



Said & another (Suing as the administrators of the Estate of the Late Said Mohamed Mtawa - Deceased) v National Land Commission (Environment and Land Appeal E019 of 2023) [2024] KEELC 6242 (KLR) (25 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6242 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E019 OF 2023
NA MATHEKA, J
SEPTEMBER 25, 2024**

BETWEEN

NOOR HASSAN SAID 1ST APPELLANT

FAHIMA SAID MOHAMED 2ND APPELLANT

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE SAID
MOHAMED MTAWA - DECEASED**

AND

THE NATIONAL LAND COMMISSION RESPONDENT

JUDGMENT

1. Noor Hassan Said and Fahima Said Mohamed being the administrators of the estate of the late Said Mohamed Mtawa (now deceased) appeal against the decision and/or award of the Respondent herein being Kshs 12,825,265/= for Parcel No. MNI/VI/1745 and Kshs. 42,019,240/= for Parcel No. MN/VI/1746 upon compulsory acquisition as exercised by the Respondent vide Gazette Notice No. 10503 dated 4th October 2018 on the following grounds:

1. That the Appellants' parcels of land being MN/VI/1745 and MN/VI//1746 were compulsorily acquired. by the Respondent and the contested awards being Kshs. 12,825,265/= and Kshs. 42,019,240/= respectively, were, given arbitrarily in total disregard and violation of the law and *the constitution* and moreso the Appellants right to fair administrative action and the right to private property as enshrined in Articles 47 and 40 of *the Constitution* of Kenya 2010.
2. That the actual area of land acquired on the respective aforementioned parcels being 0.05ha is a gross underestimation and the subsequent awards of Kshs. 12,825,265/= and Kshs. 42,019,240/= respectively, is a gross undervaluation of the Appellants properties which was



arrived entirely on the opinion of the Respondent without the benefit of the actual claim of the Appellants and cannot be taken to mean full and just compensation.

3. That the Respondent deliberately failed and/or ignored to take into account the loss of value of land and loss of use of the parcels of land by the Appellant when considering to offer the in dispute.
4. That the Respondent deliberately failed and/or ignored to consider the actual size/area of the land acquired, location, utility and the market value of the properties of the Appellants in relation to similar neighborhood properties previously sold but arrived at an opinion of a unilateral quantum of the contested awards not backed by any survey and valuation contrary to Section 107(8) of the Land Act, 2012 and Land (assessment of just compensation) Rules 2017.
5. That the Respondent deliberately failed and/or ignored to take into account that the compulsory acquisition of the Appellants parcels of land affected their lifestyle, family and their entire business forcing them to start over.
6. That the Respondent applied a flawed arbitral and unknown opinion or decision on the compensation assessment decision and awarding figures without giving reasons and factors considered in arriving at the aforementioned amounts in total disregard and violation of the principles of just compensation under Article 40(3) of the Constitution of Kenya 2010.
7. That the Respondent deliberately ignored protests from the Appellants against the awards and denied the Appellants an opportunity to be heard contrary to Article 47 of the Constitution of Kenya 2010 being a denial of their right to fair administrative action which adversely affected the Appellants right to private property as enshrined under 40 of the Constitution of Kenya 2010.
8. That the Respondent deliberately ignored the valuation reports by M/S Musyoki & Associates being registered and licensed practicing Valuers who prepared and reported the following findings: MN/VI/1745 was valued at Kshs. 59,250,000/= as at 12th November 2018 and MN/VI/1746 was valued at Kshs. 104,500,000/= as at 12th November 2018 the findings of which the Appellants rely on in this appeal and ask for payment of the remaining balances respectively being Kshs, 46,424,734/= and Kshs. 62,480,760/= the amounts of which are due and owing.
9. That the Respondent has deliberately failed to pay the Appellants just and full compensation for the compulsorily acquired properties.

For those reasons the Appellants pray:

1. That the appeal be hereby allowed.
 2. That the Respondent be ordered to pay the balances of Kshs. 46,424,734/= and Kshs. 62,480,760/= for the Appellants' parcels MN/VI/1745 and MN/VI/1746 respectively or the proper valued amount per market value on each parcel of land compulsorily acquired.
 3. That the Respondent provide the reports on Survey, Inspection and Valuation to the Appellants parcels of land before acquisition.
 4. That costs and interest of the appeal be awarded to the Appellants at commercial rate.
2. The appellants stated that they are the registered owners of Land Parcel No. MN/VI/1745 and MN/VI/1746. The two parcels of land were gazetted to be compulsory acquired by the respondent.



The respondent valued Land Parcel No. MN/VI/1745 and MN/VI/1746 at Kshs 12,825,265/= and Kshs 40,019,240 respectively. The appellants' land was compulsorily acquired for the Port Reitz-Moi Airport road project, to enhance access in and out of the Port of Mombasa to reduce congestion and operational costs. The acquisition being for public purpose, took the appellants' land against their will with the use of statutory authority, and as such they ought to be justly compensated. Article 40 (3) of *the Constitution*, which forms the basis of compulsory acquisition states 'prompt payment in full of just compensation to the person' deprived of their property. In *Patrick Musimba v National Land Commission & 4 others* [2016] eKLR it was held that;

3. 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”.

4. A prompt payment in full of just compensation as stated under Article 40 (3) of *the Constitution* does not mean any speculative value of the land but an equivalent value which could be the market value. The appellants challenge the criteria used by the respondent in assessing compensation, which they argued was a gross undervaluation of their properties. They claimed that the respondent failed to consider the size and market value of the suit properties and that the award was not backed by any survey or valuation contrary to Section 107 (8) of the *Land Act*. The respondents claimed the respondent gave a blanket figure for Land Parcel No. MN/VI/1745 and MN/VI/1746 at Kshs 12,825,265/= and Kshs 40,019,240 respectively. It was argued that the respondents did not conduct a valuation of the suit properties and failed to consider the valuation report submitted by the Petitioner, which was prepared which valued Land Parcel No. MN/VI/1745 at Kshs 59,250,000/= and MN/VI/1746 at Kshs 104,500,000/=.
5. The appeal was served but the Respondent failed to file any responses. The Appellant states that this court has jurisdiction to entertain this appeal from the National Land Commissions which concerns compensation arising out of compulsory acquisition of their land. I find that the preliminary issue for determination is that of jurisdiction.

Article 162(2) of *the Constitution* states as follows;

- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to:
 - (a) employment and labour relations; and
 - (b) the environment and the use and occupation of, and title to, land.”
6. Section 13 of the *Environment and Land Court Act* sets out in details, the extent of the jurisdiction of the court in the following terms:



- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (2) In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes?
 - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.
- (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*.
- (4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
- (5) Deleted by *Act No. 12 of 2012*, Sch.
- (6) Deleted by *Act No. 12 of 2012*, Sch.
- (7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including?
 - (a) interim or permanent preservation orders including injunctions;
 - (b) prerogative orders;
 - (c) award of damages;
 - (d) compensation;
 - (e) specific performance;
 - (g) restitution;
 - (h) declaration; or
 - (i) costs”

Article 40(3) of *the Constitution* provides that;

7. 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 conversion of an interest in land, or title to land, in accordance with Chapter Five; or



- (b) is for 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, or 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.
8. Part VIIIA of the *Land Act* provides a framework on how disputes relating to the compulsory acquisition are to be adjudicated. Under Section 112 of the Act, the National Land Commission is obligated to publish a notice of intention to compulsorily acquire land. The Section obligates the National Land Commission to appoint a date for an inquiry into the intended compulsory acquisition. At the stage of inquiry, the Commission hears issues relating to propriety and claims for compensation by persons interested in the land.
9. Section 133C of the *Land Act* sets out the jurisdiction of the Land Acquisition Tribunal as follows;
- 1) 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.
 - 3) Within sixty days after the filing of an application under this part, the Tribunal shall hear and determine the application.
 - 4) Despite subsection (3) the Tribunal may, for sufficient cause shown, extend the time prescribed for doing any act or taking any proceedings before it upon such terms and conditions, if any, as may appear just and expedient.
 - 5) If, on an application to the Tribunal, the sum which in the opinion of the Tribunal ought to have been awarded as compensation is greater than the sum which the commission did award, the Tribunal may direct that the Commission shall pay interest on the excess at the prescribed rate.
 - 6) Despite the provision 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.
 - 7) Subject to this Act, the Tribunal has power to confirm, vary or quash the decision of the Commission.
 - 8) The Tribunal may, in matters relating to compulsory acquisition of land, hear and determine a complaint before it arising under Articles 23(2) and 47(3) of *the Constitution*, using the framework set out under Fair Administrative Action or any other law.
10. Section 133D of the *Land Act*, vests in this court appellate jurisdiction and states as follows;
- (1) A party to an application to the Tribunal who is dissatisfied with the decision of the Tribunal may, in the prescribed time and manner, appeal to the court on any of the following grounds:
 - (a) the decision of the Tribunal was contrary to law or to some usage having the force of law;



- (b) the Tribunal failed to determine some material issue of law or usage having the force of law; or
 - (c) a substantial error or defect in the procedure provided by or under this Act has produced error or defect in the decision of the case upon the merits.
- (2) An appeal from the decision of the Tribunal may be made on a question of law only.
11. Part VIII and Part VIIIA of the Land Act states that disputes relating to propriety and claims for compensation by persons interested in land which is the subject of compulsory acquisition are to be adjudicated by the National Land Commission through the mechanism of inquiry contemplated under Section 112. If there is no satisfactory resolution of the dispute, the next step is the Land Acquisition Tribunal established under Section 133A of the Land Act. If a party is dissatisfied with the determination of the Tribunal, the next step is this court. The appellate jurisdiction of this court is, however, restricted to issues of law. This court takes judicial notice that the said Tribunal was gazetted and is operational.
12. The inquiry contemplated under Part VIII is an adjudicatory one and is intended to address disputes relating to the propriety/appropriateness of the intended compulsory acquisition and claims for compensation by persons interested in the land. It is for that reason that there is the right of appeal to the Tribunal under Section 133C(1) and (2) of the Land Act. I find that the jurisdiction of this court has been prematurely invoked in this Appeal. The Appellants needed to pursue the inquiry contemplated under Section 112 of the Land Act and the Land Acquisition Tribunal established under Section 133A of the Land Act. For these reasons this appeal is struck out. The Appellants are at liberty to pursue appropriate redress as provided under the law. There will be no order as to costs as the appeal was undefended.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF SEPTEMBER 2024.

N.A. MATHEKA

JUDGE

