



REPUBLIC OF KENYA



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**Kimweli v National Land Commission & another (Environment & Land
Case 384 of 2017) [2024] KEELC 4090 (KLR) (22 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4090 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 384 OF 2017**

SM KIBUNJA, J

MAY 22, 2024

BETWEEN

FELISTER MWOGELI KIMWELI PLAINTIFF

AND

NATIONAL LAND COMMISSION 1ST DEFENDANT

ATTORNEY GENERAL OF KENYA 2ND DEFENDANT

JUDGMENT

1. The plaintiff commenced this suit against the National Land Commission and the Attorney General, hereinafter referred to as the 1st and 2nd defendants respectively, through the plaint dated the 17th October 2017, seeking for:
 - a. Payment of reasonable compensation for the property acquired by compulsory acquisition.
 - b. Assessment of the compensation for the property acquired.
 - c. Interest on the same amount from date of acquisition to date of payment.
 - d. Cost of the suit.

The plaintiff averred that she was the proprietor/owner/allottee of plot number 1469/Maganda Squarter Settlement Scheme, suit property, measuring 0.0332 for a term of 99 years from 2011. That the plot was compulsorily acquired by the government for establishment of SGR. That as required, the plaintiff vacated the plot and was paid Kshs.245,928/= being part of compensation for the development on the plot, on the 5th June 2015, on the promise that compensation for the land was to be paid in three months but to date that has not been done, and hence this suit.

2. The 1st defendant entered appearance through Ms. Wahome Murakaru Advocates, and filed the notice of preliminary objection dated the 20th February 2018, raising two grounds that the court is without



jurisdiction and that the matter falls within the jurisdiction of 1st defendant in line with section 112(1) and (5) of *Land Act*.

3. The 2nd defendant also filed the notice of preliminary objection dated the 9th March 2018, raising similar grounds to those raised by the 1st defendant. The 2nd defendant further opposed the suit through their defence dated the 14th June 2022, inter alia averring that it was not privy to the issues relating to the plaintiff's claim. That the plaintiff's suit against the 2nd defendant was fatally defective for failure to serve the mandatory notice of intention to sue, and it shall be raising a preliminary objection to strike out the suit. It prayed for the suit to be dismissed with costs.
4. The record confirms that on the 26th June 20218 the parties agreed that the notice of preliminary objection herein await the determination of a similar one in ELC No. 382 of 2017. I have perused the record of ELC No. 382 of 2017 and confirmed the preliminary objection filed therein was heard on the 3rd July 2018, and the court dismissed the preliminary objection in its ruling delivered on the 16th October 2018. An order was made that the order in the ruling was "to apply to ELC Nos. 383 and 384 of 2017." There is therefore no doubt that all the preliminary objections by the defendants in ELC Nos. 382 to 384 of 2017 were dismissed through the said ruling of 16th October 2018. I have perused the record for ELC No. 454 of 2017 and noted no preliminary objection had been filed by the defendants in that matter.
5. The record further confirms that on the 1st March 2023, the learned counsel for the plaintiff and 2nd defendant agreed that this suit be heard as a test suit and the outcome to apply to ELC Nos. 382 of 2017, 383 of 2017 and 454 of 2017, that are related. The decision in this suit will therefore bind those other listed three suits.
6. The plaintiff testified on the 1st March 2023 as PW1. She told the court that in 2015 she was residing at Magadi and was allocated a plot. She produced a copy of a letter of allotment for plot No. 1469 – Miritini dated 12th September 2011, as exhibit. It was her testimony that she built a two-roomed house on the plot. The house had river-stones on the walls and roofed with iron sheets. That later, the government compensated her for the development at Kshs.231,000/=, and when she asked for compensation for the 50 by 100 feet plot, she was told to leave the plot as it was wanted for the SGR project, and wait for compensation to be paid or go to court. She testified that the government did not do a valuation for the plot and that she has not been compensated for it to date despite agreeing to vacate as required. The plaintiff confirmed knowing the plaintiffs in ELC Nos. 382 of 2017, 383 of 2017 and 454 of 2017, and added that they had not been compensated for their plots. She testified that she then instructed counsel to handle the matter for her, and the counsel wrote a letter dated 7th April 2017 that she produced as exhibit and then filed this suit. She prayed to be compensated for the plot and to be paid interest and costs. During cross examination, the plaintiff stated that though she had constructed a house and grew crops on the plot, she had not availed photographs or documents to confirm it. That though the 1st defendant paid her Kshs.231,000/=, it did not serve her with a notice of taking possession of the plot. She added that she had not done a valuation for the plot. She denied that the Kshs.231,000/= she was paid was full compensation, and pointed out that the letter of award indicated on the place for the value of the land, as pending. That the 1st defendant's award was for Kshs.241,928/= but she had expected compensation of Kshs.2,000,000/= for the plot.
7. The 2nd defendant closed their case without calling any witness, as it had not filed any witness statements.
8. The learned counsel for the plaintiff and 2nd defendant filed their submissions dated the 20th April 2023 and 26th January 2024 respectively, which the court has considered.



9. In summary, the counsel for the plaintiff relied on section 111 of the [Land Act](#) No. 6 of 2012, which provides that just compensation should be paid promptly where land has been acquired compulsorily. The counsel argued that the award dated 5/6/2015 by the 1st defendant stated the total value of land as pending, and was not clear on when the 1st defendant planned to pay the plaintiff. Counsel also submitted on the procedure of acquisition and compensation step by step as described in sections 107 to 122 of the [Land Act](#), as well the constitutional provisions. He argued that according to the [Land Act](#), the 1st defendant ought to have valued the suit property immediately after acquisition, and disclose the amount payable. The counsel submitted that they wrote letters to the 1st defendant but no replies were forthcoming.
10. The 2nd defendant's counsel submitted inter alia on the whole process of compulsory acquisition as was held in the case of Patrick Musimba v National Land Commission & 4 others (2016) eKLR, and argued that the plaintiff accepted the offer, received the compensation and due process was adhered to, and was hence justly compensated. He also emphasized that the plaintiff failed to present any valuation report to prove development she undertook on the suit property. Counsel also submitted on two points of law as follows:
 - a. The plaintiff was late in filing the suit contrary to section 3 (1) of the [Public Authorities Limitation Act](#) (PALA) Chapter 39 of Laws of Kenya, which provides that proceedings based on tort cannot be brought against the government twelve months after the cause of action arose. Furthermore, counsel cemented this position with the Supreme Court of Kenya decision in the case of Zachariah Okoth Obado v Edward Akong'o Oyugib & 2others (2014) eKLR, where it held that;

“limitation of actions is not a procedural technicality and failure to file a suit on time cannot be remedied by Article 159 (2) (d) of [the constitution](#)”
 - b. Counsel also referred to the famous section 13A of the Government Proceeding Act Cap 40 and relied on the case of David Njenga Ngugi v Hon. Attorney General 2016] eKLR, where the Court of Appeal held that the section was to prevent mischief of parties suing the government without notice. He stated that the plaintiff had failed to file notice.
11. The issues for the court's determinations are as follows:
 - a. Who owned the suit property.
 - b. Whether it was compulsorily acquired by the 1st defendant.
 - c. Whether compensation paid to the plaintiff was full compensation for the plot or for the development thereon only.
 - d. What orders commends themselves to be issued in this and the three related suits.
 - e. Who pays the costs.
12. The court has carefully considered the pleadings filed by the plaintiff and 2nd defendant, evidence tendered by PW1, submissions by the two learned counsel, superior courts decisions cited, the records in the four related suits and come to the following conclusions:
 - a. The record in ELC No. 382 of 2017 confirms that the defendant's preliminary objection on the court's jurisdiction in the suits was heard and dismissed through the ruling of 16th October 2018, that was read in the presence of counsel for both defendants. The court made a further order that that ruling was to apply to ELC Nos. 383 and 384 of 2017. The learned counsel for



the 2nd defendant appear not to have been aware of the ruling of 16th October 2018 dismissing the preliminary objections, as he submitted on the same grounds of notice and jurisdiction. The court's determination in the said ruling dismissing the preliminary objections still stands as it not been reviewed, set aside or successfully appealed against.

- b. I agree with the submissions of both counsel that compensation in compulsory acquisitions is as governed by the provisions in PART VIII of the Land Act No. 6 of 2012. PW1 testified how the suit property that was allocated to her vide the letter of allotment dated 12th September 2011, that she produced as exhibit, was compulsorily acquired, by 1st defendant for the SGR project. The letter of allotment indicates the size of the plot as 0.0294 hectares, and was a leasehold for a term of 99 years from 1st September 2011. At paragraph 4 of the plaint, the plaintiff indicated her plot was 0.0332, without specifying whether it was hectares or acres. The source of that measurement of the plot is not disclosed. That notwithstanding, the defendants have not disputed the plaintiff's claim of ownership to the suit property.
- c. The plaintiff also produced as exhibit the letter of award, signed by Salome L. Munubi, for Chairman, National Land Commission, the 1st defendant, dated the 5th June 2015. Items (c) and (d) of the letter of award leaves no doubt that the Kshs.248,928/= paid to the plaintiff by 1st defendant was indeed the value of the developments on the plot, being Kshs.213,850/=, plus 15% thereof being disturbance allowance. The amount did not include the value of the plot that was compulsorily acquired. The defendants have not tendered any explanation why the plot was not valued, yet it was compulsorily acquired, and the plaintiff's ownership to the same was uncontested. It is instructive that under item (b) of the letter of award, the space for the "value of land" is shown as "Nil (pending)". The plaintiff's contention that she was asked to vacate from the plot and await compensation later has not been disputed by the defendants, and indeed the 1st defendant did not even file a defence the suit, after losing in the preliminary objection.
- d. Article 40 (3) of the Constitution 2010 states as follows:
 - "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...."

The plaintiff, has not challenged the compulsory acquisition by the government, neither has the ownership of the suit property been brought into question. The crux of the suit is that the plaintiff is apprehensive that the 1st defendant did not justly compensate her.



- e. Section 111 (1) of the *Land Act* provides that the National Land Commission shall regulate the assessment of such just compensation, and to prepare the award for compensation of such land that has been acquired. Section 111 (2) of the said Act states:

“The Commission shall make rules to regulate the assessment of just compensation.”

The Land Value Amendment Act, which made amendments to the *Land Act* No. 6 of 2012, established the Land Acquisition Tribunal at Section 133A. Section 133C provides that:

“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.”

In section 133C (6) of the *Land Act* states as follows:

“Despite the provisions of, sections 127, 128 and 148 (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.”

It follows that the Land acquisition Tribunal is the first dispute resolution mechanism established under the law in case a dispute arises from compulsory acquisition of land.

- f. Furthermore, section 133(7) provides that the Tribunal has power to confirm, vary or quash the decision of the National Land Commission. The Act further provides that if a party is dissatisfied with the Tribunal’s decision, they may appeal to the court on a question of law only, as provided by Section 133D of the *Land Act*. However, at the time of the filing of this suit, the tribunal had not yet been formed, and the jurisprudence was that an aggrieved party’s recourse was to go straight to the court. In the case of *Five Star Agencies Limited v National Land Commission* [2014] eKLR, the court held as follows:

“.....Having considered the arguments made by the parties, it is my view that the applicable law is determined by the operative date of the disputed award of compensation.”

Section 125 of the *Land Act* states as follows:

“The Commission shall, as soon as is practicable, pay full and just compensation to all persons interested in the land.”

Section 2 of the *Land Act* defines “just compensation” in relation to compulsorily acquired land or creation of wayleaves, easements and public rights means a form of fair compensation that is assessed, and determined through criteria set out under the Act.

- g. Unfortunately, the criteria under section 107A of the *Land Act* in assessing the value of the land to be compulsorily acquired, came into operation after the award herein had been made. A journal by the world bank named as “PPP Insights’ Volume 1 Issue 3 discussed ‘Compulsory



Acquisition of Land and Compensation in Infrastructure Projects’ and stated the following on just compensation:

“Market value is the benchmark found in most compulsory acquisition laws when it comes to the calculation of compensation for an acquired asset. Laws and constitutions may also refer more broadly to principles such as “just” or “fair” compensation. Yet a key consideration that emerges when one surveys the wide variety of economic, social and cultural settings in which takings occur is that there is no universally appropriate method for calculating loss. To design compensation packages that will genuinely approach the objective of ensuring that people are no worse off than they were before the taking requires careful tailoring to local realities. Thus, even laws from highly developed market economies generally recognize that compensation needs to go beyond the value of routine gap between stated values and actual values. Although admittedly easier to apply, none of the approaches are ideal, and may in some cases result in significant divergence between the “legal” and “actual” market value of land.”

On just compensation, the court in Patrick Musimba case [supra] stated as follows:

“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.’

The failure by the 1st defendant to value or quantify the plaintiff’s plot, that it compulsorily acquired, and to promptly pay her just compensation, when the plaintiff’s title to the plot was not in question, was not only unlawful but a contravention of the plaintiff’s right to property protected under Article 40 of *the Constitution*, 2010.

- h. The fact that Mesiaba Jaka, Shadrack Ndegwa Munga, and Kazungu Nyanje Ziro, the plaintiffs in ELC Nos. 382 of 2017, 383 of 2017 and 454 of 2017 respectively, filed similar claims to that of the plaintiff herein, is a pointer that the 1st defendant must have caused injustice to the land owners, whose plots it compulsorily acquired at Maganda Settlement Scheme for the SGR project, without ensuring the plots were valued and just compensations were paid to the rightful owners promptly. There is a legitimate expectation that valuation should have been conducted by the 1st defendant to enable it make a proper assessment for compensation.
- i. The court cannot make a determination on what amount would suffice as just compensation for the suit properties that were compulsorily acquired, without a valuation report being availed. Had the 1st defendant done the valuation and indicated the value in the award to the plaintiff, the position would have been different. The court would have dealt with the question of adequacy or appropriateness of the award or compensation thereof, and not valuation of the plot.
- j. Section 107 (1) of the *Evidence Act*, chapter 80 of the Law of Kenya, provides that:

“ 107.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist...”

I have perused the awards in ELC Nos. 382 of 2017, 383 of 2017 and 454 of 2017 and the amounts therein are Kshs.1,327,618, 1,149,080 and 370,090 respectively. The values contained thereon are indicated to be for improvements on the land in question. Other than in ELC No. 383 of 2017, all the other files are indicated at the space for value of land as “pending”. As earlier pointed out above, only the 1st defendant could have offered explanations as to why the plots acquired, subject matter of the four suits, were not valued, but it opted not to file defence and or defend the suits, though served. Having considered the foregoing, I find the plaintiff has made out her case against the 1st defendant.

- k. The role of the 2nd defendant in the process of the compulsory acquisition subject matter of this suit has not been explained. The court takes judicial notice that none of the government ministries and or agencies that the 2nd defendant ordinarily comes on record for, and defends in civil litigations, is a party in this suit. The plaintiff has therefore failed to show how the 2nd defendant could be held responsible for her claim. The plaintiff’s claim against the 2nd defendant therefore fails.
- l. That pursuant to section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya, the plaintiff is awarded costs to be borne by the 1st defendant, but the 2nd defendant will bear its own costs.



13. The foregoing leads the court to the conclusion that the plaintiff has proved its case against the 1st defendant on a balance of probabilities. The court therefore enters judgement for the plaintiff and orders as follows:
- a. That a declaration is hereby issued that the plaintiff is entitled to just compensation for plot number 1469-Miritini, Mombasa that was compulsorily acquired by the 1st defendant for the SGR project in 2015.
 - b. That the 1st defendant is hereby directed to conduct a valuation of the suit property acquired for the said project and ensure the plaintiff receives just compensation promptly.
 - c. That the suit property's valuation be done, and compensation to the plaintiff be paid within six (6) months from today.
 - d. The 1st defendant to meet the plaintiff's costs.
 - e. The plaintiff's claim against the 2nd defendant is hereby dismissed with no order as to costs.

It is so ordered.

DATED AND VIRTUALLY DELIVERED ON THIS 22ND DAY OF MAY 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Plaintiff : Mr Oyas

Defendant : No appearance.

Leakey – Court Assistant.

S. M. Kibunja, j.

ELC MOMBASA.

