



REPUBLIC OF KENYA



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Muambi Properties Limited v Kenya Urban Roads Authority & 2 others (Environment & Land Case E078 of 2021) [2024] KEELC 4307 (KLR) (23 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4307 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E078 OF 2021
CA OCHIENG, J
MAY 23, 2024

BETWEEN

MUAMBI PROPERTIES LIMITED PLAINTIFF

AND

KENYA URBAN ROADS AUTHORITY 1ST DEFENDANT

THE NATIONAL LAND COMMISSION 2ND DEFENDANT

CADI CARRIERS COMPANY LIMITED 3RD DEFENDANT

JUDGMENT

1. By an Amended Plaint dated the 19th August, 2021, the Plaintiff seeks the following orders against the Defendants:-
 - a. A declaration that the Defendants have acted unlawfully by compulsorily acquiring the Plaintiff's portion measuring 0.7972 hectares from the Plaintiff's parcel known as L.R. No. 7374/3 without compensation.
 - b. The sum of Kshs. 52,632,888 with interest at fourteen per cent per annum with effect from 6th April, 2018 being the value of the portion acquired compulsorily without compensation by the Defendants.
 - c. Exemplary and punitive damages for breach of *the Constitution* and the law.
 - d. Cost and interest of this suit.
2. The 1st Defendant in its Defence denied the Plaintiff's averments except the descriptive. It argued that the Plaintiff is not entitled to the orders as sought. It denied that a demand and notice of intention to sue was issued to it, as claimed. It admitted the jurisdiction of the court. The 2nd and 3rd Defendants' did not file any Defences to controvert the Plaintiff's averments.



3. The matter proceeded for hearing where the Plaintiff called one witness while the Defendant also had one witness.

Evidence of the Plaintiff

4. The Plaintiff claims the Defendants' compulsorily acquired a portion measuring 0.7972 hectares, from its land parcel number L.R. No. 7374/3, hereinafter referred to as the 'suit land', without compensation. In the testimony of its witness (PW1 Harrison Muambi), it explained that initially the National Land Commission sought to acquire the land, which had been used as the Katumani-Vota-Konza Road and gazetted the land to be acquired vide Gazette Notice Nos. 3215 and 5264 of 2018. Further, the National Land Commission (2nd Defendant), hereinafter referred to as 'NLC' issued it, with an Award dated the 14th August, 2018 for Kshs. 52,632,888, which it accepted on 15th August, 2018. However, the 2nd Defendant declined to compensate him and the process of compulsory acquisition was cancelled vide gazette notice number 7666 dated the 29th September, 2020, wherein the NLC degazetted the earlier notice number 3215 and 5264 of 2018 for compulsory acquisition of land, claiming it was no longer required for the construction of the said road. It contends that, thereafter the members of public presented a Petition to the National Assembly, which after deliberations, directed that the Plaintiff's land, was to be compulsorily acquired for construction of a road. Further, that the 1st Defendant proceeded to take possession of the said land. It hence seeks compensation for the said acquired land. The Plaintiff produced the following documents as exhibits: Certificate of Incorporation and Resolution to file suit; Certificate of Title for L.R. No. 7374/3; Map created by the 1st Respondent for the area; Kenya Gazette Notice Number No. 3215 of 29th March, 2018 and 5264 of 31st May, 2018; Valuation Report dated 18th June, 2018 by messr Keriasek & Co. Ltd; Award for Kshs. 52,632,888 dated 14th August, 2018; Acceptance letter dated 15th August, 2018; Parliamentary Report; Response by the 1st Respondent; Response by the 2nd Respondent; Response by the Plaintiff; Gazette Notice number 7666 of 29th September, 2020; Various photographs of encroachment and Demand Letter.

Evidence of the Defendants

5. The 1st Defendant called one witness Patrick Kathiari Gitile (DW1), a Senior Land Surveyor. The witness confirmed that the intention to acquire the suit land halted when NLC awarded a sum of Kshs. 52,632,888 to the Plaintiff, which they felt was extremely high, as the existing budget for the entire road upgrade project only had a budget of Kshs. 33,137,520. It contended that, KURA hence opted not to proceed with the land acquisition and redesigned the road to identify an alternative route. He explained that, it is the residents of Vota Mua Ward in Machakos Town Constituency who petitioned the National Assembly regarding obstruction of the tarmacking of the said road, which they had been using for the last 50 years. He confirmed that KURA later learnt that the Senate Committee on Lands, had considered the matter and recommended that a community right of way be created on the portion of land LR No. 7374/3, by the NLC as provided for in the Lands Act, 2012 and on grounds that the same has been utilized as such for a very long time. Further, it was also the shortest and most convenient link joining Mombasa road by Vota residents. It was the witness further testimony that KURA was ready to construct the road along the said section once the NLC created a communal right of way as urged by the Senate. The following documents were produced as exhibits: Notice of taking possession Ref: NLC/VAL. 1555/22 dated 30th July, 2021; Gazette 3215 and 5264 of 2018 – Gazetting the suit parcel for acquisition; Request by the 1st Defendant to degazette the suit land; Gazette Notice No. 177 Vol. CXXIII of 2nd October, 2020 – deleting the suit parcel from the acquisition and in essence revoking Gazette Notice Nos. 3215 and 5264 of 2018; Petition to the National Assembly Committee



on lands by residents of Vota, Machakos on the suit land; Recommendation of the Departmental Committee on Lands of the National Assembly to create a public right of way on the suit land; Special Gazette Notice dated 25th June, 2021 - with notice of intention to create the right of way; Request by the implementing agency KURA for early access into the property to construct the remaining portion of the road; Notice of taking possession (early entry) pursuant to Section 120(2) of the Land Act 2012; Letter dated 30th July, 2021 addressed to both the Plaintiff and the 1st Defendant explaining the notice of taking possession; Registered post receipt confirming service of the notices and Plan of L.R No. 7374 showing the unsurveyed road running through the Plaintiff's property.

Submissions

6. The Plaintiff in its submissions provided the background of the dispute herein, reiterated the averments of the witness and relied on the exhibits it had produced. It argued that since the Defendants' initial attempt to acquire the Plaintiff's property aborted, and the Defendants failed to deliver vacant possession of the portion back to the Plaintiff, the Defendants continued to trespass on the Plaintiff's property. It stated that the 1st Defendant had erected beacons on the acquired parcel effectively asserting ownership of the portion. It argued that the Defendants' are legally bound to follow the proper procedure, before attempting to forcefully take possession of its parcel of land. It reiterated that the Defendants' gave an offer to it, after valuation for the required area. Further, that the 1st Defendant constructed a tarmac road in the area before compensating it, and relied on Section 120 of the Land Act to justify their illegality. It insisted that it is entitled to exemplary damages. To buttress its averments, it relied on various legal provisions as well as the following decisions: Lancashire County Council v Municipal Mutual Insurance Ltd [1996] 3 All ER 545; Horn v Sunderland Corporation [1941] 1 All ER 166; In Prest v Secretary of State for Wales (1982) 81 LGR 193, 198; R (on the application of Sainsbury's Supermarkets Ltd) (Appellant) v Wolverhampton City Council and another (Respondents) [2010] UKSC 20; Patrick Musimba v National Land Commission & 4 others [2016] eKLR; D K Njagi Marete v Teachers Service Commission [2020] eKLR; Gikonyo in Feroz Nuralji Hirji v Housing Finance Company of Kenya Ltd & another [2015] eKLR; David Gitaru v Government of Machakos and 2 others (2020) eKLR and MWK and Arnold -V- AG & 3 others (2017) eKLR.
7. The 1st Defendant in its submissions also provided the background of the dispute herein and relied on its witness testimony including exhibits produced. It submitted that the Plaintiff had failed to demonstrate that the 1st Defendant ever took possession of the suit land. Further, the Plaintiff has admitted that through gazette notice number 7666, the NLC degazetted the earlier notice number 3215 and 5264 of 2018 for compulsory acquisition of the suit land. It argued that through the degazetment of the earlier notice, it is evident that the government was no longer required, the suit land for the construction of the road. It further submitted that the suit land was not compulsorily acquired and hence no compensation was justifiable to be given to the Plaintiff, as it had not been deprived of its property by the 1st Defendant. It explained that the 1st Defendant indicated that the awarded sum was extremely high and way beyond their existing budget and therefore due to the high the road, KURA opted not to proceed with the acquisition and redesigned the road, to identify an alternative route alignment. It insisted that during the hearing, the Plaintiff's witness confirmed that the Plaintiff had allowed members of the public to use its land to access Mombasa road and further that he was duly informed that the process of compulsory acquisition could not be undertaken due to budget constraints by the 1st Defendant. It reaffirmed that the Plaintiff had not proved its case to the required standard and is hence not entitled to the orders as sought. To buttress its averments, it relied on the following decisions: Patrick Musimba v National Land Commission & 4 others (2016) eKLR; Civil Appeal No. 26 of 2015 Isinya Roses Limited v Zakayo Nyongesa [2016] eKLR; Karugi &



Another v Kabiya & 3 Others [1987] KLR 347; Karugi & Another v Kabiya & 3 Others [1987] KLR 347; *Attorney General v Zinj Limited (Petition 1 of 2020)* [2021] KESC 23 (KLR) (Civ) (3 December 2021) and Swalleh C. Kariuki & another v Violet Owiso Okuyu [2021] eKLR.

Analysis and Determination

8. I have considered the Amended Complaint, Statement of Defence, testimonies of the witnesses as well as rival submissions and the following are the issues for determination:-
 - a. Whether the Defendants' have acted unlawfully by compulsorily acquiring a portion of the Plaintiff's land measuring 0.7972 hectares from L.R. No. 7374/3, without compensation.
 - b. Whether the Plaintiff is entitled to the orders as sought in the Complaint.
9. It is not in dispute that the Plaintiff is the registered proprietor of the suit land. It is further not in dispute that the Defendants' had initially sought to compulsorily acquire the suit land, for construction of the Katumani-Vota-Konza Road. Further, that NLC made an Award to the Plaintiff which it accepted but the same was later rescinded, hence the land was not compulsorily acquired. PW1 during cross-examination admitted that the Plaintiff had allowed the members of the public to use the road traversing the suit land, from 1992. Further, that the Defendants' rescinded the offer to compulsorily acquire the suit land and decided to divert the road and use a longer option. DW1 explained that, the members of the public petitioned the National Assembly, which directed NLC to create a right of way through the suit land. PW1 confirmed that he received a letter, dated the 30th July, 2021 from NLC, which was copied to KURA, after the contractor had taken over the suit land and started working thereon. He contended that as per the said letter, it is NLC that took his land, created the communal right of way without compensating him. Further, that the 1st Defendant thereafter constructed a road, but it is yet to be compensated for the same and this forms the fulcrum of the dispute herein. It was PW1's further testimony that in 2018 the Plaintiff hired messrs Keriasek & Co. Ltd as valuers and they surrendered the value of suit land at Kshs. 78, 517, 500 vide their Valuation Report. The Defendants' through the testimony of DW1 denied compulsorily acquiring the suit land. DW1 contended that it is the members of the public that presented a petition to the National Assembly which culminated in the NLC being directed to create a right of way over the suit land. Further, KURA took possession of the suit land, and commenced maintaining it. DW1 however during cross examination confirmed that KURA did not issue a public notice before entering the suit land, wherein it constructed a road. Further, KURA did not create the right of way nor consult with the Plaintiff, if it had any objection.
10. From a cursory glance at the documents presented by the parties herein, I note the initial process of compulsory acquisition commenced when NLC sought to acquire the suit land, which had been used by the public, as the Katumani-Vota-Konza Road, for purposes of upgrading it to Bitumen standards. Further, vide Gazette Notice Nos. 3215 and 5264 of 2018 respectively, the said process commenced and NLC issued an Award dated the 14th August, 2018 for Kshs. 52,632,888, to the Plaintiff, which it accepted on 15th August, 2018. It emerged that the 1st Defendant had a budget for the project and since the Award issued by NLC was higher, KURA declined to compensate the Plaintiff, culminating in the cancellation of the said compulsory acquisition vide gazette notice number 7666 dated the 29th September, 2020. DW1 however, confirmed that the Senate directed NLC to create a right of way over the suit land and the 1st Defendant was directed to take possession and construct the road by the 2nd Defendant. Further, the 2nd Defendant has also commenced the process of creating a public right of way for the said portion. It is trite that process of compulsory acquisition of land is clearly guided by various legal provisions including Article 40 of *the Constitution*, as well as Sections 143 to 146 of the



[Land Act](#). This process was well articulated in case of Patrick Musimba v National Land Commission & 4 others [2016] eKLR where it was clarified that:-

“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.

Under Sections 107 and 110 of the [Land Act](#), the National Land Commission must then publish in the 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.

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: see Section 108 of the [Land Act](#).

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

The burden at this stage is then cast upon the National Land Commission and as can be apparent from a methodical reading of Sections 107 through 110 of the [Land Act](#), the landowner’s role is limited to that of a distant bystander with substantial interest.

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 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.

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. 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: see Sections 113- 119 of the [Land Act](#).

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](#).



If land is so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined: See 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.

[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.

The current procedure for acquisition of land by the State is as outlined above. As can be seen parliament took very seriously its constitutional duty to legislate on the State's powers of deprivation or expropriation. Perhaps conscious of the emotive nature of land issues, the Legislature appeared scrupulous and contemplative.

11. From the evidence I have analysed above, and in applying the facts of the case to the circumstances at hand, I am of the view that since NLC commenced creating a public right of way over the suit land and KURA already took possession, the process of compulsory acquisition begun. I opine that the Defendants' should have engaged the Plaintiff. I hence find that they breached the Plaintiff's rights by entering into the suit land, without following the strict procedure as set out, by the [Land Act](#). Further, I note there is now a right of way over the suit land, but there is no evidence that the Plaintiff has been compensated for the said road traversing its land.
12. I wish to highlight various legal provisions governing compulsory acquisition of land hereunder:-
Article 40(3) of [the Constitution](#) 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.”
13. While Section 113 of the [Land Act](#) provides that: -
 - “(1) Upon the conclusion of the inquiry, the Commission shall prepare a written award, in which the Commission shall make a separate award of compensation for every person whom the Commission has determined to have an interest in the land.
 - (2) Subject to Article 40(2) of [the Constitution](#) and Section 122 and 128 of this Act, an award—
 - (a) shall be final and conclusive evidence of—
 - i. the size of the land to be acquired;



- ii. the value, in the opinion of the Commission, of the land;
 - iii. the amount of the compensation payable, whether the persons interested in the land have or have not appeared at the inquiry; and
- (b) shall not be invalidated by reason only of a discrepancy which may thereafter be found to exist between the area specified in the award and the actual area of the land.
- (3) If an interest in land is held by two or more persons as co-tenants, the award shall state —
- (a) the amount of compensation awarded in respect of that interest; and
 - (b) the shares in which it is payable to those persons.
- (4) Every award shall be filed in the office of the Commission.”

14. Further, Section 119 of the Land Act (Amended) provides condition for payment of compensation and stipulates thus:-

“Payment of compensation shall be made only upon the exercise of due diligence which shall include final survey and the determination of the acreage, boundaries, ownership and value.”

15. In the case of Patrick Musimba v National Land Commission & 4 others (supra) the Learned Judges further held that:-

“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 through 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”. 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”: see Director of Buildings and Lands –v- Shun Fung Wouworks Ltd [1995] AC 111,125. 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. This can be achieved to the satisfaction of the owner of land by Appeal to the market value of the land.”

16. It is the mandate of the NLC to commence the process of compulsory acquisition, but whenever there is a dispute, they are required to rely on Section 133A of the Land Value Amendment Act, 2019. As per the provisions of the Land Value Amendment Act 2019, it established the Land Acquisition Tribunal. Further, Section 133A of the said Act provides inter alia:

“The Tribunal has jurisdiction to hear and determine appeals from the decision of, the Commission in matters relating to the process of compulsory acquisition of land. (2) A person dissatisfied with the decision of the Commission. May, within thirty days, apply to the Tribunal in the prescribed manner. (3) Within sixty days after the, filing of an application under this Part, the Tribunal shall hear and determine the Application.”

17. While, Section 133C (6) of the said Land Value Amendment Act 2019 stipulates that:-

“Despite the provisions of, Sections 127, 128 and 14 (5), a matter relating to compulsory acquisition of land or creation of wayleaves, easements and public right of way, shall, in the first instance, be referred to the Tribunal.” Emphasis Mine

18. From a reading of the above quoted legal provisions, it is clear that disputes emanating from creation of a public right of way, should in the first instance be referred to the Land Acquisition Tribunal which has the jurisdiction to confirm, vary or quash the decision of the NLC. Further, the Act stipulates that in the event that a party is aggrieved with the Tribunal’s decision, they can lodge an Appeal to the Environment and Land Court. Since the Land Acquisition Tribunal is now fully operational, it is my considered view that the Plaintiff should proceed to first lodge its claim therein as, it is the said Land Acquisition Tribunal that is clothed with jurisdiction to assess the proper amount of compensation that is to accrue to it, for the creation of a right of way over its land.

19. In the circumstances, while relying on the legal provisions I have cited as well as the decision quoted, I grant the Plaintiff leave of thirty (30) days from the date hereof, to lodge its Claim at the Land Acquisition Tribunal to enable it assess the correct compensation due to it for the creation of the public right of way over its land.

20. It is against the foregoing that I find this suit premature and will proceed to strike it out.

21. I will not make any order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 23RD DAY OF MAY, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of:

Kivuva for Plaintiff



Ms. Mwalizi for Defendants

Court Assistant – Simon/Ashley

