



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**NAIROBI ELC NO. 616 OF 2010**

**HARP INVESTCO LTD ..... PLAINTIFF/APPLICANT**

**VERSUS**

**NATIONAL SOCIAL SECURITY FUND (NSSF)**

**BOARD OF TRUSTEES ..... 1<sup>ST</sup> DEFENDANT**

**COMMISSIONER FOR LANDS ..... 2<sup>ND</sup> DEFENDANT**

**REGISTRAR OF TITLES ..... 3<sup>RD</sup> DEFENDANT**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. Through a Notice of Motion Application dated 3rd February 2017, the plaintiff seeks summary judgment against the 4th defendant. Specifically, the plaintiff seeks the following orders:

*1. THAT this application be certified as urgent and the same be heard immediately.*

*2. THAT summary judgment be entered as against the 4<sup>th</sup> defendant, Kenya National Highways Authority [KeNHA] in respect of its statutory and constitutional liability to make compensation for the 17.44 acres excised from LR No. 118895/24 Mavoko which it has, admittedly, already used for the construction of Mlolongo School and public road expansion without paying any compensation for the same.*

*3. THAT consequential to [2] above:*

*a. The National Land Commission be directed to immediately, and not more than seven [7] dates or such other time as the court may direct, to undertake a fresh and current valuation of the subject parcels of land, that is (a) the 14.24 acres portion taken by KeNHA from LR No. 118895/24 situated in Mavoko sub county and already used by KeNHA for public road expansion, and issue a formal award of compensation to the plaintiff, such that KeNHA can immediately proceed to pay the plaintiff the evaluated compensation and interest thereon; and*

*b. The matter be listed after the lapse of the 7 days to adopt the valuation report by the National Land Commission and/or formal entry of an order of compensation in favour of the plaintiff; and*

c. An order do issue directing KeNHA to immediately proceed to pay the plaintiff the evaluated compensation and interest thereon.

d. Costs of the suit be provided for; and

4. THAT a decree, whether partial or full, do issue in the terms eventually granted by the court.

5. THAT the court be at liberty to make such further or alternative orders as it may deem fit in the circumstances.

6. THAT costs of this application be provided for.

2. The plaintiff further prays that a decree, whether partial or full, does issue in the terms granted by the court; that the court be at liberty to make further orders as it deems fit in the circumstances and that costs of the application be provided for.

3. The application is supported by the affidavit of Jignesh Desai, the plaintiff's director, sworn on 3rd February 2017. The plaintiff's case is that, through a letter dated 29th September 2004, the 1st defendant offered to sell to it a portion of 229 Acres out of LR No. 11895/24 at a price of KShs.187,780,000/=. The offer was accepted by the plaintiff and a sale agreement dated 18th January 2015 was executed by the parties. Parties thereafter executed a deed of variation dated 27th April 2005 varying the agreement of 18th January 2005 to include an additional 30 Acres out of LR No. 11895/24 bringing the size of the purchased property to 259 Acres at a revised price of 212,380,000/=.

4. It is the plaintiff's case that before completion of the transaction, the Commissioner of Lands [*now defunct*], through Gazette Notice No. 3577 of 19th May 2006, gave a notice of intention to acquire approximately 50 Acres out of LR No. 11895/24 under the Land Acquisition Act [*now repealed*]. Owing to the Gazette Notice, registration in favour of the plaintiff was suspended. Through Gazette Notice No. 6321 of 11th August 2006, the Commissioner of Lands gave notice that inquiry regarding compensation by all persons interested in the suit property would take place on 12th and 13th October 2006. The inquiry never took place on the aforesaid dates or at all. The plaintiff contends that by dint of **Section 9 (4A) of the Land Acquisition Act (repealed)**, the Commissioner of Lands was deemed by law to have revoked his notice of intention to acquire the land thereby terminating the compulsory acquisition initiative.

5. The plaintiff further contends that in the year 2010, the Ministry of Roads and Public Works made an attempt to negotiate a private sale through which the 1st defendant would surrender 50 Acres from the suit property needed for a road project at a price of KShs.50 Million. It is the plaintiff's contention that at that point in time, the 1st defendant had no interest in the property because it had already sold the entire parcel of land to the plaintiff.

6. The plaintiff contends that its beneficial interest in the suit property was protected by **Section 75 (1) (c) of the repealed Constitution** and that its property could not be taken away by the Ministry of Roads & Public Works without payment of full and prompt compensation. The applicant contends that in violation of **Section 75 (1) (c) of the repealed Constitution**, the Ministry of Roads & Public Works proceeded to take a portion of 17.44 Acres of the plaintiff's property between the year 2006-2010.

7. The plaintiff annexed to its application letters dated 6th September 2010 and 14th December 2010 from the Ministry of Roads and Public Works requesting the bank account details of the 1st defendant. It also annexed a response by the 1st defendant dated 29th March 2012 declining to accept payment, contending that it had disposed off its interest in the suit property to the plaintiff. A further letter from the Office of the Attorney General dated 11th December 2012 directing the 4th defendant to settle with the registered owner on the basis of a valuation undertaken by the Government Chief Land Valuer was also annexed to the affidavit in support of the application.

8. The plaintiff contends that despite the 4th defendant admitting liability to pay for the 17.44 acres unlawfully taken from it without compensation, the 4th defendant had failed and/or ignored to have the

valuation done or pay compensation. It is the plaintiff's case that there is no genuine dispute as to the 4th defendant's sole liability to pay compensation to the plaintiff. The plaintiff further argues that there is no reason why the compensation should not be paid. The plaintiff's position is that determination of other questions as between the different defendants can be made separately and at a later stage in these proceedings.

9. The application was opposed by the 4th defendant through a replying affidavit sworn on 8th March 2007 by Thomas Gacoki, the 4th defendant's Manager in Charge of Survey. The deponent averred that the 4th defendant was not privy to any agreements entered into by the plaintiff in relation to the suit property and therefore, that any such agreements were not binding on it. The 4th defendant contended that following Gazette Notice No. 3577 of 19th May 2006, the 2nd defendant acquired 50 Acres out of the suit property on behalf of the Ministry of Roads & Public Works after which they took possession.

10. The 4th defendant averred that in accordance with advice from the Attorney General, they proceeded to carry out valuation and the government valuer valued the 17.44 Acres at KShs.165,000,000/-. However, it later emerged that a portion of the suit property measuring 3.20 Acres had been surrendered by the plaintiff as an access road to Mlolongo Public Schools and Mombasa Road. The 4th defendant contended that a fresh valuation needed to be carried out to determine the value of the acquired land because the acreage had reduced by 3.2 Acres.

11. The 4th defendant further contended that the National Land Commission has been notified and has conducted inquiries aimed at determining issues of propriety and claims for compensation and that parties to this suit were represented in the inquiry which is pending determination. The 4th defendant also contended that the present application is aimed at defeating the inquiry before the National Land Commission and that it is not in the interest of justice to grant the orders sought. Lastly, the 4th defendant contended that while public policy requires that public funds be utilized in a prudent and responsible manner, the present application seeks to compel it to compensate the plaintiff for a parcel of land which is not registered in its name and which was surrendered and which was therefore not acquired compulsorily.

12. The application was orally canvassed in court on 31st May 2017. The plaintiff and the 4th defendant also filed submissions dated 6th April 2017 and 26th May 2017 respectively. Ms Koki, learned counsel for the plaintiff, submitted that the suit property belonged to the plaintiff as the beneficial owner but was registered in the name of the 1st defendant. She argued that it is 11 years since the 4th defendant gazetted the land for compulsory acquisition and took possession of the same but no compensation had been made. Counsel argued that under **Article 40 of the Constitution**, the plaintiff was entitled to prompt compensation. Counsel further submitted that there was no dispute between the plaintiff and the 1st defendant on the ownership of the suit property. Lastly, counsel submitted that the 4th defendant had admitted that they had acquired the plaintiff's property.

13. The 1st defendant's counsel, Mr Ngacha, submitted that the 1st defendant fully supported the application by the plaintiff. He stated that the 1st defendant sold the suit property to the plaintiff and that it had no interest in the property. He contended that there was no dispute that the party to be compensated was the plaintiff as the 1st defendant had absolutely no interest in the acquired property. Counsel argued that there is no dispute as to the 4th defendant's liability to pay compensation. He submitted that the only reason why title was in the name of the 1st defendant was that the suit property was part of a bigger title and that subdivision was ongoing when the 4th defendant acquired the property. Mr Ngacha further submitted that once judgment is entered, the claim would be taken over by the National Land Commission for valuation and assessment of the amount payable.

14. Mr Osiemo, learned counsel for the 4th defendant submitted that the application was fatally defective because it should have been directed against the National Land Commission. He stated that with the repeal of the Land Acquisition Act, compulsory acquisition was now regulated by the **Land Act and Article 40 of the Constitution**. He argued that the 2nd defendant acquired the land on behalf of the 4th defendant in discharge of his statutory mandate and that the 4th defendant came in to construct the road after the land had been acquired. Counsel argued that the 4th defendant as a state corporation established under the Roads Act had no powers to compulsorily acquire land and did not therefore acquire the

plaintiff's land.

15. It was the 4th defendant's submission that in compulsory acquisition disputes, the proper party was previously the 2nd defendant and presently it is the National Land Commission and the Attorney General. Counsel argued that the 4th defendant has no statutory or constitutional mandate to compensate the owner of the acquired land and called for the dismissal of the application. The 4th defendant further submitted that the plaintiff was seeking compensation of land which had been surrendered to the 2nd defendant. Counsel submitted that compensation cannot lie in respect of a surrendered piece of land.

16. The 4th defendant denied admitting liability to pay the plaintiff and averred that it admitted utilizing 14.38 Acres for the construction of the northern corridor. It was the 4th defendant's submission that for summary judgment to issue, the claim must be for a known sum which has been specifically pleaded and proven. Lastly, the 4th defendant submitted that the plaintiff was not entitled to compensation on a title which was in the name of the 1st defendant, a public body, which it has sued alleging fraud and breach of contract.

### **Determination**

17. The question to be answered in this ruling is whether the applicant has satisfied the criteria for grant of an order for summary judgment. The present application is expressed to be brought under **Sections 1A, 1B & 3A of the Civil Procedure Act, Order 13(1) and (2) of the Civil Procedure Rules and Order 36 of the Civil Procedure Rules, Section 13(7) and 19 of the Environment and Land Court Act as well as Article 159(2) of the Constitution.**

**18. Order 36** provides a framework on the court's jurisdiction to grant summary judgment. This jurisdiction is to be exercised in a suit where the claim is for a liquidated demand with or without interest or for recovery of land. Secondly, this jurisdiction is to be exercised in a suit where the defendant has entered appearance but has not filed a defence as at the time of bringing the application for summary judgment.

19. In the present suit, there is an Amended Statement of Defence and Counterclaim on record dated 11th November 2014, duly filed by the 4th defendant on 4/12/2014. The application for summary judgment was filed on 3/2/2017. Of necessity, the first question to be answered in determining the above issue is whether the court is still seized of jurisdiction to entertain an application for summary judgment at this point. It is my view that in the present context, the court's jurisdiction to grant an order of summary judgment was clearly ousted by the filing of defence and counterclaim by the 4th defendant on 4/12/2014. If the applicant is persuaded that the 4th defendant has no tenable defence or counterclaim, at this point in these proceedings, the recourse available to the plaintiff is an application for an order striking out the 4th defendant's defence and counterclaim.

20. The second important question that has emerged in the present application is the identity of the proper party vested with the constitutional and statutory mandate to compensate owners of compulsorily acquired land. I have carefully examined the framework in **Article 40 of the Constitution and Sections 107 to 133 [Part VIII] of the Land Act** which deal with compulsory acquisition of land by the national or county governments. There is no doubt that there is an issue as to whether or not the 4th defendant is the statutory body liable to compensate the owner of the suit property. Besides, there is an issue as to whether the plaintiff is entitled to full and prompt compensation in the absence of a valid title which the plaintiff would be required to surrender to the acquiring body prior to release of the compensation funds. I would not say more at this stage because to do so may prejudice the parties' cases. It suffices to say that this is not a suit suitable for the remedy of summary judgment because the defence by the 4th defendant raises triable issues which require interrogation at a substantive hearing.

21. The upshot of this ruling is that the plaintiff's Notice of Motion Application dated 3/2/2017 seeking summary judgment has failed for lack of merit. The applicant shall bear costs of the application.

**Dated, signed and delivered at Nairobi on this 17th day of November, 2017.**

**B M EBOSO**

**JUDGE**

**In the presence of:**

Koki Advocate for the Plaintiff

Chebet Advocate for the 1st Defendant

Osiemo Advocate for the 4th Defendant

Halima Abdi: Court Assistant