd defendant was not ready. The matter was then fixed for hearing on 14.2.2018 but on the said date the case did not proceed as counsel for the 3rd defendant was bereaved and it was fixed for hearing on 12.4.2018.

10. Before the hearing date, the plaintiff filed the application dated 29th March 2018 which is the subject of this ruling. Although the said application was served on the defendants, none of them has filed any response. Owing to the urgency of the application it was fixed for interpartes hearing on the date that had earlier been set for hearing.

Plaintiff's Submissions

11. In his submissions Mr. Migiro learned counsel, leading Mr. Onesmus Langat for the plaintiff relied on the plaintiff's supporting affidavit and submitted that the even though 1st defendant had verbally intimated to the plaintiff that they were going to compulsorily acquire more of the plaintiff's land for purposes of constructing the Kisumu/Nyamasaria interchange, they proceeded to acquire additional portions of the two suit properties and demolished the applicants' buildings without any formal notice or compensation thereby occasioning him huge losses and mental anguish.

12. After the demolition took place on 28th February 2018, the plaintiff wrote to the 1st defendant on inquire why they had proceeded in that manner and received no response. Instead the 1st Defendant issued a notice of the said acquisition in the Kenya Gazette dated 2nd March 2018.

13. Counsel submitted the 1st and 2nd defendants acts were in contravention of Articles 10, 35 and 40 (3) (b) of the Constitution. He further submitted that the defendants' acts were contrary to the procedures laid down for compulsory acquisition of land in sections 111, 112, 113, 114, 115 and 120 of the Land Act No. 6 of 2012.

14. Article 10 of the Constitution of Kenya provides for transparency, accountability and good governance. Counsel's submission was that the manner in which the 1st and 2nd defendants acted smacked of bad governance and lack of accountability.

15. Article 35 of the Constitution which provides for the right to information was breached by the 1st defendant as they did not respond to the plaintiff's letters seeking information.

16. Regarding Article 40 (3) (b) of the Constitution, counsel submitted the same clearly provides that before any compulsory acquisition is carried out there must be prompt payment in full of just compensation to the person affected. He submitted that even after the defendants were served with the application, they did not give any indication that they were willing to compensate the plaintiff.

17. It is for this reasons that the plaintiff urges the court to grant him leave to further amend his Amended Plaint and direct that the 1st and 2nd defendants deposit the amount of Kshs.48,620.000 being compensation for the third acquisition of portions of his land.

18. In urging the court to exercise its discretion in favour of the plaintiff counsel referred the court to the case of **Royal Media V Telkom (2001) E.A 210** where Justice Visram observed as follows:

“Going by the authorities cited in this court, there was no dispute that this court could in a proper case, issue injunctive relief against Government officers.... I agree that for some time there has existed a wrongful impression that section 16 of the Government Proceedings Act prevented the Court from granting injunctive orders against officers of the Government...”

It is noted that Government officers in the exercise of their executive functions are sometimes required to discharge certain statutory functions and otherwise owe a duty to act according to law established. It must be remembered that officers of the Government cannot act in a manner that is inconsistent with the Constitution and Constitutional rights and freedoms....Where the court is satisfied that an injunction should issue against a Government officer, nothing can prevent it from making a mandatory injunction against that officer ordering him to do something at the interlocutory stage. It has been said that the court's power to issue a mandatory injunction at an interlocutory stage is linked to its power to issue injunctions at the final stage”

19. What can be gleaned from the above case which was decided under the old Constitution is that the courts being custodians of the Constitution should not shy away from ensuring that Government officers act in conformity with the Constitution by granting appropriate remedies including mandatory injunctions. This position has been reinforced under the Constitution of Kenya 2010 which places a high premium on the enjoyment of constitutional rights and freedoms. In the case of **Micro & Small Enterprises Association of Kenya Mombasa Branch V Mombasa County**

Government and 43 Others (2014) eKLR the court observed as follows:

“The test for the grant of conservatory orders under constitutional applications must be qualified to take into account the premium that the Constitution places on the enjoyment of fundamental rights”

Mr. Onesmus Langat submitted that he fully associated himself with Mr. Migiro’s submissions and added that in the instant case the plaintiff has pointed out that his rights under inter alia article 40 have been violated and it is clear from the 1st defendant’s conduct in its latest acquisition of the suit property that it acted against the dictates of the Constitution and the Land Act.

Defendants' Submissions

20. In a brief response, Ms. Langat learned counsel for the 3rd defendant who was also holding brief for Miss Masaka for the 1st defendant stated that she had no instructions to make submissions on behalf of the 1st defendant as they had not filed their response to the application. With regard to the 3rd defendant, she submitted that since the acts complained of did not directly touch on the 3rd defendant, she would leave it to the court.

21. Mr. Sang learned counsel for the 2nd defendant opposed the application and submitted that the orders sought were premature as the 1st defendant had not conducted a valuation of the suit property.

Issues for Determination

I have considered the plaintiff’s application against the background of the material placed before me together with counsels’ rival submissions and the following issues fall for determination:

- a. Whether the plaintiff ought to be granted leave to amend his Amended Plaintiff dated 3rd May 2017.
- b. Whether the 1st and 2nd defendants complied with the Constitution and the law in the manner in which they compulsorily acquired the plaintiff’s additional portions of land comprised in L.R No. KERICHO/KIPCHIMCHIM/656 AND KERICHO/KIPCHIMCHIM/3027
- c. Whether the 1st Defendant should be ordered to compensate the plaintiff at this interlocutory stage.

Analysis and Determination

22. The first issue regarding amendment of the Plaintiff’s Plaintiff to include a claim for the additional portions of his land acquired by the 1st defendant is fairly straight forward. It is trite law that the amendment of pleadings before the hearing of the main suit should be freely allowed if they can be made without injustice to the other party. See **Eastern Bakery V Castellino (1958) E.A 461**.

Order 8 Rule 5(1) of the Civil Procedure Rules provides as follows:

“For the purpose of determining the real issues in controversy between the parties or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just”

23. The courts have also held that amendment of pleadings was aimed at allowing a party to plead the whole of the claim he was entitled to make in respect of his cause of action. A party would be allowed to make such amendment of pleadings as were necessary for determining the real issue in controversy. See

the case of **Central Kenya Limited V Trust Bank 2 E.A 365.**

24. The facts giving rise to the amendments sought to be made by the plaintiff arose in February 2018, while this case was pending for hearing. Since the additional compensation sought is in respect of the suit property, it is only fair and just that the plaintiff be allowed to amend his plaint so that he can plead his entire claim.

25. The court is also expected to give effect to the overriding objective of the Civil Procedure Act by facilitating the just, expeditious, proportional and affordable resolution of civil disputes.

26. I now turn to the second issue as to whether the 1st and 2nd defendants complied with the Constitution and the Law in the manner in which they compulsorily acquired the plaintiff's additional portions of land comprised in the suit properties.

27. Compulsory acquisition is provided for under Article 40(3) of the Constitution of Kenya which states as follows:

28. 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.

29. Furthermore, sections 107 to 133 of the Land Act which replaced the Land Acquisition Act (repealed) contain elaborate provisions on the procedure to be followed in the process of compulsory acquisition.

30. Section 111 of the Act emphasizes the need to pay prompt and just compensation in full to all persons whose interests in the land have been determined.

31. The procedures include *inter alia* the issuance of a Notice (section 110); inquiry as to the compensation (section 112); award of compensation which must be based on the size, value and the amount of compensation payable (section 113); notice of award of compensation (section 114); Survey of land where part of the land comprised in documents of title has been acquired (section 117)

32. Of particular interest to the instant application is section 120 (ii) which provides as follows:

In cases where there is urgent necessity for the acquisition of land and it would be contrary to the public interest for the acquisition to be delayed following the normal procedures of compulsory acquisition under this Act, the Commission may take possession of uncultivated or pasture or arable land upon expiration of fifteen days from the date of publication of the notice of intention to acquire, (emphasis supplied) and the expiration of that time the Commission shall notwithstanding that no award has been made, take possession in the manner prescribed by section (1)

33. According to section 125 (1), The Commission shall as soon as is practicable, before taking possession, pay full and just compensation to all persons interested in the land

34. What can be gleaned from the above provisions is that the relevant procedures laid down in the Land

Act have to be followed before compulsory acquisition is made.

35. It is discernible that just compensation ought to be paid promptly before taking possession. The only exception is where there is urgent necessity to take possession and then only vacant land can be acquired under such circumstances.

36. In the instant case the Plaintiff has attached a copy of Kenya Gazette Notice No. 2029 dated 2nd March 2018 giving notice of the 1st Defendant's intention to acquire the plaintiff's land. The said notice was issued after the fact as the 2nd Defendant is alleged to have descended upon the plaintiff's land on 28th February 2018. The 1st and 2nd defendants took possession of developed property by demolishing the plaintiff's houses and other developments on the suit land. This was a clear violation of the provisions of section 120 of the Land Act. Furthermore, the 1st Defendant has violated the provisions of Article 40 (3) of the Constitution by failing to offer prompt compensation to the plaintiff.

37. The issues raised by the Plaintiff about the manner in which the 1st defendant recently moved to acquire the Plaintiff's property put to question the integrity of the process of compulsory acquisition adopted by the 1st and 2nd defendants. As a public body the 1st defendant is bound by the national values enshrined in Article 10 of the Constitution which include the principles of good governance, integrity, transparency and accountability. These are not idle principles that may be glossed over, they are the bedrock upon which fair administrative action rests. The cavalier and insensitive manner in which the 1st and 2nd defendants have treated the plaintiff following the third acquisition of his property by failing to respond to his correspondence or offer prompt and just compensation is deplorable.

38. The courts have consistently held that the procedure with regard to compulsory acquisition laid down in the law must be strictly followed. See **Commissioner of Lands V Coastal Aquaculture Limited (1997) 1KLR (L&E) 264 and Mathatani V Commissioner of Lands & 5 Others (2013) eKLR.**

39. In considering whether the order for payment of compensation should be made at this interlocutory stage I am alive to the fact that this would be akin to granting a mandatory injunction which should only be granted in the clearest of cases. I am also aware that at this interlocutory stage I am not required to make any conclusions regarding the rights of the parties. However, on the material placed before the court so far I am persuaded that the plaintiff has established a prima facie case. From the affidavit evidence on record it is clear that the National Land Commission acted in a manner that is inconsistent with the Constitution and the plaintiff's fundamental rights. The 1st and 2nd defendants also failed to observe the procedure laid down in part V111 of the Land Act Sections 107 – 133.

40. In view of the foregoing I find merit in the plaintiff's application and I grant it in the following terms:

a. That the plaintiff is hereby granted leave to further amend his Amended Plaintiff in terms of the annexed draft Further Amended Plaintiff. The said Further Amended Plaintiff shall be deemed filed and served upon payment of the requisite court fees.

b. The 1st defendant shall conduct a valuation of the Plaintiff's additional portions of land comprised in L.R No. KERICHO/KIPCHIMCHIM/656 and KERICHO/KIPCHIMCHIM/3027 that was compulsorily acquired pursuant to Kenya Gazette Notice No. 2029 dated 2nd March 2018 within 14 days from the date hereof (time being of essence) after which the court shall make further orders regarding the amount payable as compensation to the plaintiff pending the hearing and determination of the suit herein. Should the 1st defendant fail to conduct the valuation within the prescribed time, the court shall proceed to make an order regarding the amount of compensation payable to the plaintiff based on the plaintiff's valuation report already filed in court.

c. This case shall be mentioned on 3rd May 2018 for further orders.

d. The costs of this application shall be in the cause

Dated at Kericho this 16th day of April 2018

J.M ONYANGO

JUDGE

In the presence of:

Migiro for the Plaintiff's

Mr. Sang for the 2nd Defendant

Mr. Koko for Ms Langat for the 3rd Defendant

Court Assistant: Rotich