



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 88 OF 2012

TOYOBO INVESTMENTS LTD.....PLAINTIFF

VERSUS

RIFT VALLEY WATER SERVICES BOARD.....1<sup>ST</sup> DEFENDANT

COMMISSIONER OF LANDS.....2<sup>ND</sup> DEFENDANT

ATTORNEY GENERAL .....3<sup>RD</sup> DEFENDANT

JUDGMENT

***(Land acquisition; compensation payable after a compulsory acquisition; amount determined in 1991 but no payment made; parties having agreed on the principal payable; contention over what rate of interest applicable; statute providing for a rate of not less than 6%; discretion to award a higher rate; court awards rate of 9% per annum till payment in full; exemplary damages sought; whether same allowable; claim for exemplary damages dismissed; land excised being larger than what was proposed to be acquired; title to be rectified or respondents to pay for the extra acreage)***

1. This suit was commenced by way of plaint filed on 1 December 2010. The plaintiff pleaded that he was at all material times the owner of the land parcel L.R No. 11964/8 (the suit land) situated in Nakuru Municipality. On 3 August 1990 the Commissioner of Lands vide the Kenya Gazette No. 3644 signaled the intention of the Government to acquire a portion of 0.814 hectares to be excised from the suit land. The acquisition was under the Land Acquisition Act, CAP 295, Laws of Kenya and the purpose of acquisition was for the benefit of the National Water Conservation and Pipeline Corporation, of whom the 1st defendant is successor. At the time of acquisition, the land was valued at Kshs. 677,875/= and it is pleaded that the predecessor of the 1st defendant was directed by the Commissioner of Lands to make the payment to the plaintiff vide a letter dated 30 January 1991. The land was duly excised and a title L.R No. 11964/16 for 0.9613 Hectares was issued to the defendants but the plaintiff was never paid compensation despite numerous demands. The claim of the plaintiff as pleaded is for:-

*(a) An order compelling the defendants to reevaluate the land known as LR No. 11964/16 to determine the current market value and to compensate the plaintiff for the value so determined and damages for loss of use.*

*(b) In the alternative and without prejudice to (a) above, payment of Kshs. 677,875/= together with interest at prevailing commercial rates from the date of acquisition until payment in full.*

*(c) Costs of the suit plus 16% VAT.*

- (d) *Interest at court rates from the date of filing of suit until full payment.*
- (e) *Punitive damages against the defendants.*
- (f) *Interest on (a) and (e) at court rate from the date of judgment until full payment.*
- (g) *Any other or further relief or order this Honourable Court may deem fit.*

2. The 1st defendant filed a defence through which all the claims of the plaintiff were denied and further pleaded that the plaintiff is not entitled to compensation at the current market value. The 2nd and 3rd defendants filed a joint statement of defence. It was inter alia admitted that the plaintiff's land was excised and acquired for the National Water Conservation & Pipeline Corporation. They however denied causing the plaintiff any loss. They averred that the Commissioner of Lands has prepared a written award of compensation and interest may be paid at 6% per annum from the time of taking possession.

3. In the course of the case, the parties agreed by consent that the principal sum of Kshs. 677,875/= be paid to the plaintiff by the 1st defendant, and the issue of interest to be determined by the court.

4. All that I need to determine therefore is the interest payable, although the plaintiff seems to have an additional claim for compensation, as it is its view that the land to be excised was to be 0.814 hectares but the title issued is for 0.9613 hectares. I will come to this aspect later.

5. In their submissions, Mr. Biko and Ms. Khatambi, learned counsels for the defendants, submitted that the rate of interest payable is 6%, and it was their view that this was what was provided for by the Land Acquisition Act, CAP 295 (now repealed) which was operative at the material time. They relied on Section 16 of the said statute and the cases of ***John Kariuki Macharia v Commissioner of Lands (2014) eKLR*** and ***Shanzu Investments Ltd vs Commissioner of Lands , Civil Appeal No. 100 of 1993***. They also argued that there is no provision for a new valuation. On the other hand, Mr. Wachira Mbutia, learned counsel for the plaintiff, was of the opinion that the court has wide discretion on the issue of interest. He relied on Section 26 of the Civil Procedure Act, CAP 21, Laws of Kenya and submitted that the court has discretion to give interest before institution of the suit; interest from the date of institution of the suit; and interest from the date of judgment. He submitted that Section 16 of the Land Acquisition Act (repealed) previously had a cap of 6% on interest, but that this was amended in 1983, to remove the said cap. He submitted that the correct interpretation of Section 16 is that interest shall not be less than 6% per annum. He relied on several authorities to argue that interest needs to be paid. He cited the cases of ***Ferro Alloys Corporation vs A.P State Electricity Board, 1993 AIR 2005 (India)***; ***Secretary Irrigation Department, Government of Orrisa v G.C Roy 1992 AIR 732 (India)***. He submitted that compulsory acquisition is similar to the relationship between a vendor and purchaser and the land owner needs to be compensated for the loss suffered.

6. He submitted that compensation needs to take into account the market value of the land and relied on the case of ***Kanini Farm Ltd vs Commissioner of Lands 1 KLR (E&L) 120***. He submitted that the current market value is now Kshs. 70 million and that the interest payable ought to reflect the time-value component. He proposed compound interest at 18% per annum to the date of filing suit and the same rate of interest from the date of filing suit to the date of decree. He relied on the case of ***Velco v Barclays Ltd (2013) eKLR***. In addition to interest, Mr. Mbutia also asked for punitive damages in accordance with the case of ***Rookes v Barnard (1964) AC 1129*** on the argument that the money was withheld unlawfully. He asked for Kshs. 5,000,000/= under this head. He further asked for costs and interest on costs at 14%.

7. I have considered the submissions of counsel. First, let me make clear that the issue of principal has already been agreed and all that I am to determine is interest. There can therefore be no question for a new valuation since the principal payable has been agreed. To give an order for a new valuation would be to alter the principal. Mr. Mbutia went to great lengths to demonstrate that where land is compulsorily acquired, there is a right to compensation. This however, is not disputed by the defendants, who have agreed to pay the compensation in accordance with the valuation of the Commissioner of Lands, made when the land was acquired in 1991. The numerous authorities placed forth to demonstrate that

compensation is a must are therefore irrelevant in my view. The other authorities cited, arguing that interest also needs to be paid are also in my opinion irrelevant. This is because the Kenyan statutory law did and does provide for interest. It has not been disputed that the plaintiff is entitled to interest; the only dispute is what level of interest is payable.

8. The applicable law at the time of acquisition, and at the time the suit was filed, was the Land Acquisition Act (CAP 295) (repealed by the Land Act, Act No. 3 of 2012 which came into effect on 2 May 2012). The said statute at section 16, made provision for compensation for land compulsorily acquired by the Government. The said provision is as follows :-

*16. (1) Where the amount of any compensation awarded is not paid or paid into Court on or before the taking of possession of the land, the Commissioner shall pay interest on the amount awarded at such rate as may be prescribed which shall not be less than six per cent per annum from the time of taking possession until the time of payment or payment into Court.*

*(2) Where additional compensation is payable under section 18, there shall be added to the amount of the additional compensation interest thereon at such rate as may be prescribed which shall not be less than six per cent per annum from the time when possession was taken or compensation was paid, whichever is the earlier.*

9. It will be noted that Section 16 makes reference to Section 18 and I feel it necessary to outline the provisions of Section 18.

*18. Whenever the final survey provided for in section 17 discloses that the area of the land acquired is greater than the area of the land in respect of which the award has been made, compensation shall be paid for the excess area in accordance with this Act.*

10. Going straight to the issue of interest, Section 16 provided for interest, which "*shall not be less than six per cent per annum from the time of taking possession until the time of payment or payment into Court.*" It is not clear when the defendants took possession of the land, but for the purposes of this case, I am prepared to assume that possession was taken immediately, which is the year 1991. Indeed, I have seen the letter dated 30 January 1991, written by the Commissioner of Lands to the Managing Director, National Water Conservation and Pipeline Corporation, asking the latter to issue a cheque for the sum of Kshs. 677,875/= to the plaintiff. I think it is from that time that the money became payable.

11. Counsels for the defendants argued that interest should only be 6% on the strength of Section 16 of the Land Acquisition Act. Mr. Mbutia made reference to Section 26 (1) of the Civil Procedure Act, and I think it is prudent that I set it down. It provides as follows: - .

*Section 26 (1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.*

12. Although Mr. Mbutia argued that the issue of interest ought to be in accordance with Section 26 of the Civil Procedure Act, I beg to disagree. In my opinion, where there is an explicit statutory provision on the rate of interest payable, the discretion of the court provided by Section 26(1) is removed. In such instance, the court has no choice but to follow the rate of interest prescribed by the statute in issue. In our case, the Land Acquisition Act, did provide for a rate of interest, and I am unable to upset that prescribed rate. It is that rate which is applicable, and not the discretion provided by Section 26(1) of the Civil Procedure Act. Neither I am moved by the numerous authorities provided by Mr. Mbutia which are at best of persuasive authority only and which apply to other jurisdictions. Neither does the issue of pre-judgment interest apply.

13. What then is the interpretation to be provided to Section 16 of the Land Acquisition Act ? There is no complexity in the interpretation of Section 16. It provides that the rate of interest shall be no less than 6%. I do not agree with counsels for the defendants that the prescribed rate is 6%. "6%" and "not less than 6%" is not the same thing. If statute had intended for the rate to be fixed at 6%, it would have provided just so. But it would appear that the statute gave some discretion to the courts to go beyond 6%.

14. That said, even where the court feels necessary to exercise its discretion to go beyond 6%, it must have one eye at the mentioned rate of 6%, and in my view, the court ought not to stray too far from this rate. There must have been a reason why Parliament placed that rate of 6% and not 8,10,12,14 or other such per centum, and it will make nonsense of this rate if the court is to go too far beyond it. There are no guidelines that were prescribed by the Land Acquisition Act to assist the court on how to exercise its discretion to increase interest beyond 6%. In my view, the Court may need to take judicial notice of the increase in the prices of land, the delay in payment of the award and the general conduct of the parties. There is no doubt that land in Kenya has greatly appreciated in value. There was also significant delay in payment of compensation. No money was ever forthcoming despite the plaintiff asking for it. That said, the plaintiff took too long before claiming the money and he cannot seek to benefit from his indolence. Taking all factors into consideration, in my discretion, I assess the interest payable at 9% per annum (which is an addition of 50% of the quoted rate of 6%) from the 30th day of January 1991 until the time of payment. The defendants shall be jointly and/or severally liable to pay this sum.

15. It was mentioned in the pleadings that compensation was only to be payable on acreage of 0.814 hectares. The title issued is title to 0.9613 hectares. There is definitely a difference on the acreage. If the 1st defendant feels it necessary to have this extra acreage, then it has to pay for it at current market rates, and if not, this extra acreage has to be excised and revert back to the plaintiff so that the 1st defendant keeps possession of 0.814 hectares, for that is what the award of compensation was based upon.

16. Mr. Mbutia asked for punitive damages and cited the case of *Rookes v Barnard*. It was held in the said case that punitive damages may be awarded in certain 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. I agree that the conduct of the defendants in not paying the plaintiff in time was not proper. However, the statute does provide for remedy for delayed payments -the remedy of interest- and I cannot allow a *lex non scripta* to override clear provisions of the written law. In any event, as I stated earlier, the plaintiff always had the option of coming to court early, and I am unable to allow him to benefit from his indolence. The maxim *vigilantibus et non dormientibus jura subveniunt* applies, that is, the law assists those that are vigilant with their rights, and not those that sleep thereupon.

17. I believe that I have dealt with all issues save for costs. I award costs to the plaintiff as the suit was instituted because the defendants refused to make good their promise.

20. I now make the following final orders :-

(i) *Judgment is entered for the plaintiff against the 1st defendant for principal sum of Kshs. 677,875/= in accordance with the consent entered on 19 February 2015.*

(ii) *The plaintiff is hereby awarded interest on the principal sum at the rate of 9% per annum from 31st January 1991 till payment in full and the defendants are jointly and/or severally liable to pay this sum.*

(iii) *The 1st defendant is only entitled to 0.814 Hectares and if it feels it necessary to retain the extra acreage, it must pay for it at current market rates. If not, this extra acreage be excised and revert back to the plaintiff.*

(iv) *The plaintiff shall have costs of the suit jointly and/or severally against the defendants.*

It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 23rd day of April 2015.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**In presence of : -**

Ms. Kipruto holding brief for Mr Wachira Mbuthia for plaintiff.

Ms Kariuki holding brief for Ms Khatambi of state Law office for 2<sup>nd</sup> & 3<sup>rd</sup> defendants.

Mr Opondo holding brief for Mr Biko of M/s Odhiambo & Odhiambo for 1<sup>st</sup> defendant .

EmmanuelJumaCourt  
Assistant

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT AND LAND COURT**

**AT NAKURU**