Murachu & another v The Ministry of Health & another (Civil Appeal 176 of 2018) [2024] KECA 1531 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KECA 1531 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 176 OF 2018

W KARANJA, J MOHAMMED & AO MUCHELULE, JJA

OCTOBER 25, 2024

BETWEEN

CHARLES MAINA MURACHU ..... 1ST APPELLANT

JOSEPH WAMBUGU THINJI ..... 2ND APPELLANT

AND

THE MINISTRY OF HEALTH ..... 1ST RESPONDENT

THE NATIONAL LANDS COMMISSION.....1ST RESPONDENT THE MINISTRY OF HEALTH ..... 2ND RESPONDENT

(An appeal from the judgment of the Environment and Land Court in Nyeri (L. Waithaka, J.) dated 31st July 2018 in ELC)

JUDGMENT

1. The appellants, Charles Maina Murachu and Joseph Wambugu Thinji, have filed the present appeal to challenge the decision of the Environment and Land Court (ELC) dated 31st July 2018 rendered in ELC Petition No. 3 of 2017. The Petition was filed against the respondents, The National Land Commission and The Ministry of Health(respondents).

2. In the Petition the appellants described themselves as the administrators and legal representatives of the estates of Mary Wangechi Karoing'o and Thinji Kihiuni respectively. They sought judgment against the respondents for: inter alia, declaration that the respondents have violated the appellants' and their families' right to land under Article 40(3) of the *Constitution* of Kenya, 2010 by failing to give them full, just and prompt compensation in respect of their parcels of land which were compulsorily acquired by the Government sometime in 1979 or thereabouts; an order compelling the respondents to compensate their families justly, fairly and promptly taking into account prevailing market rates for equivalent parcels of land to those compulsorily acquired by the Government.

3. The appellants' claim was premised on the ground that sometime in 1979, the Government acquired their parcels of land namely Othaya/Kiahagu 165, 166 and 167 (hereinafter referred to as the suit properties) for the construction of Othaya Cottage Hospital but failed to compensate them as the law required. The appellants further contended that the applicable legal procedures were not complied with in the acquisition of their land. As a consequence, they suffered and have continued to suffer loss and prejudice and that they and their families were rendered destitute, homeless, and hopeless as they were left without any source of livelihood.

4. In opposition to the petition, the respondents filed a reply and grounds of opposition. They deposed that the applicable laws and procedures were complied with in acquiring the suit properties; that the owners of the suit properties were compensated and that no complaint was raised by the owners concerning the compensation paid or the process that led to acquisition of the suit properties.

5. Terming the complaints that were later lodged by the respondents concerning the acquisition of the suit properties an afterthought, and the petition an abuse of the court process, the respondents pointed out that through the letter marked CTM 11 annexed to the appellants' supporting affidavit, the appellants had acknowledged having received compensation in respect of the suit properties though they complain that it was inadequate.

6. After hearing the petition, the Environment and Land Court (ELC) (L.N. Waithaka, J.), entered judgment for the respondents against the appellants. The court found that from 1979 when the suit properties were compulsorily acquired to about 2004, more than 20 years after the alleged illegal acquisition, the petitioners had not raised any issue concerning the alleged breaches of law in the acquisition of the suit properties by the respondents. The court found, further, that the laid down law and procedure had been followed during the acquisition and that the appellants had failed to follow the correct procedure, (which the court set out elaborately in its judgment) to challenge the said acquisition if they were aggrieved. In this regard section 29 of the *Land Acquisition Act*, Cap 295 Laws of Kenya (now repealed) was cited. The court found that the petitioners had neither demonstrated that they used the procedure provided in law for asserting their rights to the suit properties and/or challenging the award given in their favour nor did they give any satisfactory reasons for failure to follow that procedure and they could not, therefore, be heard to say that their rights were violated on account of the alleged inadequate compensation.

7. Concerning the merits of the petition, the court found that the onus was on the appellants to table a valuation report done at the time the acquisition was done, or other cogent evidence to guide the court in determining whether the compensation given to them was inadequate. The court found that the appellants' complaint that the compensation they were given was inadequate had not been proved to the required standard. The petition was ultimately found to be devoid of merit and was dismissed with no orders as to costs.

8. It is against those findings that the appellants have brought this appeal. The Memorandum of Appeal is dated 3rd October 2018, and raises four (4) grounds of appeal which are, that:

    i. That the learned Judge erred in law by acting on the wrong principles of law in dismissing the appellants' petition.

    ii. That the learned trial Judge erred in fact and in law in failing to consider the appellants' petition, submissions and authorities cited therein on the issue of compulsory acquisition and historical land injustices and as such came to a wrong conclusion in the judgment, and as such occasioned injustice to the appellants.

iii. That the learned trial Judge erred in fact and in law in failing to shift the burden of proof to the respondents, and failing to call for evidence from the respondents on the issue of compulsory acquisition and historical land injustices and as such came to a wrong conclusion in the judgment, and as such occasioned injustice to the appellants.

iv. That the learned trial Judge erred in fact and in law, by totally disregarding and shutting out the appellants' evidence and as such occasioned injustice to the appellants.

9. Counsel for the appellants filed submissions in support of the appeal and served the same on the respondents but no submissions were filed by the respondents. At the virtual plenary hearing, Mr. Magua, learned counsel was present for the appellant but there was no appearance on behalf of the respondents despite service. Mr. Magua informed the Court that he would rely on his submissions entirely and opted not to make any oral highlights.

10. In a nutshell, the appellants fault the learned Judge for, inter alia, dismissing the petition based on incorrect principles, particularly the procedure for challenging the Commissioner's award.

11. They also contended that the court should apply Article 40(3) of the *Constitution* of Kenya 2010 and not the repealed *Land Acquisition Act*, given that the petition was filed post 2010. Emphasis was also placed on the Environment and Land Court's jurisdiction to handle disputes related to compulsory land acquisition under Article 162(2)(b) of the *Constitution*.

12. The appellants argued that compensation must be just, fair and based on market value, criticizing the learned Judge for not following these principles. The appellants maintained that the learned Judge failed to consider historical land injustices and the correct legal procedures for compulsory acquisition.

13. Key procedural failures cited included the absence of a written award and valuation report, and failure to issue a written compensation as required. On the burden of proof, the appellants urged that the trial judge failed to shift the burden of proof to the respondents, who needed to demonstrate compliance with the *Land Acquisition Act*. They contended that the Government, through the Commissioner of Lands, was obligated to compensate justly, which they failed to do.

14. They claimed that their property rights were violated both the old and new Constitutions, demanding fair compensation for compulsory acquisition. The appellants argued that their fundamental rights and freedoms were breached unlawfully, referencing multiple legal precedents to support their case. It was submitted that under Article 47 of the Constitution of Kenya 2010, the respondents unlawfully alienated the appellants' lawful property without any lawful justification and that their actions were in utter breach of the right to property and also to fair administrative action. Reliance was placed on *Multiple Hauliers East Africa Limited v Attorney General & Others* [2013] eKLR, *Oriental Commercial Bank Limited v Central Bank of Kenya* [2015] eKLR, and *Wachira Weheire v Attorney General* [2010] eKLR for the proposition that claims founded upon alleged violation of Fundamental Rights and Freedoms are not time barred. We are urged to allow the appeal as prayed.

15. We have considered the appeal, the submissions of counsel and the law. This being a first appeal, it is our duty to re-evaluate, re- assess and reanalyze the evidence on record and then determine whether the conclusions reached by the learned ELC Judge should hold. See *Kenya Ports Authority v Kustron (Kenya) Limited* [2009] 2EA 212 where this Court espoused that duty as follows:

> "On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that

respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

16. In addition to the above parameters, we are alive to the fact that this Court should only interfere with the findings of the trial court where the decision is based on no evidence or on a misapprehension of the evidence or where the trial court is demonstrably shown to have acted on wrong principles in reaching its findings. See *Mwanasokoni v Kenya Bus Services* [1985]KLR 931.

17. The issues for determination in this appeal are whether or not the compulsory acquisition process of land from the appellants was or is inconsistent with and or in contravention of Articles 40 of the *Constitution* and/or any written law and whether the compensation award of Kshs.9,151 per acre was a full and just compensation.

18. The statutory framework for compulsory acquisition is founded under Part VIII of the *Land Act*, 2012.

19. With a view to ensuring that there was a real, rather than a fanciful or remote connection between the compulsory acquisition and the State's developmental needs, Part VIII was drafted in detail. History in the practice of compulsory acquisition prompted such detail. Not only was the State to keep its right to compulsorily acquire but the citizen too was to be protected from wanton and unnecessary deprivation of his private property.

20. In summary, the process of compulsory acquisition now runs as follows; Under Section 107 of the *Land Act*, the National Land Commission (the 1st Respondent herein) is ordinarily prompted by the national or county government through the Cabinet Secretary or County Executive member respectively. The land must be acquired for a public purpose or in public interest as dictated by Article 40(3) of the Constitution. In our view, the threshold must be met: the reason for the acquisition must not be remote or fanciful. The National Land Commission needs to be satisfied in these respects and this it can do by undertaking the necessary diligent inquiries including interviewing the body intending to acquire the property.

21. Under sections 107 and 110 of the *Land Act*, the National Land Commission must then publish in the Kenya Gazette a notice of the intention to acquire the land. The notice is also to be delivered to the Registrar as well as every person who appears to have an interest in the land.

22. As part of the National Land Commission's due diligence strategy, the National Land Commission must also ensure that the land to be acquired is authenticated by the survey department for the rather obvious reason that the owner be identified. In the course of such inquiries, the National Land Commission is also to inspect the land and do all things as may be necessary to ascertain whether the land is suitable for the intended purpose in accordance with section 108 of the *Land Act*.

23. The foregoing process constitutes the preliminary or pre-inquiry stage of the acquisition.

24. Section 112 of the *Land Act* then involves the landowner directly for purposes of determining proprietary interest and compensation. The section has an elaborate procedure with the National Land Commission is enjoined to gazette an intended inquiry and the service of the notice of inquiry on every person attached. The inquiry hearing determines the persons interested and who are to be compensated. The National Land Commission exercises quasi-judicial powers at this stage.

25. On completion of the inquiry the National Land Commission makes a separate award of compensation for every person determined to be interested in the land and then offers compensation. The compensation may take either of the two forms prescribed. It could be a monetary award but it could also be land in lieu of the monetary award, if land of equivalent value, is available. Once the award is accepted, it must be promptly paid by the National Land Commission. Where it is not accepted then

the payment is to be made into a special compensation account held by the National Land Commission pursuant to sections 113 - 119 of the *Land Act*.

26. The process is completed by the possession of the land in question being taken by the National Land Commission once payment is made even though the possession may actually be taken before all the procedures are followed through and no compensation has been made. The property is then deemed to have vested in the National or County Government as the case may be with both the proprietor and the Land Registrar being duly notified: See sections 120 -122 of the *Land Act*.

27. If land is so acquired, the just compensation is to be paid promptly in full to persons whose interests in land have been determined in accordance with section 111 of the *Land Act*. This is in line with the Constitutional requirement under Article 40(3) of the *Constitution* that no person shall be deprived of his property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation.

28. The Constitution dictates that acquisition be in accordance with the provisions of the Constitution itself and any Act of Parliament. The Constitution itself only provides for just compensation being made promptly.

29. The appellants have challenged both the procedure adopted by the 1st respondent as well as the alleged compensation and compensatory awards offered by the 1st respondent. Before considering and determining what is a just, full compensation and the promptitude in payment, we would wish to determine whether the compulsory acquisition of various parcels of land belonging to the appellants were legal.

30. It is common ground that compulsory acquisition of land including the appellants' land was necessary for the construction of Othaya Sub-district Hospital. There is also no controversy that Othaya sub-district hospital is meant to serve and benefit the public at large.

31. On the issue as to prompt, just and full compensation and whether the constitutional principle in this regard has been violated or is threatened with violation, we have sighted various letters exhibited by the appellants. The letters do indeed confirm that an award or compensation was made to the appellants although the appellants complained that the same was not adequate. One such letter is dated 20th April, 2004 being a letter from the appellants & 5 other persons to the then Minister for Lands, Amos Kimunya in which the appellants were complaining that their fathers were not adequately compensated for the land taken from them for purposes of building the hospital.

32. The appellants have alleged and further argued that the respondents have contravened the appellants' right to just compensation under Article 40(3) of the *Constitution*. The point raised by the appellants is simply not about the quantification of the compensation payable to the appellants in respect of the compulsory acquisition of land necessary for development purposes. The appellants have also taken issue with the process adopted and applied by the respondents towards such compensation.

33. There exists, no doubt, an overarching right to compensation under Article 40 (3) of the Constitution where a person is deprived of his property for a public purpose or in the public interest. The law allows compensation to take the form of either an alternative parcel of land or cash in lieu as provided in section 114(2) of the *Land Act*.

34. With regard to the instant case, the compensation was to take the form of monetary payments. In our view, Article 40(3) of the *Constitution* envisages 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 through compulsory acquisition. 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." See *Director of Buildings and Lands v Shun Fung Wouworks Ltd* [1995] AC 111,125.

35. 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. This can be achieved to the satisfaction of the owner of land by reference to the market value of the land.

36. Having set out the applicable law as it is today, the germane question that arises that will determine the fate of this appeal is whether the law applicable to the acquisition that the appellants are challenging is the post Constitution 2010 law which we have outlined above in considerable detail or the law that was applicable when the acquisition was done.

37. We agree that the courts have determined that violations of fundamental rights have no statutory temporal statutory timelines. See; *Multiple Hauliers East Africa Limited v Attorney General & Others* and *Oriental Commercial Bank Limited v Central Bank of Kenya* (supra). However, the courts must be careful not to accept any invitation to reopen matters that were heard and determined prior to the more human rights friendly laws that came into force in 2010 and thereafter. Matters that were arbitrated upon and concluded before the Constitution of Kenya 2010 cannot be reopened on the basis that they involved abuse of fundamental human rights, if indeed the legal process involved had been exhausted.

38. In the present case, the appellants do not actually deny that their fathers were compensated for the property that was compulsorily acquired for purposes of putting up a hospital in Othaya. The properties were acquired in 1979 and the applicable law was the *Land Acquisition Act*, Cap 295 of the Laws of Kenya (repealed). The appellants have confirmed that payments were made albeit in small amounts that, in their view, were not satisfactory and were lower than the current market value of the suit properties. If dissatisfied the parties had an avenue to challenge the same as provided under the applicable law then. They did not do so. The next time the matter was raised was in 2004, about 25 days later, when the appellants raised the matter with the Minister for Lands as stated earlier.

39. We hold the view, that the appellants' parents appeared to have accepted the decision, they accepted the money, and they never complained. The matter was, therefore, done and dusted and if the Minister agreed to engage the appellants on the matter, it must have been purely on humanitarian grounds and not based on the current legal regime. The matter could not be re-agitated afresh under the Law regime that came into force almost three decades after the purported cause of action arose.

40. We agree entirely with the learned Judge's exposition that the appellants' fathers were compensated for their properties and further hold that their rights under Articles 40 and 47 of the Constitution were not violated.

41. We have said enough to demonstrate that we see no merit in the appellant's appeal. The same is hereby dismissed with no order as to costs as the appeal was not defended.

DATED AND DELIVERED AT NYERI THIS 25TH DAY OF OCTOBER 2024.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR