Registered Trustees of Premier Club & 2 others v Commissioner of Lands (Civil Appeal 85 of 2018) [2024] KECA 281 (KLR) (8 March 2024) (Judgment)

Neutral citation: [2024] KECA 281 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 85 OF 2018

MSA MAKHANDIA, K M'INOTI & M NGUGI, JJA

MARCH 8, 2024

BETWEEN

THE REGISTERED TRUSTEES OF PREMIER CLUB ..... 1ST APPELLANT

THE REGISTERED TRUSTEES PREMIER ACADEMY ..... 2ND APPELLANT

THE REGISTERED TRUSTEES SIMBA UNION CLUB ..... 3RD APPELLANT

AND

THE COMMISSIONER OF LANDS ..... RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Sergon, J.) dated 10th November, 2017.) in HCCA No. 189 of 2012)

JUDGMENT

1. This appeal stems from an award of compensation by the Commissioner of Lands, "the respondent", with respect to the appellants' parcels of land, the subject of compulsory land acquisition by the respondent. By Gazette Notice No 6034 of July 2008, the respondent gave notice of intent to compulsorily acquire parts of plot Nos. LR 209/6559/2 measuring 0.3731 Ha; LR No 209/11591/2 measuring 5.256 Ha; and LR No 209/6559/3 registered in the respective names of the appellants. The parcels were being acquired from the respective appellants for the construction of the road known as Thika Super Highway.

2. From the record, the appellants contend that the respondent awarded Kshs 66,895,885 to them with respect to the parcels of land, without consideration of their interest in the land. The appellants' contention was that they were entitled to compensation for their respective parcels of land, which was contrary to the position adopted by the respondent that the appellants were only entitled to compensation for the developments on the parcels of land and not for their interest in the land. Dissatisfied with the decision of the respondent, they each lodged appeals to the Land Acquisition Compensation Appeals Tribunal being Appeal Nos. 24, 28, and 33 all of 2009. The three appeals were

by consent of the parties consolidated with the concurrence of the Tribunal. It was agreed that the issue relating to the failure of the respondent to award compensation for the interest in land be heard and determined first before the other issues raised in the appeals could be determined. The Tribunal dismissed the consolidated appeals whereupon the appellants preferred an appeal in the High Court of Kenya at Nairobi.

3. Having considered and re-evaluated the evidence before the Tribunal, the High Court determined that the respondent had adhered to the guidelines set out under section 2 of the *Land Acquisition Act* and that the respondent, in carrying out the valuation, followed the rules, particularly, rule 10 of the First Schedule of the *Land Acquisition Act*, hence, the appellants were not entitled to claim compensation for their interest in the land. Further, the learned Judge was satisfied that the appellants were given sufficient notice vide Gazette Notice No 6034 dated 11th July 2008 as envisaged under the special conditions in the leases granted to them in respect of the parcels of land. In the end, the High Court found that the appeal lacked merit and dismissed the same with costs to the respondent.

4. Aggrieved by the judgment and decree, the appellants have lodged this appeal on the grounds that the High Court erred in law when it failed: to address its mind on the issues of law raised by the appellants in the appeal; to find that the respondent, having compulsorily acquired the appellants' land under the mandatory provisions of the *Land Acquisition Act*, the appellants were entitled to prompt and full compensation as contemplated under the Act and the *Constitution* of Kenya; to find that the appellants having not been served with the six months' notices or any notices of surrender as required by the special conditions of the leases, the respondent could not acquire the appellants' land without prompt and full compensation; to determine the material issues of the *Constitution* and section 8 of the *Land Acquisition Act*; to find that the provisions of law relating to surrender of land contained in the special conditions of the titles only related to a parcel of land that was undeveloped and that the appellants' lands having already been developed, would not be subject to surrender and compensation; to find that once the respondent chose to invoke the relevant provisions of the *Land Acquisition Act*, it was bound by law to compensate the appellants; to find that the respondent had only invoked the clauses in the leases relating to surrender of Title as an afterthought; and to find in favour of the appellants whilst the appeal was not opposed by the respondent. The appellants therefore prayed, that the appeal be allowed with costs.

5. The appeal was canvased by way of written submissions with limited oral highlights. The appellants, through Mr. Ongicho, learned counsel, submitted that the respondent had invoked the provisions of the *Land Acquisition Act* (now repealed), to acquire portions of the appellants' parcels of land. That the appellants were the lawful owners of:

    1. Land Reference Number 209/6559/2 belonging to The Trustees of Premier Club. The land acquired by the Respondent amounted to 0.371 hectares.

    2. Land Reference Number 209/11591/2 belonging to The Trustees of Premier Academy. The land acquired by the Respondent amounted to 0.267 hectares.

    3. Land Reference Number 209/6559/3 belonging to The Trustees of Simba Union. The land acquired by the Respondent amounted to 0.4489 hectares.

    Further, he submitted that each of the above properties contained special conditions relating to surrender of leases that stated:

    1. In respect of Land Reference Number 209/6559/2 that if any undeveloped land required by the Government or the Council for any public purpose may be resumed upon due Notice being served at any time during the term of the Lease without compensation. Compensation will be paid for any improvements and developed land, which, may be required.

2. Land Reference Number 209/6559/3 had an identical provision as set out above.

3. Land Reference Number 209/11591/2 notwithstanding anything to the contrary, contained herein or implied by the said *Government Lands Act* (Cap 280) - the grantee shall on receipt of six months' notice in writing on that behalf surrender all or any part of the land required for public purpose without payment of compensation save in respect of such of approved building as may have to be evacuated or demolished. No compensation shall be payable in respect of surrender of part of the land by reason of such surrender.

6. The appellants submitted that the notices to acquire portions of the parcels of land were published in the Kenya Gazette of 11th July 2008. The Notice in the Kenya Gazette notified the appellants that the respondent intended to acquire portions of the parcels of land for public use. It was submitted that the notices aforesaid were not the notices or due notices contemplated under the special conditions set out in the leases of the respective parcels of land. That the notices of inquiry which were published on 11th July 2008 setting out the date of the inquiry for 18th September 2008 did not satisfy the requirement of a six months' notice of surrender contemplated by the special condition in the leases. The Gazette Notice was issued under the provisions of sections 6 to 9 all inclusive of the *Land Acquisition Act* and not the *Government Lands Act*, which regulates the procedures of surrender of lease.

7. The appellants further submitted that under the said sections of the *Land Acquisition Act*, it was incumbent upon the respondent to ensure that, not only was adequate compensation paid for the parcels acquired, but that the same was paid promptly which was not the case here. The compensation was payable for both the parcels of land and the developments thereon, according to the appellants. The special conditions in the leases invoked by the respondent to refuse compensation for the parcels became irrelevant once the respondent chose to rely on the *Land Acquisition Act* to acquire the parcels as opposed to invoking the provisions of surrender contained in the leases and the *Government Lands Act*. It was the appellants' submission that the provisions of the *Land Acquisition Act* relating to compulsory acquisition were a replica of what used to be section 75 of the *repealed Constitution* of Kenya. Section 75 thereof provided that a party whose land is acquired under the *Land Acquisition Act* must be adequately compensated, and that such compensation must be prompt. They relied on the case of *Commissioner of Lands v Jiwaji & another* (1978) KLR 192, for that proposition. They further submitted that the respondent having failed to appear or file any submissions in the High Court, the appellants' submissions remained uncontroverted and the appeal ought therefore to have been allowed.

8. The appellants further submitted that the provisions in the grants of leases which appear to deprive the appellants of compensation for their interest in land was unconstitutional. They relied on the case of The *Registered Trustees of the Aria Pratinidai Sabhaba, v The National Land Commission & others* - H.C. Petition No 273 of 2015, to submit that by refusing to award them compensation for their interest in the parcels of land, the respondent misinterpreted the law.

9. In response, Mr. Eredi, learned counsel for the respondent, submitted that the findings by both the Tribunal and the High Court could not be faulted. That it was apparent that the leases were for particular periods of time, with specific annual rents that were revisable. The special conditions in the leases provided that any undeveloped land required by the Government for any public purpose may be resumed upon due notice being served at any time during the term of the lease without compensation. Compensation was however payable for any improvements on the parcels of land.

10. It was submitted that both the Tribunal and the High Court invoked the special conditions to deny the appellants compensation for their interest in the land. It was further contended that it was undisputed that the appellants' developments on the parcels of land were valued and the requisite compensation

paid. Counsel also submitted that for the compensation claim, the appellants were served with notices requiring them to surrender the parcels of land for public purposes. That it was clear from the gazette notice that it was a six months' notice or adequate and appropriate notice for the purpose of the notice contemplated under the special conditions in the leases.

11. Counsel further argued that when the appellants accepted the leases, they agreed to and were bound by the terms and the special conditions therein. The appellants, therefore, could not be allowed to turn around and pretend that they were entitled to compensation for the acquired parcels yet they were aware that if the parcels of land were required or needed for public purposes they would be surrendered freely back to the Government. The case of *Shree Visa Oshwal Community Nairobi Registered Trustees v Attorney General & 3 others* [2014] eKLR was relied on for the proposition that: "Covenants and conditions in a grant whether express or implied are binding on persons claiming under grant, lease or license". Finally, it was submitted that there was no basis whatsoever in law to set aside the judgment of the High Court and that this appeal should, in the circumstances, be dismissed with costs to the respondent.

12. This is a second appeal. That being the case, this Court should only address itself purely to questions of law, rather than questions of fact. In *Kenya Breweries Ltd v Godfrey Odoyo* [2010] eKLR, this Court pronounced itself thus:

> "In a second appeal, however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."

13. We have carefully considered the record, submissions by counsel and the law. The single issue for determination in our view is whether the appellants were entitled to compensation for their interest in the land parcels.

14. From the record, it is common ground that the leases were issued under the *Government Lands Act*, that the Commissioner of Lands decided to compulsorily acquire portions of the parcels of land for public purpose, and finally, that the acquisition notice was issued under the *Land Acquisition Act* and gazetted in the Kenya Gazette. However, the point of departure is that the appellants were of the view that sections 8 and 9 of the *Land Acquisition Act* obligated the respondent to ensure that compensation must be paid for both the interest in land and the developments thereon, and further, that no six months' notice was served on them as required by the law.

15. Conversely, it was the respondent's argument that he did not award the appellants compensation for their interest in land (excluding developments) because of the special conditions in the lease held by the appellants.

16. Special Clause No IV in the leases, which is a covenant, provided as follows:

> "Any undeveloped land required by the, Government or the Council for any public purpose may be resumed upon due notice being served at any time during the term of the lease without compensation. Compensation will be paid for any improvements and developed land which may be required."

Further, there was the special condition No 11 which provided:

> "That notwithstanding anything to the contrary contained herein or implied by the said *Government Lands Act* (Cap. 280) the grantee shall on receipt of six months' notice in writing in that behalf surrender all or any part of the land required for public purposes without payment of compensation save in respect of such of the approved buildings as may have to be evacuated or demolished. No compensation shall be payable in respect of surrender or part of the land by reason of such surrender."

17. The provisions of the law are very clear and we do not think we should spend a lot of time over the same. From the record and which aspect has been acknowledged by the appellants, there were payments made after valuation on the improvements and developments in the parcels as follows LR 209/6559/2 Kshs 51,374,110, LR No 209/11591/2 Kshs 3,437,000 and LR No 209/6559/3 Kshs 12,084.775 all totaling to Kshs: 66,895,885. Having so compensated the appellants, the respondent was at liberty to resume upon notice being given. Was the notice given? There is no difficulty in answering the question as the appellants themselves agree that, indeed, there was notice vide Gazette Notice No 6034 of July 2008. The notice was to the effect that the respondent intended to compulsorily acquire portions of those parcels of land. Contrary to the submissions by the appellants, the notice issued and served on them was for six months and was therefore sufficient as contemplated in the special conditions. It is apparent that there were express provisions as to how the respondent was required to resume the said parcels of land, which had been clearly specified in the leases that had been issued to the appellants. We agree with the finding of the High Court and the tribunal that the law and procedure was duly followed to the letter in the acquisition of the parcels of land.

18. The appellants were aware that they held leasehold titles that had conditions and that the respondent had a right to resume ownership of the parcels upon fulfilment of certain conditions, which the respondent adhered to. As such, they were bound by the said conditions. In dismissing the appeal, the High Court found that:

> "The respondent adhered to the guidelines set out under Section 2 of the *Land Acquisition Act* (Cap 295 Laws of Kenya). I am also satisfied that the respondent, in carrying out the valuation, followed the rules particularly rule 10 of the First Schedule of the *Land Acquisition Act* hence the appellants were not entitled to claim any compensation for the interest in the land. I am also satisfied that the appellants were given sufficient notice vide gazette notice No 6034 dated 11.7.2008 as envisaged under the special conditions. With regards to LR No 209/11591/2 special condition No 11 applied while in respect of LR No 209/6559/2 and LR No 209/6559/3 special condition No IV in both parcels applied."

19. We agree with the above reasoning of the learned Judge, as we are satisfied that the respondent, while conducting the valuation for the purpose of compensation, was guided by the provisions of the schedule to the *Land Acquisition Act*. These guidelines clearly stipulated what should be considered when determining the amount of money to be awarded in compensation, and what should be ignored. Section 2 of the schedule stated as follows:

> "In determining the amount of compensation, to be awarded for land acquired under this Act, the following matters, and no others, shall be taken into consideration:

a. The market value as determined in accordance with paragraph 1;

b. In assessing the market value, the effect of any express or implied condition of title or law which restricts the use to which the land concerned may be put shall be taken into account;

c. Damage sustained or likely to be sustained by persons interested at the time of the Commissioner's taking possession of the land by reason of severing the land from his other land;

d. Damage sustained or likely to be sustained by persons interested at the time of the Commissioner's taking possession of the land by reason of the acquisition injuriously affecting his other property, whether movable or immovable, in any other manner or his actual earnings;

e. If, in consequence of the acquisition, any of the persons interested is or will be compelled to change his residence or place of business, reasonable expenses incidental to the change;

f. Damage genuinely resulting from diminution of the profits of the land between the date of publication in the Gazette of the notice of intention to acquire the land and the date the Commissioner takes possession of the land."

20. Considering the law and the substantive provisions of the clauses in the grant, we are satisfied, just like the High Court, that indeed the respondent did diligently carry out his mandate. We find no reason whatsoever to disturb the same as we are convinced that there was no breach of the law or any provision of the lease or instrument whatsoever. The surrender of the parcels of land having been made pursuant to the provisions in the respective leases cannot be said to be unconstitutional as claimed by the appellants. Nor can they claim that they were entitled to prompt compensation for their interest in land whilst it was clearly stipulated that combination was for developments.

21. In the end, we find the appeal devoid of any merit and the same is accordingly dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH, 2024.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR