



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAIROBI

ELC APPEAL NO.2 OF 2014

STANLEY MUNGA GITHUNGURI.....1ST APPELLANT

ELIZABETH KARUNGARI WANJIHIA.....2ND APPELLANT

VERSUS

NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

Introduction:

The Appellants were at all material times registered as the proprietors of all that parcels of land known as LR No. 1055/31 (original number 1055/1/3) (hereinafter referred to as “**the suit property**”). The suit property which measures approximately 9.6 acres is situated along Ngong Road within Karen area of Nairobi City County. Sometimes in the year 2006 or thereabouts, the 1st respondent expressed an intention to acquire compulsorily a portion of the suit property measuring 0.0462 ha.(0.1142 acres) for Kenya National Highways Authority for the purposes of constructing the Southern By-pass road. Through Gazette Notice No. 11990 which was published in the Kenya Gazette of 23/8/2013, the 1st Respondent notified among others the Appellants that it would conduct inquiries on 1/10/2013 for the purposes of ascertaining the amount payable for the said portion of the suit property. The Appellants appeared at the said inquiry and made representations on what they considered as the fair market value for the said portion of the suit property. The appellants demanded compensation in the sum of Kshs.20,000,000/= for the said portion of the suit property based on an evaluation report that was prepared by Ragos Valuers and Estate Agents Ltd. on 26/9/2013. The said company had assessed the value of the suit property at kshs.125,000,000/= per acre. The 1st Respondent after considering the Appellants’ representation made an award of compensation to the Appellants in the sum of Kshs.4,574,700/= on 20/12/2013.

The Appeal to this court:

The Appellants were not satisfied with the said award and preferred an appeal against the same to this court on 27/1/2014 pursuant to the provisions of section 128 of the Land Act, 2012. In their memorandum of appeal dated 27/1/2014, the Appellants challenged the 1st Respondents award on the following grounds:-

- (i) The 1st Respondent failed to take into account the value of the suit property and as such arrived at a unilateral amount as compensation not backed by any known valuation.

(ii) The 1st Respondent failed to acknowledge the fact that the suit property was residential and as such did not take that fact into account while valuing the suit property.

(iii) The 1st Respondent failed to take into account the location of the suit property more particularly its proximity to the Highway.

(iv) The 1st Respondent failed to consider the fact that the Appellant had already commenced the development of a hospitality centre on the suit property by the time the decision to acquire the suit property compulsorily was made.

(v) The 1st Respondent misconstrued the location of the property thereby reaching an erroneous decision.

(vi) The 1st Respondent failed to consider all the material placed before it and arrived at a decision that was wrong in the circumstances.

(vii) One, Mr. E. G. Rwigi usurped the powers of the 1st Respondent and arrived at a unilateral decision that was neither correct nor supported by any valuation and as such contrary to the Land Act, 2012 and the Constitution of Kenya.

The Appellants sought the setting aside of the 1st Respondents award of Ksh. 4,574,700/= aforesaid and substitution thereof with an award of Kshs. 19,866,250/= together with costs and interest. In their record of appeal which was filed on 28th January 2014, the Appellants included among others, a copy of the Gazette Notice pursuant to which the Appellants were invited to attend the inquiry by the 1st Respondent to ascertain the amount of compensation which was payable to the Appellants for the said portion of the suit property which was to be acquired, a copy of the title for the suit property, a copy of the valuation report that was prepared on their behalf by Ragos Valuers and Estate Agents Limited, and a copy of the Award by the 1st respondent.

In response to the appeal, the Respondents filed a replying affidavit sworn by Fedelis K. Mburu a Chief Valuer with the 1st Respondent. In his affidavit which was sworn on 8/10/2014 and filed in court on 16/10/ 2014, Mr. Mburu stated as follows. The Appellants' complaint concerns the valuation that was done for the portion of the suit property a portion which was compulsorily acquired by the 1st Respondent. He together with one, Elias G. Rwigi, inspected the suit property on 2/9/2013 and valued the same on behalf of the 1st Respondent for the purposes of ascertaining the compensation to be awarded to the Appellants for the portion thereof which was acquired compulsorily as aforesaid. The suit property is located at the North East periphery of Karen residential suburbs which is a high class low density area. There are no immediate developments to the North East and South East of the suit property which areas form part of the Gazetted Ngong Forest. In view of the location of the suit property, the user of its immediate neighbourhood is unlikely to change to residential in the near future thereby depriving any intended commercial development of the critical local demand that the location requires to take off. The approval that was given to the Appellants to extend the user of the suit property to include commercial did not convert the user of the suit property to commercial. The user of the suit property became residential cum commercial which is inferior to commercial. As at the time the 1st Respondent expressed intention to acquire a portion of the suit property, no development had commenced thereon. The valuation report by Ragos Valuers and Estate Agents Limited on the basis of which the Appellants sought compensation in the sum of Kshs.19,866,250/= was based on errors and misleading factors. The valuer had assumed that the user of the suit property was commercial which was not the case and in arriving at the value of the suit property, the valuer used as comparable, premises which are situated on a different zone as the suit property. These comparable distorted the value of the suit property and cannot be relied upon to arrive at a fair compensation to the Appellants. Mr. Mburu also took issue with the valuer adding to the proposed amount of compensation, the cost of a suit which had no relationship with the acquisition of the suit property by the 1st Respondent. He also pointed out that the valuer had omitted to include the affected developments in his valuation which in this case was the perimeter wall. He urged the court to

uphold the award of Kshs.4,574,700/= which the 1st Respondent had made to the Appellants as compensation for the portion of the suit property which had been acquired compulsorily. Mr. Mburu annexed to his affidavit, a copy of a valuation report which the 1st Respondent is said to have relied on as the basis for the award that the 1st respondent made to the Appellants.

The submissions:

The appeal was heard by way of written submissions. The Appellants filed their written submissions on 25/8/2014 while the Respondents filed their submissions on 24/6/2015. I have considered the 1st Respondents award dated 20/12/2013, the Appellants' memorandum of appeal and written submissions. I have also considered the Respondent's reply to the appeal and the Respondents' written submissions. Article 40(3) of the Constitution provides as follows:-

“The state shall not deprive a person of property of any description, or 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 5; 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;”

Section 107 (1) of the Land Act, 2012 empowers the 1st Respondent to acquire land on behalf of the national or county government for public purposes or in the public interest.

Section 111(1) of the Land Act, 2012 provides that,

“If land is acquired compulsorily under this Act, just compensation shall be paid promptly in full to all persons whose interests in the land have been determined.”

Section 112 and 113 of the Land Act, 2012 provides for the procedure of making inquiries to ascertain those who are interested in the land to be acquired and the amount of compensation to be paid to them.

Section 128 of the Land Act, 2012 provides that:-

“Any dispute arising out of any matter provided for in this Act may be referred to the Land and Environment Court for determination.”

The Appellants appeal has been brought under Section 128 of the Land Act aforesaid. The appellants are not challenging the validity of the acquisition of the said portion of the suit property (hereinafter referred to only as **“the disputed property”**). The Appellants' complaint is that the 1st Respondent has not paid fair compensation for the disputed property.

Determination of the appeal:

What I have been called upon to determine in this appeal is whether the compensation that was awarded by the 1st Respondent to the Appellants for the disputed property was fair and just as provided for under Article 40(3) of the Constitution and section 111 of the Land Act, 2012 aforesaid. Under Section 111(2) the Land Act, the 1st Respondent was supposed to make rules to regulate the assessment of just compensation for land acquired compulsorily. No such rules have been made to date. The repealed Land

Acquisition Act, Chapter 295 Laws of Kenya had a schedule that set out the principles upon which compensation for land acquired compulsorily was to be determined. In the absence of similar rules under the Land Act, 2012, we may have to rely on the principles in the said repealed Act for guidance. Among the principles set out in the schedule to the said repealed Act for determining compensation are following:-

1. Market value in relation to land is the market value of land at the date of publication of the notice of intention to acquire land.
2. In determining compensation, the following matters shall be taken into account.
 - i. The market value of the land.
 - ii. Damage sustained or likely to be sustained in the land at the time of taking possession of the acquired land by reason of severing the land from other land.
 - iii. Damage sustained or likely to be sustained by persons interested in the land at the time of taking possession of the acquired land by reason of such acquisition injuriously affecting his other property whether movable or immovable in any other manner or his actual earnings.
 - iv. Reasonable expenses incidental to change of residence if occasioned by the acquisition of the land.
 - v. Damage genuinely resulting from diminution of profits of the land between the date of publication of notice of intention to acquire the land and the date possession of the acquired land is taken.
3. To the amount of compensation determined to be payable shall be added a sum equal to 15% of the market value for disturbance.

During the inquiry that was conducted by the 1st Respondent, the Appellants had sought compensation in the sum of Kshs.19,866,250/= for the disputed property made up as follows:-

Value of land Kshs.14,275,000/=

Injury caused (Broken wall) Kshs.2,500,000/=

Costs of the suit Kshs.500,000/=

Add 15% Kshs. 2,591,250/=

Total Kshs. 19,886,250/=

In arriving at the value of the disputed property, the appellants used a value of Kshs.125,000,000/= per acre for the suit property which they arrived at after considering the prices at which a number of properties said to be in the neighbourhood of the suit property were sold. The particulars of these properties (hereinafter "comparable") are set out in the valuation report by Rago's Valuers and Estate Agents Limited. See, pages 14 to 21 of the record of appeal. In the said valuation report the suit property was treated as commercial cum residential and the comparables used in arriving at the value of the land were a mixture of multi dwelling user, commercial, and residential user. It is not clear from the Appellant's valuation report as to how the value of the damaged wall was arrived at. There is also no basis set out in the said report for the sum of Kshs.500,000/= that was claimed for legal costs.

As I have stated earlier in this judgment, the Respondents have justified the sum of Kshs.4,574,700/= that was awarded to the Appellants as compensation for the disputed property. What I need to consider at this stage is whether the 1st Respondent fell into any error in assessing the award payable to the Appellants

having regard to the principles set out above for determining compensation which are underpinned in Article 40(3) of the constitution and section 111(1) of the Land Act. I have noted that all the properties which were used by the 1st Respondent as comparable in arriving at the value of land in the area where the suit property is situated at Kshs.30,000,000/= per acre were all residential properties. I am in agreement with the Appellants that the 1st Respondent failed to consider the fact that the Appellants had obtained approval for change of user of the suit property from residential to residential cum commercial user. Whereas I am in agreement with the submissions by the Respondents that residential cum commercial user is not the same as commercial user, it cannot be denied that the value of property whose user is residential cum commercial is higher than property whose user is purely residential. I am in agreement with the Appellants that the 1st Respondent misapprehended the nature of the user of the suit property as a consequence of which it arrived at an award which was not fair in the circumstances. On the other hand, I am also in agreement with the Respondents that the comparable which were used by the Appellants in arriving at the value of Kshs.125,000,000/= per acre for the suit property were not ideal in that the same were not in the immediate neighbourhood of the suit property. The value of the said properties did not therefore reflect the true market value of the suit property. Having considered the valuation reports that were relied on by the 1st Respondent and the Appellants in arriving at what they each considered as the fair market value for the suit property and the shortcomings in each, I would in arriving at what I consider to be a fair market value of the suit property adopt the comparable that were used by the 1st Respondent. I would however adjust the value that was arrived at on the basis of the said comparable upwards by 40% to take into account the deficiencies that I have noted above in the 1st Respondent's valuation report on the basis of which the 1st Respondent's award to the Appellants was made. As stated above, the 1st Respondent had valued the suit property at Kshs. 30,000,000/= per acre. If we adjust this upwards by 40%, the value of the suit property comes to Kshs. 52,000,000= per acre. The value of the portion of the suit property which had been acquired by the 1st Respondent (the disputed property") which measured 0.1142 acres would therefore come to Kshs.5,938,400/=.

With regard to the damaged wall, the 1st Respondent had given it a value of Kshs.555,000/= while the Appellants had given a value of Kshs.2,500,000/=. In both cases, no basis was laid on how the values given to the said wall were arrived at. The onus was upon the Appellants to prove that the 1st respondent was wrong in the compensation that it awarded for the said wall. There is no material before me on the basis of which I can say that the 1st Respondent erred in assessing the value of the said wall at Kshs.555,000/=. For that reason, I am not inclined to disturb that award. The Appellants had also contended that they are entitled to an award of Kshs.500,0000/= for "the cost of the suit". Again, the Appellants did not lay any basis for this award. The Appellants did not bring out how the said cost of the suit relates to the value of the property which had been acquired by the 1st Respondent. The Respondents had submitted that if the Appellants had incurred any costs in litigation, such costs should have followed the event and as such should have been recovered at source and not in these proceedings. I am in agreement with this submission. I would in the circumstances reject this claim.

In the final analysis and for the foregoing reasons, the Appellants' appeal succeeds in part. I hereby set aside the award of Kshs.4,574,700/= that the 1st Respondent had awarded as compensation to the Appellants and substitute the same with an award of Kshs.7,467,410/= made up as follows:

(i) Value of land Kshs.5,938,400/=

(ii) Value of damaged wall Kshs.555,000/=

Total Kshs.6,493,400/=

Add 15% 974,010/=

Total Award Kshs.7,467,410/=

Each party shall bear its own costs of the appeal.

Delivered and Signed at Nairobi this 1st day of July, 2016

S. OKONG'O

JUDGE

In the presence of:

N/A for the Appellants

Ms. Dundu for the Respondents

Kajuju Court Assistant