



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. APPEAL CASE NO. 3 OF 2014

STANLEY MUNGA GITHUNGURI.....APPELLANT

VERSUS

NATIONAL LAND COMMISSION1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

This is an appeal from the award of Mr. E.G. Rwigi, Assistant Commissioner of Lands at the National Land Commission dated 20th December 2013. By Gazette Notice No. 1190 dated 23rd August 2013, the National Land Commission declared its intention to acquire the Appellant's land and invited the Appellant and/or his representative to attend a meeting at its offices on 1st October 2013. The land intended to be acquired comprised of 4.914 acres hived out of L.R. No. 12389 and is located within the Karen Estate along Ngong Road. The Appellant presented a valuation by Ragos Valuers & Estate Agents Ltd where the land intended to be acquired was valued at **Kshs. 652,176,500/-**. The Appellant's representative appeared before Mr. E.G. Rwigi on the date set for hearing after which Mr. Rwigi awarded the Appellant the sum of **Kshs. 155,398,925/-**. The Appellant rejected that award and filed this appeal in the Environment and Land Court in accordance with **section 128** of the **Land Act, 2012**.

The Appellant based his appeal on the following grounds:

1. That the Respondent failed to take into account the value of the property of the Appellant and arrived at a unilateral quantum not backed by any known valuation.
2. That the Respondent erred in failing to acknowledge the fact that the user of the property of the Appellant was commercial, the City Council of Nairobi (as it then was) having approved the change of user and as such its value was not considered with this information in mind and the Respondent aimed at a value that was not commensurate with similar properties in the area.
3. That the Respondent failed to appreciate the location of the property, its proximity to the Highway and reach a valuation that was acceptable to all parties and as such properly compensate the Appellant.
4. That the Respondent also failed to consider the fact that the Appellant had already commenced development of a hospitality centre when the decision to commence the acquisition was made.
5. That the Respondent misconstrued the location of the property and reached an erroneous decision as a result.

6. That the Respondent failed to consider all the material placed before him and arrived at a decision that was wrong in the circumstances.
7. That Mr. Rwigi usurped the powers of the National Land Commission and arrived at a unilateral decision that was neither correct nor supported by any valuation and as such was contrary to the **Land Act, 2012** and the **Constitution of Kenya, 2010**.

On the basis of those listed grounds, the Appellant now prays that the Award made on behalf of the National Land Commission be set aside and judgment be entered in favour of the Appellant for:

1. The value of the property be deemed to be **Kshs. 652,176,500/-** as contained in the valuation of Ragos Valuers & Estate Agents Ltd instead of Mr. Rwigi's award in the sum of **Kshs. 155,398,925/-**.
2. Spent.
3. Interest
4. Any other or further relief deemed fit in favour of the Appellant.

Despite being given several opportunities to file their response to this appeal, the Respondent did not comply.

The only issue arising out of this appeal for determination is whether or not to uphold the award granted by Mr. Rwigi as compensation to the Appellant for Respondent's compulsory acquisition of 4.914 acres hived out of L.R. No. 12389 belonging to the Appellant.

Section 110(1) of the **Land Act, 2012** provides as follows:

“Land may be acquired compulsorily under this Part if the Commission certifies, in writing, that the land is required for public purposes or in the public interest as related to and necessary for fulfillment of the stated public purpose.”

Section 111(1) of the **Land Act, 2012** provides as follows:

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

Further, **section 111(2)** of the same statute provides that the Commission shall make rules to regulate the assessment of just compensation. This has not, to my knowledge, been done.

The question I must therefore answer is whether Mr. Rwigi's award of **Kshs. 155,398,925/-** comprises “just compensation” as opposed to the Appellant's claim for **Kshs. 652,176,500/-**.

Section 112 of the **Land Act, 2012** provides for process of inquiry to be carried out by the Commission as to compensation. I will not delve into it in detail as there is no claim that due process was not followed. Of interest is **section 113(1)** of the same statute which provides as follows:

“Upon the conclusion of the inquiry, the Commission shall prepare a written award, in which the Commission shall make a separate award of compensation for every person whom the Commission has determined to have an interest in the land.”

Clearly, this amounts to the communication to the Appellant of Mr. Rwigi's award of **Kshs. 155,398,925/-**.

Section 113(2) of the **Land Act, 2012** provides as follows:

“Subject to Article 40(2) of the Constitution and section 122 and 128 of this Act, an award-

- a. **Shall be final and conclusive evidence of –**

- a. **The size of the land to be acquired;**
- b. **The value, in the opinion of the Commission, of the land;**
- c. **The amount of the compensation payable whether the persons interested in the land have or have not appeared at the inquiry.”**

I have looked at **Article 40 (2)** of the **Constitution** which provides that Parliament shall not enact a law that permits the State to arbitrarily deprive a person of property of any description. **Section 122** of the **Land Act, 2012** refers to instances where the State acquires a portion of land and the remaining portion is rendered useless. That is not the case here. **Section 128** of the **Land Act, 2012** entitles any aggrieved party to refer the matter to the Environment and Land Court. This is what the Appellant has done here. Subject to all that, **section 113(2) (a)** of the **Land Act, 2012** cited above states that an award of the Commission shall be final and conclusive evidence of, *inter alia*, the value of the land and the amount of compensation payable. Am I at a position to question the value awarded by Mr. Rwigi?

Although **section 113(2)** of the **Land Act, 2012** provides that the award of the Commission shall be final and conclusive, the court must consider whether the compensation is “just compensation” within the meaning of **Article 40(3)** of the **Constitution of Kenya, 2010**. In this case, the Assistant Commissioner did not give any reasons for his decision hence it is not possible for the court to evaluate the award and consider whether, in light of the Appellant’s submissions, the Assistant Commissioner misdirected himself. The opinion of the Commission must not be subjective but objective and must be based on objectively ascertainable grounds and reasons. **Section 111(2)** of the **Land Act, 2012** is clear that the Commission must make rules to regulate the assessment of just compensation. Such an approach is consistent with the national values and principles which guide decision making contained in **Article 10(2)** of the **Constitution of Kenya, 2010**, more particularly transparency, accountability, etc. The decision of the Assistant Commissioner cannot stand on the basis that no reasons were given for awarding the sum of **Kshs. 155,398,925/-**. On the face of it, the figure appears to have vbeen plucked from the air. The decision in the absence of reasons is arbitrary and not in compliance with the **Constitution of Kenya, 2010**. I would add that the failure to give reasons is also a violation of **Article 47(2)** of the **Constitution of Kenya, 2010** which provides as follows:

“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.”

The duty to give reasons is now constitutionally enshrined to support the primary right of fair administrative action in **Article 47(1)** of the **Constitution of Kenya, 2010**. It is only by recording the reasons that the High Court can exercise its constitutional duty to ensure that the Appellant is paid just compensation.

Further, under **section 113 (1)** of the **Land Act, 2012**, it is the Commission that is empowered to make the award. It is not clear under what delegated authority the Assistant Commissioner made the award. Is the Commissioner’s decision to be referred to the Commission? In my view, the Commission should have promulgated rules under **Section 160(1)(e)** of the **Land Act, 2012** to streamline the procedure for assessing value of an interest in land.

In the absence of reasons, I am unable to state whether the Assistant Commissioner erred in assessing compensation. In the circumstances, I set aside the award of **Kshs. 155,398,925/-** and direct the Commission to issue a reasoned award on the basis of clearly ascertainable criteria.

I award the costs of this Appeal to the Appellant.

DELIVERED AND DATED IN NAIROBI THIS 6TH

DAY OF FEBRUARY 2015.

MARY M. GITUMBI

JUDGE