



Dembena International Limited v National Land Commission (Environmental and Land Originating Summons E005 of 2023) [2024] KEELC 4416 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4416 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E005 OF 2023
EK WABWOTO, J
MAY 30, 2024**

**BETWEEN
DEMBENA INTERNATIONAL LIMITED APPLICANT
AND
NATIONAL LAND COMMISSION RESPONDENT**

JUDGMENT

1. The Applicant, Dembena International Limited filed this Originating Summons dated 25th June 2023 under Order 37 of the Civil Procedure Rules, 2010 and Sections 1A, 1B and 3A of the [Civil Procedure Act](#).
2. The Originating Summons sought the following questions for determination: -
 - a. Whether the Revised Award of 21st September, 2021 for Kes. 804,144,317/- issued by the Respondent the National Land Commission should be set aside and be replaced with Initial Award of 3rd February, 2021 for Kes. 1,019,425,121/= also issued by the Respondent.
 - b. Whether the Respondent the National Land Commission should be compelled by an order of this court to forthwith pay to the Applicant sum of Kes. 718,487,961/- being the balance of the Award together with the interest accrued pursuant to Section 117 (1) of the [Land Act](#) No. 6 of 2017.
 - c. Whether the Respondent the National Land Commission should be compelled to meet and/or pay the costs of these proceedings.
3. The Originating Summons was supported by the Affidavit sworn by Isayas Desale Berhe a Director of the Applicant on even date. It was averred that sometimes in the year 2014, the Applicant Company acquired all that parcel of land known as Nairobi/Block 98/78 measuring approximately 0.809Ha and situated in South C along Mombasa Road (hereinafter referred to as the “suit property”) and was



- issued with a Certificate of Lease on the 5th day of September 2014. Upon acquiring the said property the Applicant embarked on the process of constructing a luxury hotel on the property. In order to actualize the said construction, the Applicant applied for a development permit on 27th October, 2014 from the City Council of Nairobi and also applied for a Change of User from Residential to Hotel on 21st November, 2014 which said applications were approved. Around the same time, the Applicant applied for a loan facility from Kenya Commercial Bank Limited for the purposes of facilitating the preliminary costs inclusive of design costs and all related approvals for the construction of the luxury hotel aforesaid.
4. On 5th December 2014, Kenya Commercial Bank issued the Applicant with an Offer Letter of even date for a loan facility of the sum of Usd 2,000,000/=. Subsequently, a legal charge in favour of Kenya Commercial Bank limited for the said sum of Usd 2,000,000.00 was registered against the title for the suit property on 7th of April, 2015. Upon drawdown of the loan facility aforesaid, the Applicant caused to be prepared architectural drawings for the project and further engaged in negotiations with potential international hotel operators specifically the Hayat brand. Furthermore, the Applicant erected a live fence on the property. Consequently, the Applicant incurred significant pre-developments costs as were particularised at paragraph 7 of the supporting affidavit.
 5. Upon full payment of the loan facility aforesaid in the year 2016, a discharge of charge was registered on 7th of March, 2017. Sometimes in the first quarter (1/4) of the year 2017, the Applicant applied for further loan facilities from KCB Bank Kenya Limited. On 3rd April, 2017 KCB Bank aforesaid issued the Applicant with a Supplemental Offer Letter of even date for the facilities outlined at paragraph 9 of the Supporting Affidavit of the Applicant.
 6. Subsequently, a charge in favour of KCB Bank Kenya Limited for the said sum of Usd 3,600,000.00 was registered against the title for the suit property on 9th June, 2017. Sometimes in the year 2018, the Applicant approached KCB Bank Kenya limited for an enhancement in the sum of Usd 2,025,000.00. On 5th June, 2018 KCB Bank issued the Applicant with an Offer Letter of even date for a Term Loan Facility (Amalgamation of existing Term Loan II and new Term Loan) all totalling to Usd. 5,625,000/= to finance capital requirement for procurement of loose build up furniture and kitchen for the Juba Hotel projects as well as meeting initial costs for infrastructural design for the proposed hotel along Mombasa Road. Subsequently, a further charge in favour of the said KCB Bank Kenya Limited for the sum of Usd 2,025,000.00 was registered against the title for the suit property on 20th June 2018.
 7. It was contended that 0.0263Ha of the suit property was marked for Compulsory Acquisition by the Respondent on behalf of the Kenya National Highways Authority (KeNHA) through Gazette Notice No. 2161 of 12th March, 2020. On 4th September, 2020 the Respondent vide Gazette Notice No. 6601 on behalf of KeNHA gave notice that it intended to delete, correct and add parcels of land listed therein that were required for the construction of the Nairobi Expressway Road Project. In the said notice, the area of the suit property to be acquired was amended to 0.6443Ha. Vide Gazette Notice No. 6602 of even date, the Respondent in pursuance of Part VIII of the [Land Act](#) and further to Gazette Notice No. 2161 of 2020 and again on behalf of KeNHA gave notice that inquiry to hear claims to compensation for interested parties for the land required for the construction of the Nairobi Expressway (A8) shall be held on the dates and places as indicated therein. The Applicant's claim for compensation was scheduled to be heard at ACK Annex, 7th Floor, Boardroom on the 30th September, 2020 at 9:00a.m. On 17th September 2020 the Respondent issued the Applicant with a Notice of Taking Possession of the area acquired of the suit property being 0.6443Ha.
 8. It was averred that it was the Respondent's assertion that under Section 120(2) of the [Land Act](#), 2012 in cases where there is an urgent necessity for the acquisition of land, it would be contrary to the public



interest for the acquisition to be delayed by following the normal procedures of compulsory acquisition under the said Act. Further, that the Respondent may take possession of uncultivated pasture or arable land upon the expiration of fifteen (15) days from the date of publication of notice of intention to acquire, and on the expiration of that time the Respondent shall, notwithstanding that no award has been made, take possession of that land in the manner prescribed by subsection (1). In a nutshell, the Respondent notified the Applicant that KeNHA had been granted access to the site to commence construction works with immediate effect. On 28th September 2020 the firm of Ms. Igeria & Ngugi Advocates on behalf of the Applicant wrote a letter dated even date to the Chief Executive Officer of the Respondent advising him that they are in receipt of the notice to attend an inquiry into the compensation claims on Wednesday 30th September 2020. Further, they informed the CEO that they could not provide the relevant claim documentation (inclusive of valuation reports) within the short timeline and as such sought the CEO's indulgence to have the full claim documentation delivered to the Respondent within on or before the 7th of October, 2020. Contemporaneously, the said firm of Advocates instructed Clayton Valuers Limited to carry Clayton Valuers Limited issued a Valuation Report on the 30th of September, 2020 wherein the suit property was valued at Kes. 1,431,779,730.00.

9. It was averred that on 7th October 2020 the Applicant's Advocates aforesaid wrote a letter to the Chairman of the Respondent informing him of inter-alia the following:-
- (i) The Gazette Notice No. 6601 indicated that the portion of the suit property being acquired was 0.6443 Ha.
 - (ii) That they had reviewed the detailed Land Acquisition Plan and noted that the entire parcel was actually designated to be acquired for purposes of constructing a BRT Station.
 - (iii) That according to the property's title documents, including the official search, maps from Survey of Kenya and an Independent Survey Report, the Property measured approximately 0.809 Ha and therefore the Applicant's claim was for the entire acreage.
 - (iv) The Applicant was in the process of constructing a Hotel prior to the property being compulsory acquired.
 - (v) They were filing a formal claim for compensation pursuant to the provisions of the *Land Acquisition Act* (Chapter 295) specifically Section 9(3) and Section 23(2) and the Applicant's claim for the Land was Kes. 1,472,202,869.19.
 - (vi) They were requesting that the claim funds be deposited in the Applicant's Account particulars of which were stated therein.
9. On 11th January 2021, the Respondent vide Gazette Notice No. 78 corrected the acquired area of the suit property from 0.6443 Ha aforesaid to 0.8096 Ha. Having concluded inquiry relating to the acquisition of the suit land, the Respondent in pursuance of Section 113 (1) of the *Land Act*, 2012 on the 3rd of February, 2021 issued the Applicant with an award of Kes. 1,019,425,121/=. According to the Respondent the value of the land was Kes. 880,240,780/= and the total compensation payable to the Applicant for land and improvements inclusive of 15% disturbance allowance and any other applicable statutory additions (if any) amounted to the said total sum of the award being Kes. 1,019,425,12. The Applicant's Bank Account details were provided to the Respondent on 19th February, 2021 for purposes of payment but only Ksh 300, 937,160.00 was paid with the remaining balance yet to be remitted and the same remains outstanding to date.



10. The Applicant further averred that it was seeking payment of Kshs. 718,487,961/- together with accrued interest being payment of the balance of the Initial Award of 3rd February 2021 together with interest pursuant to the provisions of Section 117(1) of the *Land Act*.
11. Despite being served, the Respondent never filed any response nor written submissions in respect to the Originating Summons herein.
12. The Applicant filed written submissions dated 12th February 2024 and submitted on the following issues:-
 - a. Whether the Revised Award of 21st September 2021 for Kshs. 804,144,317/= issued by the Respondent, the National Land Commission, should be set aside and be replaced with the initial Award of 3rd February 2021 for Kshs. 1,019,425,121/= also issued by the Respondent.
 - b. Whether the Respondent should be compelled by an order of this court to forthwith pay to the Applicant sum of Kes 718,487,961/= being the balance of the Award together with interest accrued pursuant to Section 117(1) of the *Land Act*.
 - c. Whether the Respondent should be compelled to meet and/or pay the costs of these proceedings.
13. The Applicant reiterated the contents of its Affidavit and further submitted that the Land Acquisition Tribunal had not been set up as at the time of filing this Originating Summons and hence this court had jurisdiction to hear this suit. The case of *Ravaspaal Kyalo Mutisya =versus= National Land Commission* (2022) eKLR was cited in support.
14. The Applicant also submitted that the entire acreage of the suit property comprising of 0.809Ha was acquired for the construction of the Nairobi Expressway project and it was unconscionable for the Respondent to purport that part of the suit land was a road reserve and on 23rd September 2021 arbitrarily revise downward the award issued previously to the Applicant on 3rd February 2021 and issue the Applicant with a Revised Award of Kshs. 804,144,917/= whereby the area of the land to be acquired changed to 0.6388Ha from 0.8096Ha.
15. It was argued that the Respondent should be compelled to pay the sum of Kshs. 718,487,961/= being the balance of the Initial Award together with interest. The Applicant also prayed for costs of the suit together with interest.
16. The court has carefully considered the Originating Summons and the written submissions filed by the Applicant. The issue for determination is whether the Applicant is entitled to the reliefs sought.
17. From the evidence adduced herein, it is not disputed that the Applicant was the registered owner of parcel of land known as Nairobi/Block 98/78 measuring approximately 0.809Ha which was marked for compulsory acquisition by the Respondent on behalf of the Kenya National Highway Authority (KeNHA) through Gazette Notice No. 2161 of 12th March 2020. Evidence was also adduced to the effect that on 4th September 2020, the Respondent vide Gazette Notice No. 6601 on behalf of KeNHA gave notice that it intended to delete, correct and add parcels of land listed therein that was required for construction of the Nairobi Expressway Road Project. In the said notice, the area of the suit property to be acquired was amended to 0.6443Ha. The Applicant was later paid a sum of Kshs. 300,937,160/= from the sum of Kshs. 804,144,317/= which was the revised award. The Applicant disputed the same and sought for the setting aside the revised award of Kshs. 1,019,425,121/= of which it will imply that the Respondent pays a sum of Kshs. 718,487,961/= being the balance of the award.



18. The members of the Land Acquisition Tribunal was gazetted on 7th September 2023 and as at the time of the said gazettelement this suit had already been filed thus necessitating the hearing of this matter before this court.
19. In the instant case, even though the suit was not defended, the court was shown a revised award dated 23rd September 2021 which showed the total compensation to be Kshs. 804,144,317/=. From the documentation that was provided to the court the Respondent revised the said award on the basis that part of the suit land was a road reserve. The Applicant has not demonstrated any evidence to the contrary that indeed the same was not part of the road reserve to warrant the revision of the award. There was no evidence that the Applicant also provided any information to the Respondent disputing the fact that part of its property was not on a road reserve. The Applicant did not furnish this court with any survey and or expert report demonstrating that part of its land did not fall on a road reserve to warrant the revision of the award. In the circumstances this court is not satisfied that the Applicant has made a case for grant of the reliefs sought.
20. In conclusion, it is the finding of this court that the Originating Summons is not merited and the same is dismissed in its entirety with an order that each party bears own costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF MAY, 2024.

E. K. WABWOTO

JUDGE

In the presence of:-

Mr. Mbaji for the Applicant.

N/A for the Respondent.

Court Assistant: Caroline Nafuna.

