



**Odhiambo v Kenya Railways Corporation & 2 others (Environment and Land Case Civil Suit 438 of 2018) [2024] KEELC 7061 (KLR) (28 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7061 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 438 OF 2018**

**JA MOGENI, J**

**OCTOBER 28, 2024**

**BETWEEN**

**MARY ODHIAMBO ..... PLAINTIFF**

**AND**

**KENYA RAILWAYS CORPORATION ..... 1<sup>ST</sup> DEFENDANT**

**THE NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> DEFENDANT**

**THE OFFICE OF THE ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The background of the case is that the 1<sup>st</sup> Defendant acquired the Property L R No L.R. No 209/13543 measuring 0.7145 hectares from the total acreage measuring 1.50 hectares allotted to the plaintiff on 25/07/1990.
2. Vide a letter dated 3/06/2015 the 2<sup>nd</sup> defendant informed the plaintiff that the suit property had been ear marked for compulsory acquisition by the Government for purposes of construction and development of the Mombasa-Nairobi Standard Gauge Railways line. However, the 2<sup>nd</sup> defendant failed to acquire the entire property, and only recommended to the 1<sup>st</sup> defendant the acquisition of 0.7145 hectares and this being the upper portion of the suit property which was assessed at the cost of Kshs. 60,915,500 and the award for this acquired portion was made by the 2<sup>nd</sup> defendant on 14/10/2015.
3. The decision by the 2<sup>nd</sup> defendant to acquire and recommend the acquisition of the upper half portion of the suit property rendered the remaining half in the lower portion inaccessible to the plaintiff denying her the right to own and use the property as is her constitutional right. This led to the plaintiff writing to the 2<sup>nd</sup> defendant on 12/10/2015 requesting for acquisition of the remaining portion due to its inaccessibility to the plaintiff but the letter to the 1<sup>st</sup> defendant by the 2<sup>nd</sup> defendant dated 23/10/2015 was not responded to.



4. It has however emerged that the 1<sup>st</sup> defendant undertook immediate acquisition and possession of the entire property which is fully accessible to it and has been using the same for its purpose and profitable gain despite having paid for half of the portion. At the same time whereas the 2<sup>nd</sup> defendant caused to be recalled the letters of allotment issued to the plaintiff failed to cause both a fresh survey of the acquired portion and a fresh issuance of a title deed for the unacquired portion thus rendering the land incapable of further use and/or disposal by the Plaintiff as is her constitutional right.
5. As a result of the continued used and refusal to settle, the plaintiff's claim on compulsory acquisition of the land and failure to pay compensation owned to the plaintiff in respect of the remaining portion, the plaintiff prays for judgment against the defendants for:
  - a. An order directing the 2<sup>nd</sup> Defendant to conduct a fresh and current valuation of the unacquired portion, being 0.7145 hectares, of the parcel of land known as LR 209/13543 situated in Embakasi, Nairobi
  - b. An order directing the 2<sup>nd</sup> Defendant to acquire and issue a letter of award to the Plaintiff for the unacquired portion, being 0.7145 hectares, of the parcel of land known as LR 209/13543 situated in Embakasi, Nairobi premised on the current valuation sought in prayer (a) above.
  - c. An order directing the 1<sup>st</sup> Defendant to acquire and or pay for the aforesaid unacquired portion, being 0.7145 hectares, of the parcel of land known as LR 209/13543 situated in Embakasi, Nairobi as per letter of award to be issued under prayer (b) above.
  - d. Interest on (b) (c) above at court rates and for such period as the court shall think just
  - e. Costs of this suit
  - f. Any other order that the court may deem fit to grant.
6. The 1<sup>st</sup> defendant filed a defence on 27/11/2018 and undated amended defence in 2021 denying each and every allegation of the plaintiff's claim. It pleads that it only acquired the portion of land it needed from L R No L.R. No 209/13543 total acreage measuring 1.50 hectares belonging to the plaintiff which is 0.7145 hectares, of the parcel of land known as LR 209/13543 situated in Embakasi, Nairobi. For this the award made by the 2<sup>nd</sup> defendant was honored and the plaintiff was paid Kesh 60,915,500/-.
7. The 1<sup>st</sup> defendant contends that it has not acquired the other portion of the land belonging to the plaintiff as alleged by the plaintiff. That the reliefs sought against them cannot issue in the absence of a procedural compulsory acquisition based on law and executed by the 2<sup>nd</sup> defendant.
8. It is the 1<sup>st</sup> defendant's plea that the plaintiff's plea against them is bad in law and it offends Section 87 of Cap 397. That even if the plaintiff had any claim against them it would be time-barred and would not lie in compensation for compulsory acquisition. The 1<sup>st</sup> defendant avers that compensation for compulsory acquisition is based on the need of a public body to acquire land for a purpose and not on request and that is why there was no gazettelement of the alleged suit land which a process that the 2<sup>nd</sup> defendant (NLC) should have undertaken.
9. The 1<sup>st</sup> defendant alleges the plaintiff's claim is unsuited and that she wants to obtain public funds undeservedly and unprocedurally and prays that the suit is dismissed.
10. On his part the 2<sup>nd</sup> defendant filed a defence dated 27/03/2023 and denies each and every allegation contained in the Amended Plaint save for those that are merely descriptive of the parties.
11. The 2<sup>nd</sup> defendant states that the 1<sup>st</sup> defendant ( "acquiring authority") seeking to undertake the construction of the Mombasa – Nairobi Standard Gauge Railway, requested and instructed the 2<sup>nd</sup>



- defendant to compulsorily acquire various suit properties along the said corridor as per the provisions of Article 40 of *the Constitution* and Chapter VIII of the *Land Act*.
12. That the 2<sup>nd</sup> defendant caused to be Published a Notice of Intention and a Notice of Inquiry to acquire the above property notifying all the affected property owners or persons identified with interest in parcels of land to attend an inquiry and present their claims of compensation.
  13. That the plaintiff duly attended the inquiry and upon conclusion, the award was prepared taking into consideration the provisions of Part VIII of the *Land Act* and the provisions of the Land (Assessment of Just Compensation) Rules, 2017. From the meeting she duly accepted the terms of the award by appending her signatures and the funds were disbursed.
  14. It is the 2<sup>nd</sup> defendant's contention that in undertaking compulsory acquisition, the 2<sup>nd</sup> defendant does not act independently without instructions from an acquiring body. That in this particular cases it was issued with a design of the project for the construction of the Mombasa – Nairobi Standard Gauge Railway including the affected parcel of lands and the acreage to be acquired by the 1<sup>st</sup> defendant.
  15. The 2<sup>nd</sup> defendant avers that it received specific instructions to acquire part of the Plaintiff's parcel of land measuring 0.7145 Ha, and remitted the amount of Kshs.60,915,500/= in respect thereof, therefore it cannot proceed to acquire the remaining portion of land unless further instructions are obtained from the 1<sup>st</sup> defendant.
  16. It is the 2<sup>nd</sup> defendant's prayer that the court finds that there is no reasonable cause of action as against the 2<sup>nd</sup> defendant and thus it is not liable to pay costs of this suit. Further that the court dismisses the suit against the 2<sup>nd</sup> defendant with costs.
  17. On its part, the 3<sup>rd</sup> defendant filed a defence dated 12/01/2022 and denied each and every allegation contained in the Amended Plaintiff and only admits the paragraphs of the Amended Plaintiff in so far as the same are merely descriptive of the parties. It avers that the function of compulsory acquisition is purely the mandate of the 2<sup>nd</sup> defendant. The 3<sup>rd</sup> defendant further avers that there was no notice of intention to sue Government issued to the Hon. Attorney General as required by Section 13A of the *Government Proceedings Act*.
  18. It is the 3<sup>rd</sup> defendant contention that this suit does not raise any cause of action against it.
  19. I inherited this file from my brother Justice Wabwoto who was transferred and thus it was a part-heard matter. The plaintiff had already testified before I took over the matter. The parties opted to have my court continue with the matter and not start afresh.

### **Plaintiff's Case**

20. The plaintiff called one witness. She testified and adopted her witness statement on 21/11/2023 including her list and bundle of documents. When she was cross-examined she told the court that stated that the 2<sup>nd</sup> defendant paid her the initial compensation. That she instructed a surveyor to undertake a survey since she could not access her plot there being no access road. That she was told that the 1<sup>st</sup> defendant had been allocated the parcel of land. She testified that from the survey report she can see an access road but it was not there on the ground.
21. On re-examination she testified that she received an invitation to attend the hearing of LR 209/13543. According to her the hearing was about the whole suit parcel and that she was not given the deed plan for the portion that was not taken, that she does not have documentation to show that she owns the portion that was not taken. She testified that the 1<sup>st</sup> defendant has not contested the ownership of her



parcel. It was her testimony that she wrote to the 2<sup>nd</sup> defendant informing them that she did not have access to the other half of the property and that the area was restricted.

22. PW1- Patrick Opiyo told the court that he is a Land Surveyor by training and that he had filed a survey report dated 28/10/2022. He testified that the suit parcel No. LR 209/13543 is owned by the plaintiff and a portion was acquired by the SGR being 0.745 hectares but that Kenya Railways, the 1<sup>st</sup> defendant fenced the whole parcel because when he went to the ground that is what he found and that is what he wrote in his report.
23. It was his submission in the report he presented that there is a proposed sub-division plan attached to the bundle which shows roads. However, he testified in cross-examination that whereas on the map the roads are there on the ground there are no roads. In re-examination he stated that there is not access road because it is fenced off by Kenya Railways. With this the plaintiff closed her case.

### **Defence Case**

24. The 1<sup>st</sup> defendant called one witness – Duncan Mwangi Gachuhi (DW1) who testified and adopted his witness statement dated 31/07/2019. He stated that he was a land surveyor working with the 1<sup>st</sup> defendant corporation. In cross-examination he testified that the plaintiff is the owner of the suit property of the entire parcel.
25. He told the court that in his report he has stated that the suit property is accessible although the plaintiff has stated that it is not. He further testified that the 1<sup>st</sup> defendant had acquired some land from some companies which was to allow the plaintiff access to Mombasa road including the properties that were land locked. He also testified that the plaintiff had written to NLC vide a letter requesting for acquisition of the remainder of half the plot since she had no access and that NLC vide a letter dated 23/10/2015 forwarded the request for the purchase of the remainder to the 1<sup>st</sup> defendant.
26. When cross-examined further on access he testified that the access road constructed is already in use although he had not provided any photos to support this claim in his report. He also referred to a letter dated 24/02/2020 where there was a request for temporary access through the Kenya Railways Road to the suit property and paragraph 1 of the letter states that it was for private use. Further the Registry Map Sheet Nol 16 produced show that the roads were not developed and so the owner of 209/16437 was requesting for access.
27. He testified that he was aware that the plaintiff could not access her property but that she offered that the 1<sup>st</sup> defendant to purchase her property and that she never sought for temporary access. On re-examination he stated that the letter from the plaintiff to NLC was requesting for Kenya Railways to buy the balance of the suit property left after the initial acquisition and such a purchase will be subject to public procurement. With that the 1<sup>st</sup> defendant closed its case.
28. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants did not call any witnesses and thus it was assumed that the close of the 1<sup>st</sup> defendant's case also marked the close of their case.

### **Analysis and Determination**

29. I have carefully considered the pleadings filed, annexures and evidence adduced at the hearing including submissions filed by the parties. In my considered view, the issues that arise for determination are;
  - a. Whether the unacquired portion of the suit property was compulsorily acquired by the 1<sup>st</sup> defendant and the plaintiff was not compensated



- b. What was the extent of occupation by the 1<sup>st</sup> defendant of the suit property?
- c. Whether the Plaintiff is entitled to the orders sought.

**Whether the unacquired portion of the suit property was compulsorily acquired by the 1<sup>st</sup> defendant and the plaintiff was not compensated.**

30. Article 40 of *the Constitution* 2010, protects the right to own and acquire property in any part of Kenya and specifically provides that no one will be deprived of their property by the state unless the deprivation results in acquisition of land in accordance to Chapter Five of *the Constitution* or is for a public purpose and is done in accordance with *the 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.
31. Essentially therefore, deprivation of property by the state which is generally manifest as compulsory acquisition has to be accompanied by prompt, full and just compensation, as provided in *the Constitution* and the *Land Act*.
32. In the case of *Attorney General vs Zinj Limited [Petition 1 of 2020]* [2021] KESC 23 (KLR) (CIV) (3 December 2021), the Supreme Court held as follows;
- “It follows that any compulsory acquisition process ought to have commenced with a requisite Notice to the Respondent, and any other persons claiming an interest in the land, the public purpose for which the land was to be acquired, ought to have been clearly stated. Most critically, the resultant acquisition ought to have been attended with prompt payment in full, of a just compensation to the Respondent.”
33. The process for compulsory acquisition has been provided for in Sections 107 to 131 (Part VIII) of the *Land Act*. Section 107 of the Act provides that whenever there is need for either the County or National Government to acquire land, the Cabinet Secretary or the County Executive Committee member makes a request for the acquisition of the land to the National Land Commission. Where the Commission establishes that the request meets the requirements in Article 40 (3) of *the Constitution*, the Commission ensures the land in question is mapped out and valued and ensure the acquiring authority has identified the number and register of the persons in actual occupation of the land and establish the time they have uninterruptedly occupied the land or their ownership interest therein. The commission then publishes in the Gazette the intention to acquire the land. Section 112 of the Act provides that 30 days upon publishing of the Notice of intention to acquire land, an inquiry date is set to hear matters of proprietary and claims for compensation by persons interested in the land, and thereafter the inquiry is done. Section 111 provides that where the land is compulsorily acquired, just compensation must be paid in full to all persons whose interests in the land have been determined.
34. In the instant case, there is no dispute that the owner of the suit property is entitled to compensation in the sum assessed by the 2<sup>nd</sup> Defendant. What is in dispute is non-acquisition of the other half portion of the suit property which is said to be in accessible. The survey report of the plaintiff presented by PW1 and the testimony of DW1 both confirmed that the plaintiff indeed has no access to the portion that was left by the 1<sup>st</sup> defendant. Both witnesses confirmed that the said portion has been fenced by the 1<sup>st</sup> defendant. This in essence means that the plaintiff has no access to her portion of land left.



35. Further the plaintiff testified that the 2<sup>nd</sup> defendant did not undertake a survey that would have allowed her to access a deed plan and neither did the 2<sup>nd</sup> defendant issue her with a new title following the acquisition for half portion of the land for which she was compensated. In essence, the plaintiff cannot make use of the half portion that was not “acquired” by the 1<sup>st</sup> defendant since she not only has no access but that she has no title to the half portion of land which as testified by herself and PW1 has been fenced by the 1<sup>st</sup> defendant.
36. The governing statute at the time the acquisition is alleged to have taken place was the Land Acquisition Act Cap 295. The Plaintiff avers that due process was followed and she was paid what she was awarded for half of the suit parcel however for the other half of the suit property the 1<sup>st</sup> defendant despite facing the parcel did not compensate her yet they are unable to access the suit property.
37. The plaintiff produced correspondence including the survey report that she assigned a surveyor to prepare. In denying the allegation of the Plaintiff, the 1<sup>st</sup> defendant produced the gazette notice that served notice of the intended acquisition. It has also produced correspondences written to neighbours who owned suit property in the project area seeking temporary access but none to show that the said temporary access was granted. Infact, the surveyor who produced the 1<sup>st</sup> defendant’s commissioned survey report confirmed that the plaintiff had not access to the half of the unacquired suit property.
38. The witness called by the plaintiff alleged that the suit property was compulsorily acquired by the 1<sup>st</sup> defendant through the action of fencing it and making use of it to the exclusion of the plaintiff. I have already alluded to the process recognized by the law in order for a property to be compulsorily acquired. This Court has seen letters that have been purportedly used to compulsorily acquire the suit land. The 1<sup>st</sup> defendant despite fencing off the whole parcel of land has denied having compulsorily acquired the whole portion but having been the one who allegedly fenced off the entire parcel it had the onus of proving otherwise. Without any documentation to this effect not even a Gazette Notice to this effect, this court has no reason to rely on the 1<sup>st</sup> defendant’s word. Further DW-1 who is a surveyor who came to give evidence on behalf of 1<sup>st</sup> defendant confirmed that the whole parcel is fenced off and that apart from the plaintiff there were other parties who had no access to their parcels and to Mombasa road.
39. DW1- testified and stated that the plaintiff has never approached the 1<sup>st</sup> defendant seeking to be granted permission to access the remainder half portion. The question that I have is this – why would an honor of a land or an owner of property have no access to their property? *The Constitution* in Article 50 did not anticipate a limitation of this right by any person unless by application of *the constitution* itself. How can I own land then I am told I must ask for permission from my neighbor to access my land? Is that ownership, servitude or a mockery of right to property?
40. From the evidence before this court I am persuaded to find that the 1<sup>st</sup> defendant should indeed compensate the plaintiff for the unacquired portion that is already fenced and being used by the 1<sup>st</sup> defendant. The procedure of doing so is not for this court to address because that is not what is before the court.

**What was the extent of occupation by the 1<sup>st</sup> defendant of the suit property?**

41. The question of extent of occupation by the 1<sup>st</sup> defendant of the unacquired portion has been answered by the two surveyors’ reports and therefore this Court is inclined to use the said reports to make its findings. Though the 1<sup>st</sup> defendant had denied occupying the plaintiff’s whole parcel by way of fencing off the portion that the plaintiff was not awarded for. It is revealing that the PW1’s report has alleged that the 1<sup>st</sup> defendant occupied the whole of the portion of land, the Surveyor’s Report indicates that



the activities of the 1<sup>st</sup> defendant have covered the entire suit property and therefore it is this Court's opinion that that it is not only the half portion that the 1<sup>st</sup> defendant took away from the Plaintiff.

42. The Court has perused the surveyor's report from the plaintiff's Surveyor and he had indicated that the 1<sup>st</sup> defendant had fenced off the unacquired portion locking out the plaintiff from her land. The plaintiff on the other hand testified that she was not able to access the unacquired portion of the suit land and she brought before this court evidence to support her allegations. Section 107 and 108 of the Evidence Act requires that whoever alleges must prove of the existence of such facts, in this case having produced the documentation that supports her assestion, this Court finds and holds that the area of occupation by the 1<sup>st</sup> defendant is that which was reported by the PW1 and DW1 including the plaintiff herself.

#### **Whether the plaintiff is entitled to the orders sought.**

43. As a government or government institution, it is governed by section 5 1 (a) and (c) of the National Land Commission Act, CAP 5D, which is grounded upon Article 67 (2) (a) of the Constitution which provides that for the purposes of acquiring land for carrying out a government project it must acquire the same through the National Land Commission. Although the 2<sup>nd</sup> defendant argued that it is non-suited, I disagree because the National Land Commission cannot be sued without including the benefiting institution. Secondly, the 2<sup>nd</sup> defendant has capacity to sue and be sued and the Plaintiff did not have to sue the national government to defend it.
44. There is the question about the portion of land acquired which has been the running subject of this analysis. Having come to a conclusion that the suit land was fenced off denying the plaintiff access, this Court must therefore answer the question as to whether or not the Plaintiff is entitled to the reliefs that she has sought. The Plaintiff has sought for compensation for the unacquired parcel since it is occupied by 1<sup>st</sup> defendant. As already noted, the suit land was never wholly acquired as the 1<sup>st</sup> defendant only paid for half the portion of the suit parcel but it has emerged that the plaintiff was denied access to the unacquired portion and infact it was fenced off. Thus this Court has no option but to find that the said prayer is merited.
45. This Court will take Judicial Notice that the 1<sup>st</sup> defendant is a State Corporation and to this extend, it is in the interest of the public that the said Company is in good shape, up and running. The Court takes into account that public interest should not override private interest. However, in this instant case, the plaintiff has testified that she was willing to let go of the suit land and be given compensation by the 1<sup>st</sup> defendant through the acquisition process to be undertaken by the 2<sup>nd</sup> defendant who to this date despite having acquired a portion of the suit property has not provided the sub-division of the suit property nor a new title to the plaintiff.
46. It is this Court's opinion that in this instant case, the Public interest can be protected while also protecting the interest of the plaintiff. The plaintiff having been willing to take compensation, the Court finds and holds that the portion already occupied by the 1<sup>st</sup> defendant should be left to the 1<sup>st</sup> defendant for its access and use but subject to the 1<sup>st</sup> defendant compensating the plaintiff for the said half portion which must be acquired by the 2<sup>nd</sup> defendant.
47. In the case of Gami Properties Limited...Vs...National Land Commission [2017] eKLR, the Court held that;

“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”.

48. It is important to note that the compensation that was done was based on a valuation report that covered the half portion. However, the Court directs the 1<sup>st</sup> defendant to compensate the plaintiff for the other half portion which it has emerged is already fenced and in fact the plaintiff for the last 9 years has not had access to due to the activities being undertaken on the land by the 1<sup>st</sup> defendant. This Court therefore finds that there is a need for the area occupied by the 1<sup>st</sup> to be valued and then the 1<sup>st</sup> defendant through the 2<sup>nd</sup> defendant to compensate the plaintiff with regard to the said portion.
49. This Court having carefully considered the available evidence, it finds that the Plaintiff has proved her case on the required standard of balance of probability. Consequently this Court enters Judgment for the Plaintiff against the Defendant on the following terms: -
- a. An order is hereby issued directing the 2<sup>nd</sup> Defendant to conduct a fresh and current valuation of the unacquired portion, being 0.7145 hectares, of the parcel of land known as LR 209/13543 situated in Embakasi, Nairobi
  - b. An order is hereby issued directing the 2<sup>nd</sup> Defendant to acquire and issue a letter of award to the Plaintiff for the unacquired portion, being 0.7145 hectares, of the parcel of land known as LR 209/13543 situated in Embakasi, Nairobi premised on the current valuation sought in prayer (a) above.
  - c. An order is hereby issued directing the 1<sup>st</sup> Defendant to acquire and or pay for the aforesaid unacquired portion, being 0.7145 hectares, of the parcel of land known as LR 209/13543 situated in Embakasi, Nairobi as per letter of award to be issued under prayer (b) above.
  - d. The court awards interest on (b) and (c) above at court rates from the date of this judgment until payment of the award
  - e. The court dismisses the suit against the 3<sup>rd</sup> defendant.
  - f. Costs of this suit are awarded to the plaintiff to be borne by the 1<sup>st</sup> defendant.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28<sup>TH</sup> DAY OF OCTOBER, 2024.**

**MOGENI J**

**JUDGE**

In the Virtual Presence of:-

Mr. Mutei for 1<sup>st</sup> Defendant

Mr. Omelto holding brief for Mr. Adunga for Plaintiff

No appearance for 2<sup>nd</sup> Defendant



Ms. Caroline Sagina - Court Assistant.

