



Republic v Chairman of the National Land Commission & 2 others; Halal Meat Products Limited & another (Interested Parties) (Judicial Review Miscellaneous Application E002 of 2023) [2024] KEELC 932 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEELC 932 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E002 OF 2023**

EK WABWOTO, J

JANUARY 25, 2024

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO
APPLY FOR ORDERS OF MANDAMUS AND PROHIBITION**

AND

IN THE MATTER OF: THE LAND ACT, 2012

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF: THE NATIONAL LAND COMMISSION

BETWEEN

REPUBLIC APPLICANT

AND

CHAIRMAN OF THE NATIONAL LAND COMMISSION 1ST RESPONDENT

SECRETARY OF THE NATIONAL LAND COMMISSION 2ND RESPONDENT

NATIONAL LAND COMMISSION 3RD RESPONDENT

AND

HALAL MEAT PRODUCTS LIMITED INTERESTED PARTY

KENYA RAILWAYS CORPORATION INTERESTED PARTY



JUDGMENT

1. By a Notice of Motion dated 22nd August, 2023, the applicants herein, Urban Solutions Real Estates Limited and Carlingwood Investments Company Limited sought the following Orders:-
 - i.
 - “1. Mandamus to compel the respondents to make a determination, within thirty days of this Honourable Court’s order, as to whether the 1st or 2nd applicant have/had an interest in all those parcels of land known as Title Numbers Ngong/Ngong/2221, 2628 and 2629.
 - ii. Mandamus to compel the respondents to make an award of compensation to the 1st ex-parte applicant in the event the respondents determine that the 1st or 2nd ex-parte applicants have/had an interest in all those parcels of land known as Title Numbers Ngong/Ngong/2221, 2628 and 2629.
 - iii. Prohibition directed against the respondents jointly and severally and the 2nd interested party forbidding the respondents
 - iv. Jointly and severally and the 2nd interested party from paying to the 1st interested party compensation in respect of loss and damage to the structures and or development in the acquired pieces of land the subject matter of these proceedings and or any further compensation at all.
 - v. That the costs of this application be awarded the applicants.”

The Applicants Case

2. It was the case that by a joint venture agreement dated 2nd September, 2015 and two further agreements both dated 19th November, 2015 (the agreements are marked as exhibits “FAM1” and “FAM 2” to the affidavit of the ex-parte applicants sworn by Fathudin Ali Mohamed on 14th August, 2023- hereinafter referred to as “Fathudin’s Affidavit”), the 2nd ex-parte applicant agreed to develop all those parcels of land known as Title Numbers Ngong/Ngong/2221, 1960, 2628 and 2629 (hereinafter called the “Parcels of Land”) registered in the name of the 1st interested party (hereinafter called “the Agreements”). And by deed of assignment dated 20th May, 2-16, (marked as exhibit “FAM 3” to Fathudin’s the Agreements to the 1st ex-parte applicant transferred all its rights, title and interest in the Agreements to the 1st ex-parte applicant. These facts are not disputed by the respondents nor are they disputed by the interested parties.
3. It is a common position of all parties that by a gazette notice number 12526 dated 22nd December, 2017 published pursuant to Sections 112 and 162(2) of the Land Act (hereinafter called “the Act”), the 3rd respondent gave notice that the Government intended to acquire portions of all those parcels of land known as Title Numbers Ngong/Ngong/2221, 2628 and 2629 on behalf of the 2nd interested party for the construction of Standard Gauge Railway (Phase 2A) for Public Purpose.
4. The Respondents subsequently acquired portions of all parcels of land known as Title Numbers Ngong/Ngong/2221, 2628 and 2629 (hereinafter called “ the Acquired Land”) on behalf of the 2nd interested party. The said acquisition frustrated the performance of the agreements, bringing the same to a halt. Having incurred huge expenses prior to the said acquisition, the ex-parte applicants were



- constrained to lodge a claim for compensation with the 3rd respondent, which they lodged, together with the claim of the 1st interested party, under the cover of a letter dated 7th July, 2018 from Abib & Associates, Advocates (the said cover letter is marked as exhibit “FAM 4” to Fathudin’s Affidavit).
5. By cover letters dated 14th May 2019 and 16th October, 2019 (marked as exhibits “FAM5” and “FAM 6” respectively to Fathudin’s Affidavit) the ex-parte applicants made further submissions and amendments to their earlier submissions.
 6. By a letter dated 10th January, 2020 (marked as “FAM 7” to Fathudin’s Affidavit) the 2nd Respondent sought certain documents from the 1st ex-parte applicant. The said documents were duly submitted to the respondents vide the 1st ex-parte applicants cover letter of 13th April 2021 (marked as “FAM 8” to Fathudins Affidavit).
 7. The letter dated 13th April 2021 (FAM 8) the 1st ex-parte applicant clearly states in part as follows: “Finally, unfortunately we have not been able to produce bank statements from our client’s erstwhile advocates, Abib & Associates.”
 8. Despite the twin compensation claim lodged by the 1st ex-parte applicant together with the 1st interested party being separate and distinct, the respondents in their affidavit herein appear to conflate the two compensation claims; there has been part payment of the 1st Interested Party’s claim for loss and damage. In respect of structures and or developments on the Acquired Land still pending. On the other hand, the ex-parte applicants have received no award at all in respect of their compensation claim.
 9. Notwithstanding the above mentioned submissions, numerous meeting and letters addressed to the respondents, the respondents to date, over 5 years after the 1st ex-parte applicant’s initial submissions, have not determined the exp-parte applicants’ claim.
 10. The ex-parte applicants claim lodged with the respondents is Kshs. 1,667,005,373.80 which is inclusive of approximately Kshs. 120,000,000.00 advanced to or paid for and on behalf of the 1st interested party, project finance cost, consultancy and architectural fees paid and payable to Arkan, marketing consultancy and architectural fees paid and payable to Arkan, marketing consultancy fees paid and payable to Hass Consult Limited and loss of profit inter-alia other heads of claim.
 11. For the exparte to incur the huge expenses the 1st interested party had granted the ex-parte applicants access to and control over the Parcels or Land, including the Acquired Land, to enable the ex-parte applicants undertake the necessary preliminaries before commencing the construction on the said Parcels of land.
 12. Despite the Respondent having paid the 1st interested party part of its claim in the sum of Kshs. 140,576,426.00 sometime prior to mid-2019 in the 1st interested party failed to repay the advance or loan granted to it by the exparte applicants.
 13. As a matter of abundant caution the ex-parte applicants filed in Nairobi High Court Civil Suit No. 10 of 2019 against their previous advocates, Abib & Associates and the 1st interested Party (a copy of Amended Plaintiff is marked as exhibit “FAM 9” to Fathudin’s Affidavit). Annexure “HMAM 4” to the 1st interested party’s replying affidavit contains the plaintiff in High Court Civil Suit No. 10 of 2019 prior to the filing of the same Amended Plaintiff.
 14. The respondents are presently processing payment to the 1st interested party in respect of their loss and damages as regards to structures and or developments that were in the acquired Land. The said payments can be made to the 1st interested party at any time and without notice to the ex-parte applicants.



15. There are three risks in paying the 1st interested party's pending claim for loss and damage to structure and developments:-
 - i. The amount claimed by the ex-parte from the 1st interested party will exceed Kshs. 20,000,000 if interest and general damages is included.
 - ii. In their claim with the respondents, the ex-parte applicants have claimed the amount paid to the 1st interested party as project costs, it indeed the same is paid to the ex-parte applicants by the respondents and the respondents have paid the 1st Interested Party pending claim that would amounts to double payments from public funds.
 - iii. Further the 1st Interested Party has been allocated the sum of Kshs. 4 billion from public funds in compensation of the Parcels of Land the subject matter of these proceedings, any payment to the 1st interested party amounts to double payments.
16. Despite demand made, the respondents have refused to act pursuant to Section 115 or 127 of the [Land Act](#) and refrain from paying any further compensation to the 1st Interested Party to safeguard public funds and or the ex-parte applicants' claim.

The 1st, 2nd and 3rd Respondents Case

17. The 1st, 2nd and 3rd Respondents in opposition to the application filed a Replying Affidavit sworn by one Austine Odhiambo a Senior Valuation and Taxation Officer of the 3rd Respondent herein. It was the Respondents case that:-
18. That the 3rd Respondent is an independent Commission established under Article 67(1) of [the Constitution](#) and is operationalized by the [National Land Commission Act](#) No. 5 of 2012 and has one of its fundamental functions. The management of public land on behalf of the National and County Governments. Beyond that, it is charged with the mandate to compulsory acquire land on behalf of public bodies at their request.
19. During Construction of Mombasa-Nairobi Standard Gauge Railway (Phase 2A), the 3rd Respondents upon the request and instructions of the 2nd Interested Party as the "acquiring authority" compulsorily acquired various properties along the said corridor as per the provisions of Article 40 of [the Constitution](#) and Chapter VIII of the [Land Act](#).
20. The suit properties to wit; title numbers Ngong/Ngong/2221, 2628 and 2629 were among the properties identified for compulsory acquisition for purposes of construction of the Standard Gauge Railway (Phase 2A).
21. In Strict Compliance with the Provisions of Chapter VIII of the [Land Act](#) and Article 40 of [the Constitution](#), the Respondent caused to be Published a Notice of Intention to Acquire the various properties in the Kenya Gazette Number 12526 of 22nd December, 2017.
22. In the intervening period, the project team comprising of the 3rd Respondent and 2nd Interested Party undertook ground inspections of the suit properties inter alia to determine the amount of compensation payable as per their respective mandate.
23. The 1st Interested Party confirmed that the 3rd Respondent paid it an amount of Kshs. 140,576,426/= as payment for the portion of land compulsorily acquired.



24. However, the acquired suit properties are subject to unresolved matters in respect of loss and damage to the structure and developments among others. For these legitimate reasons. The Commission has not paid out for these compensations and will only do so once proof of the same is presented before it.
25. All material times the Applicants were duly notified of the developments herein through various meetings and correspondences with officials of the 3rd Respondent which information is within their knowledge. Indeed, the 3rd Respondent confirms as per the Applicants annexure “FAM 7” that it wrote to the Applicants advising them that their claim is being reviewed and requesting for supporting documents to enable them finalize their claim. However, the Applicants are yet to avail all the supporting documents as requested as per the Applicants annexure “FAM 8”.
26. In addition, the applicants have an ongoing dispute with the 1st Interested Party. Therefore, the Commission will only pay out the compensation to the applicants, as a matter of due diligence, when the dispute surrounding the property has been resolved.
27. The 3rd Respondent is willing to disburse the compensation for loss and damage to the structures and developments once the claims are investigated and confirmed and any other encumbrances that may be registered against the property are discharged.
28. The instant application is not necessary and it is a gross abuse of the Court process. The 3rd Respondent has already made part payment of the compensation and it is ready to pay the balance where applicable once all the issues surrounding loss and damage to the structure and developments have been addressed.

The 1st Interested Party Case

29. The 1st Interested Party filed an affidavit sworn by Habib Mohamed Ali on 21st September, 2023 in opposite to the application. It was averred that:-
30. The 1st Interested Party is the exclusive registered proprietor of all the parcels of land described as Title Nos. Ngong/Ngong/221, 2628 and 2629.
31. By a Joint Venture Agreement dated 2nd September, 2015, the 1st Interested Party and the Applicants covenanted to commence a housing project on the said properties, which properties even prior to the execution of the said agreement had existing structures and developments belonging to the 1st Interested Party (Annexed and marked HMAM1 is the said Joint Venture Agreement).
32. By Virtue of a Gazette Notice No. 12526 (Published on 22nd December, 2017) and even prior to ground breaking, the aforementioned parcels of land became subject of compulsory acquisition for the construction of the Standard Gauge Railway by the 2nd Interested Party even though the compulsory acquisition was being initiated by the Respondents on behalf of the 2nd Interested Party. (Annexed and marked HMAM2 is the said gazette notice).
33. As a consequence of the said acquisition, the Joint Venture Agreement and all other attendant agreements between the Applicant and the 1st Interested Party were frustrated and could not be implemented for the housing project as envisaged by the parties.
34. Further as a consequence of the said frustration and inability for the Joint Venture Agreement to be implemented, it became imperative for the 1st Interested Party to seek compensation for the acquisition of its land and the Applicants being persons who had an interest on the subject properties by dint of the Joint Venture Agreement sought Compensation for their costs that were incurred in the performance of their obligations under Joint Venture Agreement with the 1st Interested Party over the intended project that was to be done on the subject properties.



35. The only compensation sought by the Applicants was limited to their costs and losses (including advances allegedly made to the 1st Interested Party on account of the Joint Venture Agreement) suffered in the preliminary steps to start the housing project and the court must take note that the Applicants did not break ground as no construction was ever undertaken by the Applicants.
36. The Costs allegedly incurred by the Applicants were in respect of the Joint Venture Agreement (including advances allegedly made to the 1st Interested Party and estimated at Kshs. 120,000,000) were essentially preliminary costs as the Applicants who were developers were yet to break any ground at the subject property was yet to commence by the time the compulsory acquisition took place.
37. As a consequence of the losses that both parties had suffered, two separate and distinct claims were lodged on 7th July 2019 with the Respondents to determine the quantum of compensation payable to the Applicants and the 1st Interested Party arising from the said acquisition and the losses. The said claims were presented by the firm of Abib and Associates Advocates on behalf of the Applicants and the 1st Interested Party. (Annexed HMAM3 is a summary of the Applicants' claim to the Respondents).
38. AS part of the project costs/losses that the Applicants incurred are advances purportedly mad to the 1st Interested Party on account of the Joint Venture Agreement over the project that was to be done on the subject suit properties and which costs the Applicants have since included in their claim to the Respondents. The said advances estimated at about Kshs. 120,000 are a subject of a separate dispute and whether or not they are payable by the 1st Interested Party is an issue yet to be determined by the court.
39. The Applicants despite including the said amount of Kshs. 120,000,000 in their claim presented before the Respondents, they are also pursuing the same amount from the 1st Interested Party, and the blocking of the further processing of the 1st Interested Partys' claim is purely an attempt to recover these advances from the 1st Interested Party's claim. The suit where the advances of the Applicants to the 1st Interested Party is a matter awaiting determination in HCCC No. 10 of 2019.
40. The suit where determination as to whether the advances made by the Applicants to the 1st Interested Party are recoverable from the 1st Interested Party is HCCC No. 10 of 2019 and which suit is yet to be determined (Annexed and marked HMAM4 are copies of pleadings filed before the Commercial Division of the High Court for determination of the said dispute).
41. The 1st interested Party contends that if at all these advances were paid to the 1st Interested Party, the same can only be recoverable in the claim filed by the Applicants before the Respondents commission as the frustration of the Joint Venture Agreement was as a result of an event occasioned by operation of law and the said loss cannot be attributed to a breach by the 1st Interested Party.
42. Nowhere in its claim has the 1st Interested Party claimed the said advances that were made to it by the Applicants and the Applicants are put to strict proof on this fact.
43. The Applicants had filed separate proceedings for determination of this part of their claim a matter that is still pending before the courts and the reference of the said dispute here is purely intended to mislead this honourable court.
44. The Respondent are not party to the dispute between the Applicants and the 1st Interested Party in so far as those advances that were made are concerned and nothing has been shown in what way the Respondent are party to the dispute of the advances purportedly made by the Applicants to the 1st Interested Party.



45. The Respondents are just but discharging their mandate as per *the Constitution* of Kenya and what seems to be a private dispute on amounts allegedly advanced to the 1st Interested Party cannot be used to disrupt the Respondents from discharging their Constitutional mandate.
46. The delay in the determination of the separate and distinct claim of the Applicants cannot be visited on the 1st Interested Party (who has been diligent) and nothing had been shown how the 1st Interested Party may have prevented the determination of the Applicants' claim to prevent the 1st interested Party from having its claim processed by the Respondents.
47. The Respondents' commission is discharging a constitutional duty and does not work under direction of any person as this is an independent commission established by law.
48. The Applicants are duty bound to prove their claim before the Respondents in terms of amounts they actually spent and should also demonstrate that these amounts were directly intended for the Joint Venture Agreement. A lack of diligence by the Applicants may also be the reason why their claim remains unpaid to date as that is claimed on their part are largely private payment obligations.
49. It is not in the place of the 1st Interested Party to know why the claim by the Applicants is not yet processed but no good reason has been shown why the Respondents should stop processing the 1st Interested Party's Properties owned by the 1st Interested Party even prior to the execution of their joint venture agreement. The subject properties have always belonged to the 1st Interested Party even prior to the execution of the joint venture agreement. The subject properties have always belonged to the 1st Interested Party and is as such entitled to compensation for its structures destroyed.
50. Proceedings filed the only reason why the Applicants want the processing of the 1st Interested Party's Claim stopped, is because of a misguided apprehension that the Applicants want to recover their alleged advances to the 1st Interested Party (costs and losses) of a sum equivalent to Kshs. 120,000,000 from the claim being processed by the 1st Interested Party.
51. This is not in a way of valid double payments apprehension as the Applicants submit, the 1st Interested Party has not claimed any such amounts from the Respondents and it further claims for compensation which compensation is strictly limited to the damages on the structures of the 1st interested party projects.
52. Notwithstanding, this misguided apprehension by the Applicants that the Respondent are likely to make a double payment (which is not the case) the 1st interested party (costs and losses) of a sum equivalent to Kshs. 120,000.000 from the claim being processed by the 1st Interested Party.
53. This is not in any way a valid double payment apprehension as the Applicants submit, the 1st Interested Party has not claimed any such amount compensation is strictly limited to the damages on the structures of the 1st Interested Party projects.
54. Notwithstanding this misguided apprehension by the Applicants that the Respondents are likely to make a double payment (which is not the case) the 1st Interested Party is ready and willing to have their part of the further claim being processed equivalent to the sum of Kshs. 120,000,000 held in escrows or retained by the Respondent pending determination of this matter and whether such amount is recoverable from the 1st Interested Party.

The Case of the 2nd Interested Party

55. The Second Interested Party never participated in the proceeding nor did they file any pleading despite service and being notified of the existence of these proceedings.



The Applicants submissions

56. The Applicants filed written submissions dated 10th November, 2023. The Applicants submitted on the following three issues:-
- i. Whether the ex parte applicants have locus standi to bring this action.
 - ii. Whether the respondents have in respect of the ex parte applicants, complied with the procedure for redress as provided by the Sections 112,113,114,115 and 125 of the Act.
 - iii. Whether the 1st Interested Party ought to be paid the outstanding compensation for loss and damage to structures and or development in the acquired parcels.
57. It was argued that Article 40 of *the Constitution* provides for protection of right to property and more particularly Article 40 (3) (6) (i). It was also argued that by virtue of the existence of the Agreement for the Construction and development of residential units on the parcels of land prior to the acquisition of portions of the same by the Government, the 1st and 2nd Applicants had equitable claim of the parcels of land bringing the applicants under definition (a) of the Property in Article 260 of *the Constitution*. Reliance was placed to the cases of Karl Wehner Classen versus Commissioner of Lands & 4 Others [2019]eKLR AND Philip Jalango versus Ryan Properties Limited [2020]eKLR.
58. It was also submitted that the administrative action in dispute in these proceedings is the omission and failure by the Respondent to determine the claim for compensation by the applicants as a result of the compulsory acquisition of the Acquired land and compensate them accordingly. It was also submitted that the ex parte applicants have not been heard as provided for by Section 112 of the Act and Section 4 of the *Fair Administrative Action Act* nor have there any proceedings upon which the applicants have been made aware of.
- It was also argued that no Notice of inquiry was published in the Gazette as mandated by Section 112 (1) (a) of the Act.
59. On whether the 1st Interested Party ought to be paid the outstanding compensation for loss and damages to structures and or development in the acquired parcel, it was submitted that the respondents have to date not determined the applicant's claim for compensation but determining the compensation claims of the 1st Interested party with haste despite the claims by both parties arising from the acquisition of the same parcel of land will clearly prejudice the determination by the respondents or the court of any question as to construction, validity or effect of the agreement to the retirement of the ex parte applicant. It was also argued that the determination by the respondents and or courts of any question as to whether the ex parte applicants are interested in the acquired land, the extent or nature of their interest and whether compensation is payable to them will depend in the interrogation of the agreement.

Issues and Determination

60. Court has considered the motion, the rival submissions of the parties. The court has also considered the relevant legal framework and jurisprudence and is of the view that the issues for determination are as follows:-
- i. Whether the Applicants have made at a case for the grant of the judicial review orders sought.
 - ii. Who should bear the costs of the motion?
61. The applicants have sought for judicial review orders of mandamus and prohibition.



62. In the instant case, that the respondents by a Gazette Notice Number 12526 dated 22nd December, 2017 published a Notice, pursuant to Section 112 and 162 (2) of the Land Act of the intention to acquire the acquired land. However, the applicants were not aware of any date appointed for an inquiry to hear issues of propriety and claims for compensation. By persons interested in the land as provided by Section 112(1) of the Act. There was no compliance of Section 112 of the Act. It was also contended that the Respondent have not complied with the provisions of Section 112, 113,114, 115 and 125 of the Land Act.
63. The Court has considered the evidence that was tendered herein, and it is indeed evident that the Respondents to date have not determined the applicant claim for compensation.

Fair Administrative Action Act

64. The evidence on record confirms that the Applicant have not been accorded an opportunity to be heard in respect to their complaint and as such the Respondents violated its right to fair administrative action as contemplated under Article 47 of the Constitution and Section 4(3) of the Fair Administrative Action Act.
65. On whether or not the Applicants are entitled to the Madamus Orders sought. The scope of such orders was discussed by the Court of Appeal in the case of Kenya National Examination Council versus Republic Exparte Geoffrey Gathenji Njoroge & 9 others [1997]eKLR.
66. In view of the foregoing, it is the finding of this court that the Applicants have made out a case for grant of the Judicial Review Orders of mandamus sought herein.
67. In respect to the prohibition orders sought, the applicants sought prohibition Orders directed against the respondents jointly and severally and the 2nd Interested party for bidding the respondents jointly and severally and the 2nd Interested party from paying compensation in respect of loss and damage to the structures and or development in the acquired pieces of land, the subject matter of these proceedings and or any further compensation at all.
68. On this particular issue, the 1st Interested Party submitted that the compensation sought by the 1st Interested Party submitted that the compensation sought by the 1st Interested Party is on loss and damages to physical structures and developments on its properties which is clearly different set of compensation the applicants have not shown how this is a dispute.
69. From the evidence that was adduced herein, it was also evident that the applicants had made a similar application in Nairobi High Court Case No. 10 of 2019 seeking to stay the compensation due to the 1st Interested Party and was disallowed by the Court.
70. In view of the foregoing, it is the finding of this court that the Orders sought of Prohibition cannot be granted in the circumstances applicable to this case.
71. In the end, the judicial review motion dated 22nd August 2023 is allowed in terms of prayers 1 and 2 only with an Order that each party bears own costs of the motion.

Those shall be the final Orders of this court.

It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF JANUARY, 2024

HON. JUSTICE E.K. WABWOTO



JUDGE

In the presence of

Mr. Osodo for the Applicants

Mr. Wngila for the 1st Interest Party

Mr. Sigei for 2nd Interested Party

Court Assistant: Caroline Nafuna

HON. JUSTICE E.K. WABWOTO

JUDGE

