



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KERICHO

ELC NO. 5 OF 2017

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. This Ruling is in respect of the amount of compensation payable to the Plaintiff /Applicant for the third compulsory acquisition of a portion of his land comprised in land parcel number KERICHO/KIPCHIMCHIM/656 and KERICHO/KIPCHIMCHIM/3027 herein referred to as the suit land. Following the said acquisition, which was carried out while this case was pending, the Plaintiff moved the Court vide an application dated 29th March 2018 seeking inter alia an order that the 1st and 2nd Respondents be ordered to make prompt payment of Kshs. 48,620,000 to the Plaintiff in respect of the said acquisition.

2. In its Ruling dated 16th April 2018 the court, found that the 1st Defendant had acted in a manner that was inconsistent with the Constitution and sections 107-133 of Land Act by moving into the Plaintiff's land without offering him any compensation. The Court then directed the 1st Defendant to conduct a valuation of the suit land within 14 days of the Ruling, after which the Court would make further orders regarding the amount of compensation payable to the Plaintiff pending the hearing and determination of the main suit.

3. The Court further directed that for compensation in respect of the third acquisition to be determined in an objective and fair manner, the 1st Defendant's valuer, Mr. Charles Moemi and the Plaintiff's valuers, Prime Land Valuers Limited do attend Court for cross-examination on their valuation reports which were at variance to enable the Court arrive at a just decision.

4. The 1st Defendant's valuer, Mr. Charles Moemi was cross examined on 24th May 2018 and the Defendant's valuer, Mr. Simeon Kipkorir Kiprono was cross examined on 22nd June 2018.

Issues for Determination

5. Arising from the said cross-examination, the following issues emerge for determination:

1. Whether the 1st Defendant's valuation report should be disregarded and compensation based purely on the plaintiff's valuer's report be made
2. If the answer to no. 1 is in the negative, whether the Plaintiff's claim for compensation through the valuation report by Prime Land Valuers Limited, has successfully rebutted the valuation and proposed award by the 1st Defendant's valuer which otherwise is final.
3. Depending on the answer to issue (2) what is the just compensation of the Plaintiff in respect to the third acquisition?
4. Whether the Plaintiff is entitled to exemplary damages

Analysis and Determination

6. Mr. Migiro acting alongside Mr Mutai, learned counsels for the Plaintiff urged the Court to disregard the 1st Defendant's valuation report as in their opinion, the 1st Defendant failed to conduct a fresh valuation in accordance with the Ruling dated 16th April 2018 and instead sought to rely on an earlier valuation report for a valuation conducted sometime in 2016.

7. In his response, learned counsel Mr. Mugambi for the 2nd Respondent argued that the 1st Respondent misconstrued the Court order on valuation resulting in their failure to conduct a fresh valuation.

8. To put this matter to rest, it must be noted that the Court ordered that both valuers be cross-examined on their valuation reports in order to arrive at a just valuation and both valuers were cross examined by the parties' respective counsel and the Plaintiff cannot at this juncture purport to seek that the plaintiff's valuer's report be expunged from the record. The Plaintiff's counsel raised this matter when the case came up for cross-examination of the 1st Defendant's valuer on 22.6.2018 and the Court overruled the Plaintiff's counsel's objection after considering submissions by counsel for the Plaintiff and the 2nd Defendant. The answer to the first issue is therefore a No.

9. Moving on to the second issue, Mr. Mugambi has submitted that the valuation report by the 1st Defendant's valuer as presented by Mr. Charles Moemi, is credible and therefore, it ought to be adopted by this Honorable Court as just compensation to the Plaintiff in respect to the third acquisition.

10. Mr. Mugambi has attacked the credibility of the report by the Plaintiff. He has submitted that during cross examination of Mr. Rono, the valuer, for the Plaintiff, it came to light that the valuation was done and the report was prepared by one Lawrence Sang who is not a registered valuer, as required by the Valuers Act, Cap 523 hence he is not qualified as a valuer. Mr. Rono admitted that his role was merely to append his signature on the report.

11. Section 21 of the Valuers Act, whose heading is "Unregistered persons not to practice as valuers". Section 21 (1) (a), (b) (c) of the Act states as follows:

(a) no individual shall carry on business as a practising valuer unless he is a registered valuer;

(b) no partnership shall carry on business as practising valuers unless all the partners whose activities include the doing of acts by way of such practice are registered valuers;

(c) no body corporate shall carry on business as valuers unless the directors thereof whose duties include the preparation of valuations in respect of any type of movable or immovable property are registered valuers.

12. I agree with counsel's submissions that Prime Land Limited being a body corporate is bound by the provisions of section 21(c) of the Valuers Act. The subsection provides that for a valuation report by a body corporate such as the one tendered by Prime Land Limited to be admissible, the said valuation must be carried out by its directors, who must be registered valuers.

13. It has been submitted by Mr. Mugambi that section 21(1)(c) of the Valuers Act, was enacted by Parliament to cure situations whereby individuals who are not registered/qualified as valuers, hide behind a body corporate in order to illegally carry out valuations in the name of a body corporate which is licensed to carry out valuations.

14. Section 21(2) of the Valuers Act creates the offence that is committed for practicing valuation without being registered as a valuer and states as follows:

"Any person who contravenes subsection (1) shall be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding twelve months or to both."

15. As submitted by Mr. Mugambi, the intention of parliament in framing Section 21 in mandatory terms and inclusion of a section creating an offence and punishment for contravening the section was to exclude persons who are not qualified and registered as valuers from practicing as such.

16. Based on the foregoing it is my finding that the valuation by Prime Land Limited is incurably defective and inadmissible for contravening Section 21 of the Valuation Act. Having so found, I do not find it necessary to delve into the merits of the report. Suffice it to say that parties who seek to rely on expert witnesses ought to be more diligent in ensuring that the witnesses meet all legal requirements.

17. Where does that leave us? Unfortunately, for the Plaintiff, I have no choice but to fall back on the 1st Defendant's valuation report which the Plaintiff did not sufficiently rebut.

18. During cross-examination, Mr. Moemi stated that a survey had been conducted on the Plaintiff's whole parcel of Land during the first acquisition and it is the notes that had been taken during that survey, which enabled his team to prepare the valuation report in respect to the third acquisition.

19. Mr. Moemi further stated that no significant change had occurred on the Plaintiff's property as at the time of the third acquisition and therefore the figures in respect to the third valuation were adjusted to include the time that had elapsed since survey was made.

20. Upon cross-examination, Mr Moemi stated that they used comparables of similar character, that is agricultural land within Kipchimchim area of Kericho county to determine the market value of the Plaintiff's property. He further stated that valuation report took into consideration the topography of the Plaintiff's property and that there is a river that passes on the suit land which is partly swampy and therefore some of the land formed part of the riparian reserve. This was confirmed by the Court on a site visit to the suit land.

21. According to Section 113(2) of the Land Act, the onus is on the Plaintiff to rebut the position that the 1st Defendant's proposed award which is supposed to be final is not just compensation. This has not been done.

22. In the *locus classicus* case of **Kanini Farm Ltd v Commissioner of Lands [1984] eKLR/[1986] KLR pg 310** the court pronounced itself on the definition of the market value of property during Compulsory Acquisition as hereunder;-

“The market value as the basis for assessing compensation is the price which a willing seller might be expected to obtain from a willing purchaser, a purchaser who though he may be a speculator, is neither a wild nor an unreasonable speculator.....In determining the amount of compensation which ought to be paid the court should take into account comparable sales and awards on other acquisition of land of similar character”

23. It is common ground that the suit property is a free hold, it does not attract rent or rates and thus is agricultural. The Plaintiff confirmed that there has never been a change of user of the suit property or approval of the same, from agricultural to commercial or residential. The 1st Defendant's valuation is therefore grounded on the guiding principles regarding determination of the market value and award which must conform to comparable land of similar character.

24. From the foregoing, I make the following orders:

- a) The plaintiff is awarded Kshs. 14,927,000/= being just compensation for a portion land parcel no. KERICHO/KIPCHIMCHIM/656 measuring 0.2670 Hectares together with the developments thereon,
- b) The plaintiff is awarded Kshs. 3,473,000/= as compensation in respect of 0.0770 Hectares comprised in land parcel number KERICHO/KIPCHIMCHIM/3027. The said amount shall be paid within 90 days.
- c) Exemplary damages in the sum of Kshs. 200,000/= to be paid by the Respondents
- d) The costs of this Application shall be borne by the Respondents

Dated, signed and delivered at Kericho this 29th day of August 2018.

J.M ONYANGO

JUDGE

In the presence of

Mr. Migiro for the Plaintiff/Applicant

Mr. Sang for Mr. Mugambi for the 2nd Defendant's

No appearance for the 3rd Defendant

Court Assistant: Rotich