



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC PETITION NO. 14 OF 2017

(MACHAKOS ELC PETITION NO. 10 OF 2015)

IN THE MATTER OF: THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS AS ENSHRINED UNDER ARTICLES 19, 20, 21, 22, 23, 24, 40, & 47 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE LAND ACQUISITION ACT, CAP 295 (NOW REPEALED)

AND

IN THE MATTER OF THE LAND ACT, 2012

AND

IN THE MATTER OF: COMPULSORY ACQUISITION OF L.R. NO. 1692/ 68 NAMANGA TOWNSHIP, KAJIADO COUNTY VIDE GAZETTE NOTICE NO. 11974/11975 OF 23RD SEPTEMBER, 2011

BETWEEN

KATRA JAMA ISSA.....PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

KAJIADO COUNTY GOVERNMENT.....2ND RESPONDENT

THE NATIONAL LAND COMMISSION.....3RD RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY.....4TH RESPONDENT

JUDGEMENT

Introduction

The Petitioner filed a Petition dated the 27th March, 2015, which is supported by an Affidavit sworn by one, KATRA JAMA ISSA dated the 26th March, 2015. The 4th Respondent on their part filed a Replying Affidavit sworn by one, Engineer Otieno Ogalo Oguta, who is its Manager Roads. The 1st, 2nd and 3rd respondents did not file a response to the Petition.

The Petitioner filed a further affidavit on the 10th April, 2018 and her submissions on 3rd July, 2018. The 4th Respondent filed its Submissions on 18th July, 2018.

Petitioner's Case

By a Petition dated the 27th March, 2015, the Petitioner prays for the following orders:

1. A Declaration that the Petitioner's fundamental rights and freedoms as enshrined under Articles 40 (1), 40 (2) (a), 40 (3) (b) (i) 47, (1) and 47 (2) of the Constitution of Kenya 2010, have been contravened and infringed upon by the Respondents herein.
2. A Declaration that the Petitioner's proprietary interests in PLOT No. L.R. 1692/ 68 situate in Namanga, within Kajiado County, was compulsorily acquired by the State.
3. A Declaration that the Petitioner herein is entitled to prompt, just and adequate compensation in full within the meaning and tenor of Article 40 (3) (b) (i) the sum of Thirty Three Million, Seven Hundred Thousand (Kshs. 33, 700, 000/=) for the compulsory acquisition of her proprietary interests in PLOT No. L. R. 1692/68 situate in Namanga Township, within Kajiado County.
4. General, exemplary and aggravated damages under Article 23 (30) of the Constitution of Kenya 2010, for the unconstitutional conduct of the 4th Respondent.
5. Any other orders and directions as this Honourable Court may consider appropriate.
6. Costs of the Petition.

Evidence of 1st 2nd, 4th and 5th Respondents

The 4th Respondent opposed the Petition and filed a replying affidavit sworn by Engineer Otieno Ogalo Oguta, who is its Manager Roads where he deposed that the then Commissioner of Lands, Mr. Z A Mabea through Gazette Notice No. 7 dated the 22nd December, 2011 and published on 6th January, 2012 sought to invoke the provisions of the Land Acquisition Act (Cap 295) for purposes of completing the Arusha – Namanga – Athi River Project, Namanga One Stop Border Post. He confirms that among the parcels of land sought to be affected included the Petitioner's parcel known as L.R No. 1692/68 measuring 0.0096 hectares. He explains that prior to the acquisition, the land was valued at Kshs. 5, 355, 625. 00 by Mr. J K Mutua of the Ministry of Lands who prepared a report dated the 19th January, 2012. Further, as per the valuation report, it indicated that the parcel of land was developed with a permanent single storey building and some semi – permanent houses (which fall outside the acquisition line, hence not subject to compensation) at the time of gazette for acquisition and only the permanent house was considered. He contends that while the Petitioner's parcel of land measures 0.030 hectares, the Ministry of Land only wished to compulsorily acquire the area of only 0.0096 hectares. Further, that the valuation report prepared by the Petitioner does not take into consideration the said paramount consideration. He concurs with the position of the Tribunal on 6th November, 2013 and insists the only applicable valuation are those conducted as at 6th January, 2012 which ousts the Petitioner's valuations. He insists the Commissioner of Lands adhered to the provisions of section 9 of the Land Acquisition Act (now repealed) by holding an inquiry for hearing of the claims for compensation by persons interested in the land and this was done before preparation of the award on 19th January, 2012. He avers that upon the conclusion of valuation of land relating to Arusha – Namanga – Athi River, the Commissioner of Lands caused to be prepared to the 4th Respondent, a schedule of payment for all the affected parties. He states that the Land Acquisition Act was repealed by the Land Act and in the circumstances the functions including duties of the Land Acquisition Compensation Tribunal were rendered void. He claims that the Petitioner has not demonstrated to Court why there was inordinate delay in seeking justice as to the issue of compensation from the year 2012 to 2014. He denies that any of the Petitioner's rights guaranteed under Article 40 and 47 of the Constitution have been infringed upon. Further, that the right to proprietary interest provided under Article 40 of the Constitution is not absolute. He reiterates that the 4th Respondent effected to the National Land Commission payment in respect of various properties including LR. No. 1692/68 and an RTGS for Kshs. 5, 355, 625 was forwarded to it. He reaffirms that any claim the Petitioner has, lies with the National Land Commission, which has safely secured the sum of Kshs. 5, 355, 625 and not the 4th Respondent. Further, that the demolition of the property on LR. No. 1692/68 was done through the consent of the land owner who in anticipation for demolition removed the structures including features like doors and windows to allow for expansion. He argues that the Petitioner has not demonstrated that her private interest far outweighs the general public interest.

The Petitioner KATRA JAMA ISSA filed a further affidavit in rejoinder to the 4th Respondent's Replying Affidavit where she reiterated the contents of her Petition. She insists the suit land was compulsorily acquired and the only issue before Court is the quantum of the compensation. She affirms that the Award from the Ministry of Lands was dated the 19th January, 2012 while the government valuation was dated 25th April, 2012 respectively. She claims that the suit property was gazetted on the 6th January, 2012 at which time, no valuation by the Ministry of Lands had been conducted. The Petitioner insisted that from 6th November, 2013 the Tribunal Case never proceeded due to lack of quorum, which compelled her to file the instant Petition. She reiterates that she is yet to be compensated for her land which was compulsorily acquired and this is a violation of her rights. She denies removing structures and fixtures from the suit land.

Both the Petitioner and the 4th Respondent filed their respective submissions that I have considered.

Analysis and Determination

Upon consideration of the Petition dated the 27th March, 2015 including the supporting and replying affidavits as well as submissions filed herein, the following are the issues for determination:

- Which Law applies in respect of the Petitioner's claim herein;
- Whether the compensation offered by the 4th Respondent for the Petitioner's parcel of land title number PLOT No. L.R. 1692/ 68 that was compulsorily acquired is adequate;
- Whether the Petitioner's fundamental rights and freedoms have been infringed upon;
- Whether the Petitioner is entitled to General, exemplary and aggravated damages; and

- Who should bear the costs of the Petition?

It is not in dispute that the Petitioner is the proprietor of plot number PLOT No. L.R. 1692/ 68. It is also not in dispute that the said parcel of land was gazetted for compulsory acquisition on 6th January, 2012 vide gazette notice number 7. What is in dispute is the area to be compulsorily acquired as well as the amount of compensation to be paid to the Petitioner.

On the issue of applicable law, I note the process of compulsorily acquiring the suit land herein commenced when the Land Acquisition Act was still in force. However, the Petitioner was aggrieved with the Award and filed an Appeal to the Land Acquisition Compensation Tribunal (LACT) that wound up before making a determination of the said Appeal. Currently, compulsory acquisition is governed by the Land Act. In the case of **Five Star Agencies Limited Vs National Land Commission (2014) eKLR**, Justice Nyamweya stated as follows:’ .. **....Having considered the arguments made by the parties, it is my view that the applicable law is determined by the operative date of the disputed award of compensation. I find that I must agree with the Appellant that the operative date can only be 23rd August, 2013, when the Respondent published the acquisition notice of the Appellant’s portion of land through Gazette Notice No. 11190.’**

After considering the facts as presented and being persuaded with the above cited authority, I find that the applicable law in the instant dispute is the repealed Land Acquisition Act that was in force on 6th January, 2012 when the suit land was gazetted for compulsory acquisition.

As to whether the compensation offered by the Respondent for the Petitioner’s parcel of land title number PLOT No. L.R. 1692/ 68 that was compulsorily acquired is adequate. As per the gazette notice, dated the 6th January 2012, it indicated that the area to be compulsorily acquired was 0.0096 hectares from the suit land.

On 19th January, 2012, the Ministry of Lands granted the Petitioner an Award of Kshs. 5, 335, 625/= for the area to be compulsorily acquired. According to the Ministry of Lands Valuation Report dated the 19th January, 2012 it included the developments on the suit land before arriving at a valuation of Kshs. 5, 355, 625/= which the Petitioner objected to and lodged an Appeal at the Land Acquisition Compensation Tribunal (LACT) contending that the compensation offered was unreasonable. The Tribunal however did not conclude the determination of the Appeal as the Land Acquisition Act, that established it, was repealed. There was an earlier valuation conducted in 2011 while the rest were done in 2011 and 2015 respectively. From the submissions of the 4th Respondent, it contends that the Land Acquisition Compensation Tribunal had delivered a ruling on 16th November, 2013 where it stated that the only applicable valuation reports are those conducted as at 6th January, 2012. Further, that the funds allocated to the Petitioner had already been set aside by the Commissioner of Lands and deposited with the National Land Commission.

The Petitioner on the other hand contended that the valuation by Messrs Camp Valuers dated the 22nd May, 2015 represents a fair and just value of the suit property. She insists that the valuation conducted by the Respondents dated the 19th January, 2012 erred by failing to consider other pertinent facts envisaged by the Schedule to the repealed Land Acquisition Act thus arriving at a valuation which constituted a gross undervalue.

Article 40 (1), (2), (3), and (4) of the Constitution provides that: ‘**1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property— (a) of any description; and (b) in any part of Kenya. (2) Parliament shall not enact a law that permits the State or any person— (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4). (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.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.’

Further Article 47 of the Constitution states as follows:’

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.’

From the evidence presented, it is not in doubt that at the time the Petitioner's land was gazetted for compulsory acquisition, she had been presented with a valuation report which informed the amount of compensation to be paid. She declined the compensation and filed an Appeal at the Land Acquisition Compensation Tribunal. I note she was accorded audience at the Tribunal but the said Appeal was not determined as the Tribunal was wound up by the repeal of the Land Acquisition Act. Further, prior to the gazetting of the suit land for compulsory acquisition, it emerged that an inquiry was conducted by the Respondents. It is my considered view that all these occurrences confirm that the Petitioner was indeed accorded fair administrative action as enshrined in Article 47 of Constitution. I opine that it is the Petitioner's actions that led to the delay in payment of compensation and not the Respondents as she claims. In the circumstances, I am unable to make a finding that her fundamental rights and freedoms as enshrined in article 40 and 47 of the Constitution have been infringed upon.

On determining whether the Award presented to the Petitioner was adequate or not, I wish to refer to the four Valuation Reports herein. In the first instance, the Ministry of Lands conducted a valuation and presented the disputed Award of Kshs. 5, 355, 625 to the Petitioner. The Petitioner on the other hand contracted three valuers to undertake a valuation of the suit land. A cursory look at the three valuation reports to wit: Prestige Management Ltd dated the 16th November 2011 that proposed compensation of Kshs. 7, 700, 000/-; Mamuka Valuers (Management) Limited report dated 30th May, 2012 which proposed an Award of Kshs. 7, 400,000 and Camp Valuers report dated the 22nd May, 2015 which assessed compensation at Kshs. 33, 700, 000/=.

In the case of **Patrick Musimba v National Land Commission & 4 others [2016] eKLR** where the Learned Judges held that: ' **In our view, a closer reading of Article 40(3) of the Constitution would reveal that the Constitution did not only intend to have the land owner who is divested of his property compensated or restituted for the loss of his property but sought to ensure that the public treasury from which compensation money is drawn is protected against improvidence. Just as the owner must be compensated so too must the public coffers not be looted. It is that line of thought that , under Article 40(3), forms the basis for "prompt payment in full, of just compensation to the person" deprived of his property through compulsory acquisition. As was stated by Scott L.J, in relation to compulsory acquisition, in the case of Horn-v- Sunderland Corporation [1941] 2 KB 26,40: "The word "compensation" almost of itself carries the corollary that the loss to the seller must be completely made up to him, on the ground that unless he receives a price that fully equaled his pecuniary detriment, the compensation would not be equivalent to the compulsory sacrifice". Effectively Lord Scott's statement gave rise to the unabated proposition that the compensation of compulsorily acquired property be quantified in accordance with the principle of equivalence. A person is entitled to compensation for losses fairly attributed to the taking of his land but not to any greater amount as "fair compensation requires that he should be paid for the value of the land to him, not its value generally or its value to the acquiring authority": see Director of Buildings and Lands -v- Shun Fung Wouworks Ltd [1995] AC 111,125. We see no reason why the same approach should not be adopted locally. The Constitution decrees "just compensation" which must be paid promptly and in full. The Constitution dictates that the compensation be equitable and lawful when the word "just" is applied as according to Black's Law Dictionary 9th Ed page 881 the word "just" means "legally right; lawful; equitable". In our view, the only equitable compensation for compulsory acquisition of land should be one which equates restitution. Once the property is acquired and there is direct loss by reason of the acquisition the owner is entitled to be paid the equivalent. One must receive a price equal to his pecuniary detriment; he is not to receive less or more. This can be achieved to the satisfaction of the owner of land by Appeal to the market value of the land.'**

From a cursory look at the Valuation Report by Camp Valuers, upon which the Petitioner seeks to rely on, I note it took into account the area to be compulsorily acquired, proposed development, and the anticipated income. I find that this report has based its compensation on the general value of the land. The compensation in the report by Camp Valuers contains a major difference to the one by Prestige Valuers which had been done on 11th November, 2011 and assessed compensation at Kshs. 7, 700,000. However, the report by Mamuka Valuers which was done in May 2012 even reduced the amount of compensation to Kshs. 7, 400,000/=. I note the Tribunal in a ruling confirmed that it shall be guided by valuations undertaken as at 6th January, 2012. Insofar as the 4th Respondent disputed the report by Prestige Valuers dated 11th November, 2011, as it took into account the whole parcel of land, and compared its value with the neighbouring plots. The said report clarified that the remaining portion after acquisition would be of no economic value. In relying on the above cited judicial authority, I find the valuation by Prestige Valuers which was undertaken before gazetting of the suit land for compulsory acquisition, is an equitable compensation which ably compensates the Petitioner for the direct loss of her land.

As to whether the Petitioner is entitled to General, exemplary and aggravated damages.

In this instance, I wish to make reference to the case of **Rookes v Barnard (1964) 1 All ER 367**, where the Court held that: '**exemplary damages may be awarded in two classes of cases; first where there is oppressive, arbitrary or unconstitutional action by the servants of the government, and secondly, where the defendant's conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff.**

In relying on this authority and the current circumstances, I do not find the actions of the Respondents to compulsorily acquire the suit land to be unconstitutional and oppressive nor calculated to benefit them. From the Petition, the Petitioner did not adduce any evidence in respect of the damages she suffered. In my view the valuation report I have relied on took into account all aspects of the losses and damages the Petitioner would incur as a result of the compulsory acquisition of her land. It is against the foregoing that I am unable to award her general, exemplary as well as aggravated damages.

On the issue of costs, I find that the Petitioner is indeed entitled to costs as she has been inconvenienced.

It is against the foregoing that I find the Petition dated 27th March, 2015 is merited and will proceed to make the following orders:

- a) The Petitioner KATRA JAMA ISSA be and is hereby entitled to prompt, just and adequate compensation in full within the meaning and tenor of Article 40 (3) (b) (i) the sum of Seven Million Seven Hundred Thousand (Kshs. 7, 700, 000/=) for the compulsory acquisition of her proprietary interests in PLOT No. L. R. 1692/68 situate in Namanga Township, within Kajiado County.
- b) The costs of the Petition are Awarded to the Petitioner which should be borne by the Respondents jointly and severally.

Dated signed and delivered in open court at Kajiado this 19th day of December, 2018

CHRISTINE OCHIENG

JUDGE