Kenya National Highways Authority v Issa & 3 others (Civil Appeal 59 of 2019) [2025] KECA 213 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KECA 213 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 59 OF 2019

PO KIAGE, M NGUGI & P NYAMWEYA, JJA

FEBRUARY 7, 2025

BETWEEN

THE KENYA NATIONAL HIGHWAYS AUTHORITY ..... APPELLANT

AND

KATRA JAMA ISSA ..... 1ST RESPONDENT

KAJIADO COUNTY GOVERNMENT ..... 2ND RESPONDENT

THE HON ATTORNEY GENERAL ..... 3RD RESPONDENT

NATIONAL LAND COMMISSION ..... 4TH RESPONDENT

(Being an appeal from the judgment of the Environment and Land Court at Kajiado (C. Ochieng J.) dated 19th December, 2018 in ELC Petition No. 14 of 2017 (formerly Machakos ELC Petition No. 10 of 2015))

JUDGMENT

1. The sole issue for determination in this appeal is whether the trial court erred in awarding the 1st respondent compensation of Kshs 7,700,000 for the compulsory acquisition of a portion, measuring 0.0096 ha, out of her land parcel L.R. No. 1692/68 measuring 0.03 ha. (hereafter 'the suit property') situate in Namanga Township within Kajiado County. First, however, some background to the issue.

2. The 1st respondent's claim for compensation was commenced by way of a petition dated 27th March 2015. The petition was supported by her affidavit sworn on 26th March 2015 and a further affidavit sworn on 9th April 2018. The 1st respondent's case was that the suit property had been compulsorily acquired by the appellant, and the only issue before the trial court was the quantum of the compensation that she was entitled to.

3. She was dissatisfied with the award from the Ministry of Lands dated 19th January, 2012 which valued the portion acquired from the suit property at Kshs. 5,355,625.00. She averred that the suit property was gazetted on 6th January 2012 at which time no valuation by the Ministry of Lands had been conducted. She had appealed against the award to the Land Acquisition Compensation Tribunal established under the Land Acquisition Act but the appeal did not proceed due to lack of quorum.

4. The 1st respondent placed three valuation reports before the trial court. The first, undertaken by Prestige Management Valuers Ltd dated 16th November 2011, valued the suit property at Kshs. 7,700,000; Mamuka Valuers (Management) Limited, in a report dated 30th May 2012, returned a valuation of Kshs. 7,400,000; while the report by Camp Valuers dated 22nd May 2015 valued the suit property for purposes of compensation at Kshs. 33,700, 000.

5. The 1st respondent further averred that officials of the appellant and the 3rd respondent had entered her property on 7th May 2014 and proceeded to demolish the structures thereon. She alleged infringement of her constitutional rights under Articles 40 and 47 of *the Constitution*, and sought three declaratory orders, namely: that her fundamental rights and freedoms enshrined under Articles 40 (1), (2) (a), (3) (b) (i) and 47 of *the Constitution* had been contravened and infringed upon by the respondents; that her proprietary interests in plot No. L.R. 1692/ 68 situate in Namanga, within Kajiado County, was compulsorily acquired by the State; and that she is entitled to prompt, just and adequate compensation in full within the meaning and tenor of Article 40 (3) (b) (i) in the sum of Kshs. thirty-three million, seven hundred thousand (Kshs. 33,700, 000) for the compulsory acquisition of her proprietary interests in the said plot. She also sought general, exemplary and aggravated damages under Article 23 (3) of *the Constitution* for the unconstitutional conduct of the 4th respondent.

6. The appellant filed a replying affidavit in opposition to the petition sworn by its Manager, Roads, one Engineer Otieno Ogalo Oguta. Its case was that the then Commissioner of Lands, Mr. Z. A. Mabea, through Gazette Notice No. 7 dated 22nd December 2011 and published on 6th January 2012, sought to invoke the provisions of the Land Acquisition Act (now repealed) for purposes of completing the Arusha – Namanga – Athi River Project, Namanga One Stop Border Post. A portion of the 1st respondent's parcel known as L.R No. 1692/68 measuring 0.0096 hectares was among the parcels of land to be affected by the acquisition.

7. It was averred for the appellant that prior to the acquisition, the land to be acquired was valued at Kshs. 5,355,625.00 by Mr. J K Mutua of the Ministry of Lands who prepared a report dated 19th January 2012. The valuation report indicated that the land parcel was developed with a permanent single storey building and some semi – permanent houses, with the latter falling outside the acquisition line and therefore not subject to compensation. It was further averred that at the time of gazettement for acquisition, only the permanent building was considered. The appellant further averred that while the 1st respondent's parcel of land measured 0.030 hectares, the Ministry of Lands only wished to compulsorily acquire an area of 0.0096 hectares.

8. The appellant averred that the valuation reports prepared for the 1st respondent did not take into consideration the said paramount consideration; that the only applicable valuations were those conducted as at 6th January, 2012, which ousted the 1st respondent's valuations; that the Commissioner of Lands had adhered to the provisions of section 9 of the Land Acquisition Act (now repealed) by holding an inquiry for hearing of the claims for compensation by persons interested in the land, which was done before preparation of the award on 19th January 2012; that upon the conclusion of valuation of land relating to the Arusha – Namanga – Athi River road project, the Commissioner of Lands caused to be prepared a schedule of payment for all the affected parties, but following the repeal of

the Land Acquisition Act by the *Land Act* 2012, the functions, including the duties of the Land Acquisition Compensation Tribunal, were rendered void. It maintained that the 1st respondent did not demonstrate to the court why there was inordinate delay in seeking justice on the issue of compensation from the year 2012 to 2014 and denied that any of the 1st respondent's rights guaranteed under Articles 40 and 47 of *the Constitution* were infringed upon, noting that the right to property guaranteed under Article 40 of *the Constitution* is not absolute.

9. The appellant averred that it had effected payment in respect of various properties, including the suit property, to the National Land Commission and an RTGS for Kshs. 5,355,625 was forwarded to it. It was the appellant's case that any claim by the 1st respondent lay with the National Land Commission, which had safely secured the sum of Kshs. 5,355,625 for her, and not the appellant.

10. The appellant averred, further, that the demolition of the property on the suit property was done with the consent of the land owner who, in anticipation of the demolition, removed the structures, including features like doors and windows, to allow for expansion of the road, and the appellant prayed that the petition be dismissed.

11. The 1st, 2nd and 3rd respondents did not file a response to the Petition.

12. In its decision, the trial court found that the law applicable to the dispute was the repealed Land Acquisition Act that was in force on 6th January, 2012 when the suit land was gazetted for compulsory acquisition. It took into consideration the fact that the 1st respondent filed an appeal disputing the compensation sum and found that it is her actions, not the appellant's, that led to the delay in payment of compensation. It, therefore, found no infringement of her fundamental rights and freedoms as enshrined in Articles 40 and 47 of *the Constitution*.

13. With respect to the amount of compensation, the trial court found that the valuation by Prestige Management Valuers, which valued the suit property at Kshs. 7,700,000, ably compensated the 1st respondent for the compulsory acquisition of her land. It therefore ordered that the 1st respondent was entitled to prompt, just and adequate compensation in full within the meaning and tenor of Article 40 (3) (b) (i) in the sum of Kshs seven million seven hundred thousand (Kshs. 7,700,000) for the compulsory acquisition of her proprietary interests in the suit property, a decision that the appellant was aggrieved by, leading to this appeal.

14. The appellant raises eight (8) grounds of appeal in its memorandum of appeal dated 19th February 2019. Summarised, these are that the trial court erred in law and in fact in: failing to consider the valuation report by the Ministry of Lands, which valued the piece of land to be acquired at Kshs. 5,355,625; awarding excessive compensation amounting to Kshs. 7,700,000 for the compulsory acquisition of the 1st respondent's proprietary interests in the suit property; considering speculative evaluation of the suit property and failing to consider the valuation by the Ministry of Lands; finding that the whole process of compulsory acquisition of the 1st respondent's land was legal and constitutional but misdirected herself in awarding compensation contrary to the evaluation of the Commissioner of Lands; considering the whole parcel of the land whereas the 4th respondent was only compulsorily acquiring 0.0096 hectares out of 0.03 hectares; awarding the 1st respondent compensation that was speculative and not based on actual and verifiable comparable with the neighbouring parcels of land;. failing to correctly apply the principles in interpretation of Article 40 of *the Constitution* with regard to just and full compensation and thereby arrived at the wrong decision; and misapplying the law and consequently making the wrong decision.

15. In support of its appeal, the appellant filed submissions dated 10th August 2020 which were highlighted by learned counsel, Miss Sitati, who held brief for Mr. Wanyama for the appellant. The appellant

submitted that it was dissatisfied with the amount of Kshs. 7.700,000 awarded to the 1st respondent by the trial court which, in its view, was exorbitant. It submitted that the trial court failed to consider the valuation report prepared by the Ministry of Lands, which took into account the then market value of the property. Further, that the report compared the suit property with two adjacent plots, No.1692/67 and 1692/49, took into account the future loss that the first respondent would have suffered, and arrived at a figure of Kshs. 5,355,625 as compensation. The appellant further submitted that the valuation report prepared by Prestige Managements Valuers Limited, which the trial court relied on in its decision, considered the entire plot and not the portion measuring 0.0096 ha which had been acquired.

16. The appellant took issue with the conclusion reached by Prestige Management Valuers Limited that if 0.0096 ha was acquired, then the entire property would lose economic value. According to the appellant, if the entire property was valued at Kshs. 7.7 million, then the value of the portion that was compulsorily acquired would have been Kshs. 2.4 million and not the Kshs. 5.355,625 offered in compensation for the portion acquired. The appellant further submitted that the remaining portion of the 1st respondent's property, which was 68% of the entire property, would appreciate in value as it was adjacent to the multi-million project road. The appellant urged this Court to allow its appeal, set aside the judgment of the trial court and substitute it with an award of Kshs 5,355, 625 as just and fair compensation for the compulsory acquisition of the portion measuring 0.0096 ha.

17. Learned counsel, Mr. Eredi, who appeared for the 2nd respondent, indicated that the 2nd respondent supported the appellant's position on the appeal as set out in its submissions. He further submitted that the report from the Ministry of Lands had taken into account anticipated income and loss of income by adding 15% of the value, and was therefore the correct valuation. It had also taken into consideration the fact that only a small portion of the land, 32%, was being acquired. His submission was therefore that the government cannot compensate for the entire parcel when it is not acquiring it and it remains with the owner, noting that the value of the land had increased and the 1st respondent continues to derive benefits from the remainder of the land. He submitted that the trial court had, therefore, erred in law and in fact in making the award of Kshs. 7,700,000.

18. There was no appearance for the 3rd and 4th respondent.

19. The 1st respondent filed submissions dated 24th August 2020 which were highlighted by learned counsel, Mr. Mohammed Billow, who held brief for Mr. Osman, counsel for the 1st respondent. The 1st respondent supported the decision of the trial court, submitting that the award of Kshs. 7,700,000 was just and reasonable. The 1st respondent submitted that the trial court had referred to two valuation reports, one conducted by the Ministry of Lands dated 19th January 2012 and the other by Prestige Management Valuers Limited dated 16th November 2011; that it noted that the former did not consider the developments made on the land and the projected earnings that the 1st respondent intended to receive from the property and, most fundamentally, the economic viability of the remaining portion. The 1st respondent urged this Court to uphold the decision of the trial court and dismiss the appeal.

20. We have considered the record of appeal, the impugned judgment, and the submissions of the parties. This being a first appeal, we are under a duty to re-evaluate the evidence before the trial court and reach our own conclusion, always bearing in mind that the trial court had the advantage of seeing and hearing the witnesses who appeared before it -see Selle & Another vs Associated Motor Boats Co. Ltd & Others (1968) EA 123. In analyzing the evidence, we also bear in mind that an appellate court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence, or if the trial court is shown demonstrably to have acted on wrong

principles in reaching its findings- see Ephantus Mwangi & Another v. Duncan Mwangi Wambugu [1982-1988] I KAR 27 and Jabane v. Olenja (1986) KLR 661.

21. The essential facts of the dispute which were placed before the trial court and determined on the basis of affidavit evidence, which we have set out earlier in this judgment, are not in contention. The 1st respondent was the registered proprietor of the suit property, L.R. No. 1692/68 situate in Namanga, within Kajiado County. The entire parcel measured 0.03 ha. The appellant, which was in the process of implementation of the Arusha – Namanga – Athi River Project, Namanga One Stop Border Post, sought to acquire a portion of, among others, the 1st respondent's parcel, measuring 0.0096 ha out of the total area of 0.03 ha. It gazetted the matter in Gazette Notice No. 7 of 22nd December 2011. A valuation was carried out by the Ministry of Lands, which arrived at a valuation of Kshs. 5,355,625 for the portion that was to be acquired. The 1st respondent was not satisfied with the valuation and it filed an appeal before the Land Acquisition Compensation Tribunal, being Land Acquisition Compensation Tribunal Case No. 48 of 2012. She contended before the Tribunal that the compensation offered was manifestly low and did not amount to fair compensation as envisaged under Article 40 of *the Constitution* and the *Land Act*. The appeal before the Tribunal was, however, not prosecuted before the repeal of the Land Acquisition Act, which resulted in the Tribunal being disbanded. Consequently, the 1st respondent filed the petition that ultimately resulted in this appeal.

22. In arriving at the decision that Kshs. 7,700,000 ably compensated the 1st respondent for the compulsory acquisition of her land, the trial court stated as follows:

> " I note the Tribunal in a ruling confirmed that it shall be guided by valuations undertaken as at 6th January, 2012. Insofar as the 4th Respondent disputed the report by Prestige Valuers dated 11th November, 2011, as it took into account the whole parcel of land, and compared its value with the neighbouring plots. The said report clarified that the remaining portion after acquisition would be of no economic value. In relying on the above cited judicial authority, I find the valuation by Prestige Valuers which was undertaken before gazettement of the suit land for compulsory acquisition, is an equitable compensation which ably compensates the Petitioner for the direct loss of her land." (Emphasis added).

23. In the report prepared by Prestige Management Valuers Limited which the trial court relied on, the valuer recommends that "the compensation award for the entire plot and development thereon since, as per the markings of the intended acquisition, the remaining portion would be of no economic value." This was a point of major contestation at the hearing of this appeal before us. While acknowledging that only a portion measuring 0.0096 ha, the equivalent of 32% or so of the 1st respondent's property was being acquired, counsel for the 1st respondent was hard pressed to explain how compensation for the entire parcel could be justified.

24. Under Article 40(3) of *the Constitution*, a party whose property is acquired for a public purpose is entitled to prompt and fair compensation. It provides that:

> 3. 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.

25. In considering what amounts to just compensation, a five-judge bench of the High Court in Patrick Musimba v National Land Commission & 4 others [2016] eKLR expressed itself as follows:

> 118. In our view, a closer reading of Article 40(3) of *the Constitution* would reveal that *the Constitution* did not only intend to have the land owner who is divested of his property compensated or restituted for the loss of his property but sought to ensure that the public treasury from which compensation money is drawn is protected against improvidence. Just as the owner must be compensated so too must the public coffers not be looted. It is that line of thought that, under Article 40(3), forms the basis for "prompt payment in full, of just compensation to the person" deprived of his property though compulsory acquisition. As was stated by Scott L.J, in relation to compulsory acquisition, in the case of Horn-v- Sunderland Corporation [1941] 2 KB 26,40:
>
> > "The word "compensation" almost of itself carries the corollary that the loss to the seller must be completely made up to him, on the ground that unless he receives a price that fully equaled his pecuniary detriment, the compensation would not be equivalent to the compulsory sacrifice".
>
> 119. Effectively Lord Scott's statement gave rise to the unabated proposition that the compensation of compulsorily acquired property be quantified in accordance with the principle of equivalence. A person is entitled to compensation for losses fairly attributed to the taking of his land but not to any greater amount as "fair compensation requires that he should be paid for the value of the land to him, not its value generally or its value to the acquiring authority"...
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> 120. We see no reason why the same approach should not be adopted locally. *The Constitution* decrees "just compensation" which must be paid promptly and in full. *The Constitution* dictates that the compensation be equitable and lawful when the word "just" is applied as according to Black's Law Dictionary 9th Ed page 881 the word "just" means "legally right; lawful; equitable". In our view, the only equitable compensation for compulsory acquisition of land should be one which equates restitution. Once the property is acquired and there is direct loss by reason of the acquisition the owner is entitled to be paid the equivalent. One must receive a price equal to his pecuniary detriment; he is not to receive less or more." (Emphasis added).

26. We agree fully with the sentiments of the court in the above matter, which the learned judge of the ELC took guidance from. However, with respect, we are of the view that the trial court fell into error in accepting the reasoning of the valuer that the 70% of the 1st respondent's property that had not been acquired was rendered of no economic value by the acquisition of a portion of the property. We note that in its report dated 19th January 2012, the Ministry of Lands took into account the developments on the land, excluding developments on that portions of the land that was not required for the implementation of the road project.

27. Similarly, Prestige Management Valuers, in its report dated 16th November, 2011, recognised that only a portion of the property was being acquired, but recommended, a recommendation that the trial court accepted, that the 1st respondent should be compensated for the entire parcel, stating "Our valuation herein below is therefore on the assumption that the owner will 'lose' her entire interest on the parcel.". We note that the report does not include the basis on which the valuer arrived at this

conclusion. Indeed, the Prestige Management Valuer's report does not include any comparables with adjoining parcels, as was the case in the Ministry of Lands report, to show the basis of its valuation and conclusions. Given the facts before us and the law with respect to compensation in the event of compulsory acquisition for a public purpose, we find that the trial court was in error in basing its decision on this valuation report and its recommendations.

28. We accordingly allow the appeal and set aside the judgment of the trial court. We substitute therefor an order that the fair and just compensation for the compulsory acquisition of 0.0096 out of 0.03 ha of the 1st respondent's parcel L.R. No. 1692/68 is Kshs. 5,355,625 as assessed by the Ministry of Lands in the report dated 19th December 2012. There shall be no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF FEBRUARY, 2025.

P. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.