



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 251 OF 2013

JOHN KARIUKI MACHARIA.....APPELLANT

VERSUS

COMMISSIONER OF LANDS.....RESPONDENT

JUDGMENT

Introduction

The Appellant is the registered owner of land parcel No. Ruiru/Mugutha Block1/T.555 measuring approximately 0.1008 Ha (hereinafter referred to as “the suit property”). The land abuts the Nairobi – Thika A1 Highway. The Respondent advertised the Government’s intention to compulsorily acquire the said parcel of land for public purposes namely the expansion and improvement of the Thika Road, in Kenya Gazette Notice No. 5902 of 28/5/2010 Vol. CXII 55, under the repealed Land Acquisition Act.

The Appellant duly lodged an application for compensation to the Respondent in accordance with the said repealed Act. The Government Valuers through the Ministry of Lands gave a valuation report with a proposed compensation value of Kshs. 10,870,000/-. Being dissatisfied with the award of the Respondent, the Appellant lodged an application to the Land Acquisition Compensation Tribunal.

Whilst the matter was pending before the Tribunal, Parliament enacted the Land Act No. 6 of 2012 which repealed the Land Acquisition Act under which the Land Acquisition Compensation Tribunal was established. Consequently, the parties moved to this Court which is vested with the jurisdiction to hear and determine all disputes relating to title to, occupation and use of land and the environment.

The Appellant’s Case

The Appellant filed an appeal document dated 13/11/2010 wherein he stated that he lives on and utilizes the property for both commercial and domestic use for activities including; hardware and timber yard, zero grazing project, parking yard for his three (3) lorries, living quarters housing his workers and also provides advertising space to commercial companies at a fee. The Appellant provided a detailed list of the developments thereon.

The Appellant averred that he is a physically challenged person whose right side leg is crippled, and that he is registered with National Council of Disabled Persons of Kenya and entitled to all the rights and privileges contained in the Persons with Disabilities Act 2003. Further, that because of his physical condition, he cannot afford to live far from main public transport systems. The Appellant further averred that he is paying Bank loans advanced to him whose payment proposal was that the hardware business situate in the subject property would generate resource to repay the loan. The effect of the acquisition has resulted to him having to sell his wife’s property in order to meet his financial liabilities.

The Appellant stated that he desires to relocate to 1/8 Acre plot fronting Thika Road in Juja which is selling at Kshs.4,000,000/- but in order to fit his original status, he will need ¼ Acre which would cost another Kshs.8,000,000/-. It is the Appellant's averments that the difference between what he has been awarded and the cost of the plot he wishes to relocate to is Kshs.2,870,000/-. He avers further that the amount cannot reinstate the developments he had in the suit property, and that he stands to suffer great loss and damage as a result of the acquisition.

The Appellant filed the following valuation reports (all by Zachariah M. Ndeti, Registered Valuer practicing as Zanconsult):

- a. A valuation report dated 29th June, 2010 with a value of the suit property of Kshs 68,962,000/=
- b. A valuation report dated 22nd July 2011 with a value of the suit property of Kshs 68,965,000/=
- c. A valuation report dated 16th September, 2011 with a value of the suit property of Kshs 54,117,000/=.

The Appellant filed submissions dated 24/5/2011 wherein he submitted that the Government valuation report in proposing a compensation value of Kshs. Kshs.10,870,000/= failed to consider the following salient points. First, that the valuation report stated that the property is located interior and thus away from the highway whereas it adjoins the highway; Secondly, the said report fails to acknowledge that he will incur loss in his business upon relocation and further that the relocation of the business from the subject property shall inevitably lead to losses. It was the Appellant's submission in this regard that the measure of compensation is that the landlord's assets should not be diminished but should place him in the same financial position he enjoyed before the acquisition.

Counsel for the Appellant filed supplementary submissions dated 9/7/2012 in light of further valuation reports done on his behalf and by the Government Valuer. Counsel cited the applicable law governing compulsory acquisition as Section 75 of the repealed Constitution; the repealed Land Acquisition Act; the Constitution of Kenya of 2010; and the Land Act, No. 6 of 2012. Counsel outlined the relevant matters to be taken into account in determining compensation for compulsory acquired land as set out in the schedule to the Land Acquisition Act.

Counsel submitted in respect to the market value that the exposition of the law as to what constitutes "market value" of land for purposes of compensation on compulsory acquisition of land is the market value at the time of publication of the notice of intention to acquire the land; the price a willing seller would be expected to obtain from a willing purchaser; and in determining compensation under this head, the court should take into account comparable sales. Counsel submitted that the valuation reports done on behalf of the Appellant took due account of comparable sales of other properties in the locality in arriving at the value of Kshs.8,362,000/= under this head. Further that the comparable relied on by the Respondent's valuers in their report dated 16/9/2011 support the above value asserted by the Appellant's valuer. Hence, counsel submitted that said sum of Kshs.8,362,000/= is reasonable under this head.

In respect to damages for loss of immovable/movable assets, counsel submitted that such assets are a relevant matter to be taken into consideration in awarding compensation. He submitted that the private valuer used the rates provided by the Ministry of Works in arriving at the cost of Kshs.8,807,000/- in respect of the developments on the subject land.

Counsel submitted that the assessment by the Appellant's valuer is reasonable considering that both the Government Valuers and the Tribunal confirmed that as at 15/9/2011 while on site, the land had the following improvements: 2 permanent stone houses in good structural houses in good structural and decorative condition; a permanent domestic servants' quarter; 2 outbuildings with a total combined plinth area in excess of 380 square feet; a cow shed and troughs and a chicken shed with a total combined plinth area in excess of 400 square feet, and an external kitchen and 2 other sheds.

As regards damages for loss of business/income, counsel submitted that the acquisition injuriously affecting a person's earning or leading to a diminution of the profits of the land is also a relevant matter to be taken into consideration in awarding compensation. It was his submission that the Appellant's

earning/profits from the land have not only been affected or diminished, but totally lost as the Appellant has had to look for alternative residence and place of business.

Counsel submitted further that the basis for calculation of the compensation under this head is the Appellant's audited financial statements and referred the Court to the copies of the 2009 and 2010 Audited Financial Statement attached to the submissions stating that the private valuer applied the annual profit of Kshs.7,692,671 (rounded to Kshs.7,692,000/=) in calculating the loss of earnings/profit thereof. Counsel also submitted that the Appellant was living in very difficult circumstances since proposed undisputed award of undisputed Kshs.11,846,810/- had not been paid pending conclusion of the proceedings, which would to mitigate the Appellant's loss and suffering.

As regards damages for change of residence/place of business, and disturbance compensation counsel submitted that the Appellant is entitled to this sum in the clear wording of paragraph 2(d) of the Schedule which mandates the payment of "*reasonable expenses incidental to*" the relocation. Counsel submitted that the term "reasonable" should take into account, the fact that the Appellant is a Person with Disability as defined under the Persons with Disability Act, No. 14 of 2003. Counsel submitted that a reasonable award under this heading should be tied at 15% of the Market value of the land as provided for in paragraph 4 of the Schedule and that "the market value of the land" for purposes of this paragraphs includes both the value of the land, the developments thereon and any profits or earning being derived from the land.

The Respondent's Case

The Respondent filed the following valuation reports prepared jointly by Bernard Nzau, Registered valuer and T.W. Kimondu, Registered Valuer;

- a. A valuation report dated 14th January 2011 giving a value of Kshs 10,870,000/= to the suit property.
- b. A report dated 5th August 2011 in response to Appellant's valuation report dated 22nd July 2011; maintaining the said value of Kshs 10,870,000/=.
- c. A valuation report dated 16th September 2011. with a value of the suit property of Kshs 11,846,810/=.

The Valuers submitted that in arriving at the rate of valuation for land, they considered comparables and that to arrive at the rate of valuation for the developments on the subject property, they considered rates of construction adopted by the Ministry of Public Works and the Joint Building Council, 2010, when after they made adjustments to these rates to take care of the construction quality, depreciation and the general maintenance condition of the structures in question.

In response to the valuation report made on behalf of the Appellant, the Government Valuers submitted as follows:

- a. Comparables used to come up with the report had not been cited.
- b. The award for injurious affection cannot be factored in the compensation for reasons that the whole plot is affected in the acquisition.
- c. The report does not have a breakdown of the valuation of the various structures affected. The general figure given for the main buildings and the outbuildings, results in uncertainty in establishing the construction rates adopted, and the source of information for such costs.
- d. The award of Kshs.28,680,000/= for loss of income as a result of the acquisition is not supported with any tangible evidence of the lost income. The books of accounts submitted by the Appellant to the Commissioner of Lands indicate an annual net profit of Kshs.273,092 and an annual gross profit of Kshs.2, 063, 578.
- e. The Appellant in his submission has stated that loss of business income is for a period of 20 years, which is his estimate for his remaining active life. The Valuers submitted that compensation based on the current market value and life interest is not the basis to the adopted, because the assumption made is that once the market value is paid, the affected land owner will seek

- alternative accommodation within a year and continue with life as presently lived.
- f. The 15% statutory addition is limited only to the value of land and improvements thereon, and therefore net income lost is not subject to this rule.
 - g. In response to the Appellant's proposed award of Kshs.109,736,200/= and that the Act should have a provision for 35% statutory addition for disabled persons, the Valuers submitted that as much as they empathized with the Appellant, they are limited by the provisions of law.

Counsel for the Respondents filed submissions dated 5/7/2011 and stated that the value to be determined in accordance with the repealed Land Acquisition Act is the market value of the land as per the schedule to the Act and cited the case of **Kanini Farm Ltd v Commissioner of Lands (1986) KLR 310** in this regard. It was counsel's submission that the comparables used by the Commissioner of Lands compare very well with the subject property as they are of the same user and front the main Thika Road.

Counsel contended that the valuation report by the Government Valuers is in accordance and full compliance with the provisions of the repealed Land Acquisition Act which disallowed speculative valuations. In response to the claim that the owner is entitled to the value for the property based on its subdivision potential, the Counsel submitted that the same is erroneous and unlawful, as schedule 3(1) of the Land Acquisition Act clearly states that improvements that may happen after the date of publication of the Gazette of the intention to acquire the land are to be ignored/disallowed in determining compensation payable. Further, counsel submitted, the claim is contrary to the definition of the market value of the property as at the date of publication of the gazette notice of intention to acquire.

Counsel submitted that the cost of alternative accommodation provided by the Government Valuer is adequate and properly explained in terms and amount breakdown. In respect to the business loan, Counsel submitted that the same does not form part of the items for consideration in valuation for compulsory acquisition pursuant to the provisions of the Act. Further, that Ministry of Public Works and the joint Building Council, 2010 construction rates are authoritative and that there no need for further proof.

Counsel also submitted that the income tax records availed by the Appellant are the only legal record to be used in determining the Appellant's income since it is a requirement of the law that a person pays income tax on his income. In respect to the provisions of the Disabilities Act No. 14 of 2003 applicable to the Appellant, Counsel submitted that the same was of no relevance herein the issue for determination is the market value of the Appellant's property for purposes of compulsory acquisition.

The Respondent's Counsel filed further submissions dated 31/7/2012 reiterating the contents of the their previous submissions that the Appellant being a person with disability is not relevant to this suit, as the compensation after compulsory acquisition is guided by the repealed Land Acquisition Act. Counsel also restated that the market value is dictated by principles in the schedule to the repealed Land Acquisition Act. Counsel also submitted that the Appellant had not proven that schedule 2(c) which refers to properties that co-depend on each other so that that acquiring one property would prejudice the activities in the other was applicable to him, and thus he cannot claim under the schedule.

In response to the Appellant's contention that he has since not been paid the undisputed proposed award made by the Government Valuers so as to mitigate his living conditions pending the determination of the case, counsel submitted that since he has challenged the amount to be awarded to him the provision had to be halted until the determination of the case as an award could not precede the hearing.

As regards the financial statements referred to by the Appellant, counsel submitted that compensation for any loss of earning/profits could only be made if the Appellant can prove that for the years he claims to have lost the profit he had been making annual returns and paying tax at the Kenya Revenue Authority. Further, that under declaring profits for purposes of avoiding tax is a crime and that the Kenya Revenue Authority should be furnished with the latest financial statements so as to recover taxes made on profits and not declared by the Appellant.

Counsel also submitted that the Appellant was at liberty to relocate to a place of his choice so long as

such place would be comparable to the rates of the one that he used to live in. Further, that the additional 15% on the market value was applicable to the market value of the land and the improvements thereon, which had been considered in the Governments valuations in calculating the compensation. Counsel reiterated that the Appellant's proposed award is unjustified as he had not given any viable reason that the amount awarded to him would not settle him comfortably.

Issues for Determination

It is not in dispute that the process of compulsory acquisition of the Appellant's property is regular. The Appellant in this regard acknowledged that the public interest in having an expansion of Thika road to a super highway is much more superior to his own personal interests. The only issue for determination is the adequacy of proposed amount of compensation by the Government Valuers of Kshs. 11,846,810/- The Appellant avers that the said amount is inadequate in view of the proximity of the suit property to Thika road, the developments in terms of structures constructed thereon, the businesses he conducts on the property, and the loans advanced to him on the strength of the income generated from the businesses.

Further, the Appellant states that he is a person with disability, a factor that the Respondent has completely declined to consider in coming up with the proposed award. The Respondent, on its part, contends that the proposed award is adequate on grounds that it is based on the market value as at the date of gazettment, it was arrived at after comparisons with parcels of land around the subject property and in compliance with the provisions of the relevant law.

The process of acquisition commenced in 2008 when the repealed Land Acquisition Act, Cap 295 was still in force. Section 8 of the said Act provided that where land is acquired compulsorily under the Act, full compensation shall be paid promptly to all persons interested in the land. Article 40(3) of the Constitution now also provides as follows with regard to the right to property:

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.

Similar provisions are found in section 111 of the Land Act to the effect that just compensation shall be paid promptly in full to all persons whose interests in the land have been determined upon compulsory acquisition.

Under section 9(3) of the repealed Land Acquisition Act, the Commissioner of Lands was required to make a full inquiry as to which persons were interested in land that was to be acquired, the value of the land and what compensation is payable to each of the persons whom he has determined to be interested in the land, which compensation was to be determined in accordance with the principles set out in the Schedule to the Act.

Paragraph 2 of the said Schedule is couched in mandatory terms, and provides that the following matters, and no others, shall be taken into consideration in determining the amount of compensation –

- a. Market Value
- b. Damage sustained by severing part of the land from another land

- c. Damage sustained by reason of the acquisition injuriously affecting the land owner's other property, whether immovable or movable or his actual earnings
- d. Reasonable expenses incidental to change of residence or place of business
- e. Damage genuinely resulting from diminution of the profits of the land between the date of gazettelement and the date of taking actual possession.

Market value is defined in paragraph 1 of the said schedule to mean the market value of the land as at the date of publication in the Gazette of the notice of intention to acquire the land. Paragraph 3 of the Schedule specifically disappplies certain factors in determining the amount of compensation to be paid, including any increase in the actual value of the land as at the date of publication of the notice of intention to acquire likely to accrue from the use to which the land will be put when acquired.

In the present appeal the Appellant's entire parcel of land was being acquired, and no other land of his was being affected. The factors therefore that are relevant in determining the compensation payable to him pursuant to the provisions of the schedule to the repealed Land Acquisition Act are the market value of the suit property, the damage sustained by reason of the acquisition affecting the Appellants' actual earnings, reasonable expenses incidental to change of residence or place of business, and damages resulting from diminution of the profits of the land between the date of gazettelement and the date of taking actual possession.

I also note in this respect the Appellant is forbidden by paragraph 3 of the Schedule to the repealed Land Acquisition Act to use sub-division values of other plots of land as a comparable, as this is a value that has not yet accrued to his land.

My view therefore on what the market value of the suit property entails in this appeal, is that it is the unimproved site value of the suit property and the value of the developments thereon in the open market at the time of gazettelement of the notice of intention to acquire the suit property on 28th May 2010. I have arrived at this definition because both the Appellant and Respondent gave no comparable property that was sold at that time that had developments similar to those on the suit property, and majority of the comparables were of properties with vacant possession.

I am also guided in this respect by the following decisions on the factors that courts should consider in determining the market value of property that has been compulsorily acquired. In **Kanini Farm Ltd v Commissioner of Lands (1986) KLR 310** the court stated as follows:

“The market value as the basis for assessing compensation is the price which a willing seller might be expected to obtain from a willing purchaser, the purchaser may be a speculator, but a reasonable one...In determining the amount of compensation which ought to be paid the court should take into account comparable sales and awards on other acquisition of land of similar character”

In **Limo v Commissioner of Lands KLR (E&L) 175** it was also held in this regard as follows:

“In addition to the matters contained in the schedule to the Land Acquisition Act which a court should consider in assessing compensation to be paid to a person whose land has been compulsorily acquired, courts have tended to take into account the nearness of the land in question to the main town and its nearness to the road access.”

I note in this regard that the closest comparable the Appellant provided in terms of size is that of Ruiru East Block 1 /2164 measuring 0.5 hectares which sold with vacant possession for Kshs 1,700,000/= in March 2010. Given that the size of the said land is roughly half the size of the suit property, the unimproved site value of the Appellant's land would then have been Kshs 3,500,000/= at the time of notice of intention to acquire it. The Respondent on the other hand provided two comparables. The first was two parcels of land each measuring 0.450 hectares namely L.R No 27904/3 and L.R No 27904/4 and each sold for Ksh 2,500,000/= between February and April 2009. The two parcels of land were located next to the Juja Highway which the Respondent described as “a superior location”. The other

comparable was Ruiru /Mugutha Block 1/ 557 measuring 0.100 hectares which was less than 100 metres from the suit property and was fronting Thika Road, and which sold for Kshs 3,500,000/= in November 2009.

It would therefore seem that the actual unimproved site value of the suit property as at the time of the intention to acquire it would have been approximately Kshs 3,500,000/=. It has been argued by the Appellant that his accessibility needs to be factored in as a result of his disability when paying him compensation in this regard. I am in agreement with the Appellant's sentiments and find the fact of his disability to be relevant in this appeal for the reasons that there are certain rights and privileges that are accorded to the Appellant as a result.

Section 21 of the Persons with Disabilities Act (Chapter 133 of the Laws of Kenya) provides in this regard that the Appellant is entitled to a barrier-free and disability-friendly environment to enable them to have access to buildings, roads and other social amenities. Article 54 1 (c) of the Constitution also provides that to reasonable access to all places and public transport shall be an entitlement to the Appellant as a person with disability. This rights of the Appellant are invisible and cross cutting in all aspects of the Appellant's life and activities, and are therefore clearly also applicable when considering the compensation payable to him.

In addition, the Respondent as a state organ is obliged to observe, respect, protect, promote and fulfil these rights of the Appellant. The application and actualization of these rights in the present appeal require that the compensation that is availed to the Appellant as a person with disability is able to facilitate his acquisition of property that he can reasonably access, for it to qualify as just and full compensation.

It is for these reasons that I find the comparable property to be that of L.R No 27904/3 and L.R No 27904/4 that were sold for Kshs 2,500,000/= each, and were considered by the Respondent to be superior for reasons of their easy accessibility. As the size of the said parcels of land was 0.45 hectares, and slightly less than one half of the size of the Appellant's land, I would consider the sum of Kshs 6,000,000/= reasonable compensation to the Appellant for the unimproved site value of the suit property, and that would also factor in his rights of accessibility as a person with disability.

As regards the value of the developments on the suit property, there seems to be an agreement of minds between the Appellant and Respondent on the value of fencing and gates on the suit property, save for the fact that the Respondent did not include in its valuation, nor dispute the valuation of the chain link and iron sheet fencing that was included in the Appellant's valuation of 16. 9.2011. I therefore adopt the Appellant's valuation in this regard of Kshs 1,225,000/= and 137,000/= respectively.

I however note that in determining the value of the other buildings and structures on the suit property, both the Appellant and Respondent relied on the construction costs by the Ministry of Works, and yet reached radically different valuations. In my view, a fair and reasonable end result in the circumstances would be to determine the average costs from the two sets of valuations. The Appellant in its valuation report dated 16/9/2011 valued the costs of development at Kshs 8,807,000/= while the Respondent in the valuation report of the same date gave a value of Kshs 5,619,400/=. The average of the two values is Kshs 7,213,200/= which I find to be the value of the buildings and structures built on the suit property. The 15% addition to the unimproved site value of the suit property and the total value of the developments thereon will therefore be Kshs 2,186,280/=.

On the contested value of the effect of the acquisition on the Appellant's actual earnings and his loss of income, I concur with the Respondent's submissions that what was envisaged by paragraph 2(c) of the Schedule to the repealed Land Acquisition Act, was compensation for the loss of income that will result during the transitional period of acquisition and resettlement of the Appellant. It is clear from the said paragraph that the material time to be taken into account for compensation purposes is "the time of the Commissioner's taking possession of the land by reason of the acquisition". A reasonable time in my view in this regard is one year.

The other point of contention in this regard between the Appellant and Respondent in this regard is whether the amount realized and to be compensated is the gross profits or the net profits . I am of the view that the use of the words “actual earnings” in paragraph 2c of the Schedule should be given its plain and normal meaning, which is that of net profits. The net profits for the year 2009 from the Appellant’s audited accounts was Kshs 273,000/= and I find that the Respondent’s valuation of Kshs 350,000/= in this regard was fair. The Appellant also included an annual income from his farming activities of Kshs 162,000/= that was not contested by the Respondent, and which the Court will award as part of loss of actual earnings for the period of one year.

The costs of alternative accommodation and relocation valued at Kshs 950,000/= by the Respondent were not contested by the Appellant. Lastly, the Appellant did not claim any compensation in respect of damages arising from diminution in value of the suit property, nor provide any evidence of the same, and these damages will therefore not be awarded.

I accordingly allow the Appellants appeal and award the sum of Kshs 18,223,480/= as compensation to the Appellant for the compulsory acquisition of land parcel No. Ruiru/Mugutha Block1/T.555, which sum is made up of the following valuations:

	Kshs
1. Market value of the suit property (being the unimproved site value and total value of the developments thereon)	14,575,200/=
2. 15% addition to the market value	2,186,280/=
3. Damages for loss of actual earnings for one year	512,000/=
4. Expenses incidental to change of residence <u>and/or place of business</u>	<u>950,000/=</u>
<u>Total</u>	<u>18,223,480/=</u>

The said sum of Kshs 18,223,480/= shall be paid to Appellant by the Respondent with interest at court rates from the date of this judgment until date of possession by the Respondent of the land parcel No. Ruiru/Mugutha Block1/T.555.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____14th ____ day of
____January____, 2014.

P. NYAMWEYA

JUDGE