



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISUMU**  
**ENVIRONMENT & LAND COURT**  
**JUDICIAL REVIEW CASE NO.12 OF 2013**  
**NAS AUTO SPARES.....APPLICANT**  
**VERSUS**  
**LAND ACQUISITION & COMPENSATION TRIBUNAL...1ST RESPONDENT**  
**THE COMMISSIONER OF LANDS.....2ND RESPONDENT**  
**THE CHAIRMAN NATIONAL LAND COMMISSION.....3RD RESPONDENT**  
**J U D G M E N T**

1. INTRODUCTION

(a) The exparte applicant, Nas Auto Spares Ltd, filed the Notice of Motion dated 23<sup>rd</sup> April 2013 against The Land Acquisition Compensation Tribunal and The Commissioner for Lands seeking for the following orders:

" 1. **AN ORDER OF PROHIBITION** prohibiting the Respondent his officers or agents or any other person or entity acting under his authority from implementing any award made under the Land Acquisition Compensation Tribunal as purportedly constituted under the Land Acquisition Act (Cap 295) (repealed) in purported compensation for the compulsory acquisition of the Applicant's parcel of land namely

**KISUMU/KASULE/5522.**

2. **AN ORDER OF CERTIORARI** to remove this Honourable Court to be quashed the proceedings and decision of the respondent, his officers or agents or any other person or entity acting under his authority to a purported award on compensation for the compulsory acquisition of the Applicant's said parcel of land namely **KISUMU/KASULE 5522** which award was purportedly made on the 11/7/2012.

3. **AND ORDER OF MANDAMUS** compelling the Respondent his officers or agents or any other person or entity acting under his authority to compensate the Applicant for the compulsory acquisition of its said parcel of land namely **KISUMU/KASULE/5522** under the provisions of the Land Act (Number 6 of 2012) and not the Land Acquisition Act (Cap 295) (repealed).

4. That this Honourable Court do proceed to make such other or further orders that it may deem apt in the circumstances.

5. That costs of these proceedings be catered for."

**(b)** The application is based on five grounds as set out belows:

" 1. The Respondent has purported to award compensation for the compulsory acquisition of the Applicant's said parcel of land in July 2012 under the Land Acquisition Compensation Tribunal as constituted under the Land Acquisition Act (Cap 295) whilst the said Act had already been repealed in May 2012 and thus had no force of law it being non-existent at the material time save as repealed Act.

2. That in view of the repeal of the Land Acquisition Act (Cap 295) Laws of Kenya by the Land Act 2012 in May 2012 the appeal to the Land Acquisition Compensation Tribunal could not possibly lie as the said Tribunal no longer existed in law.

3. The Respondent's said award is therefore Whimsical, Arbitrary, Illogical, Unreasonable, Capricious, Illegal, Irrational, Ultra Vires, Null and Void and are an Utter and Blatant abuse of power.

4. That the Respondent's actions are thereby Unlawful, Improper in Law and in fact, amount to an act of Utter Bad Faith and Ineptitude, Malicious, Oppressive and Utterly unjust to the applicant.

5. That the reliefs sought herein can only be obtained before this Honorable court by virtue of these proceedings."

The exparte applicant had earlier when applying for leave which was granted on 10<sup>th</sup> April 2013 filed a verifying affidavit sworn by Naresh Kumar Rambhai Patel on 21<sup>st</sup> March 2013 and Statement of facts also dated 21<sup>st</sup> March 2013.

2. The following is the summary of the Exparte Applicants case as is discernable from the grounds on the application, statements of facts and evidence affidavit filed.

(a) That the Exparte Applicant purchased land parcel Kisumu/Kasule/5522 which is a subdivision from Kisumu/Kasule/4500 and got registered as proprietors on 28<sup>th</sup> March 2011. The land is 0.21 hectares as shown on the title deed issued on 29<sup>th</sup> March 2011 and annexed to the verifying affidavit.

(b) That the land was compulsorily acquired by the Government and a formal letter of award was received by the Exparte Applicant. {The letter of award annexed to the verifying affidavit and marked "NAS 4" is addressed to Henry Awuoth Odego and is in respect of Plot No.KISUMU/Kasule/1777. The letter is dated 11<sup>th</sup> July 2012.}

(c) That the Exparte Applicant was dissatisfied with the amount offered under the award and instructed Counsel to file an appeal. That Exparte Applicant was advised by Counsel that no appeal could be filed before the Land Acquisition Compensation Tribunal as it had ceased to exist following the repealing of that Land Acquisition Act, Chapter 295 of Laws of Kenya under Section 161 (1) of the Land Act No.6 of 2012 which came into operation on 2nd May 2012.

(d) That though the deponent on the verifying affidavit indicated in paragraph 2 and 10 that he had annexed a certificate of official search, what has actually been annexed is a copy of the register certified on 18<sup>th</sup> July 2012 for land parcel Kisumu/Kasule/5222, measuring 0.05 hectares indicating that it was a subdivision of plot 398 and that it was registered in the names of Thomas Osome Kidiga on 7<sup>th</sup> December 2009.

(e) That the Respondents action were "capricious, unreasonable, illogical, ultra vires, oppressive manifestly unjust, irrational arbitrary, callous, in bad faith, utterly unjust and are a patent and abject

abuse of power, ” and therefore this application should be allowed.

**3.** The Application is opposed by the Respondents who filed a replying affidavit sworn by Elias Gitari Rwigi on 14<sup>th</sup> October 2013 whose highlights are as follows:

(a) That Commissioner for lands received a request from Kenya National Highways Authority to acquire Land for Nyamasaria Heavy Truck Parking through letter dated 2<sup>nd</sup> March 2010 and upon receiving the ministerial consent under letter dated 6<sup>th</sup> May 2010 gazatted the intention under gazatte notice No.8753 of 23<sup>rd</sup> July 2010.

(b) The notice for public inquires was also gazatted as notice No.8754 dated 23<sup>rd</sup> July 2010.

(c) That the due process was followed and after inspection and valuation of the land, the letter of awards to the land owners were served.

(d) That in respect of the Exparte Applicant complaint, it was found out that the land was owned by a different person namely Agnes Adhiambo Seda to whom the award dated 13.2.2011 was sent to.

(e) That the process to compulsorily acquire the land was conducted under the Land Acquisition Act Chapter 295 of Laws of Kenya (Repealed) and not under the Land Act number 6 of 2012.

(f) That the letter of award annexed to the Exparte Applicants verifying affidavit dated 2012 were not addressed to the Exparte Applicant and hence not meant for them.

(g) That the acquisition was conducted in accordance with procedure and the Government has taken possession.

**4.** The Exparte Applicant then filed a further affidavit sworn by Naresh Kumar Rambhai Patel on 4<sup>th</sup> November 2013 in response to the replying affidavit. This said further affidavit has the following highlights:

(a) That documents mentioned in the replying affidavit were not annexed.

(b) That Agnes Adhiambo Seda was not the the registered proprietor of Kisumu/Kasule/5522 in July 2010 when the gazatte notice was published. That the said Agnes got registered as the owner on 9<sup>th</sup> December 2010 before transferring ownership to the Exparte Applicant. A copy of the green card for parcel Kisumu/Kasule/5522, affidavit sworn by Agnes Adhiambo Seda on 12<sup>th</sup> November 2013, certificate of official search for parcel Kisumu/Kusule/5522 dated 25<sup>th</sup> July 2012, copy of title deed for the said parcel of land, sketch plan showing part of the road and adjacent plots, mutation forms for Kisumu/Kasule/440, letters dated 22<sup>nd</sup> November 2011 and 11<sup>th</sup> July 2012 are annexed to the further affidavit.

**5.** The Exparte Applicant filed a Chamber Summons under Certificate of Urgency dated 25<sup>th</sup> September 2014 seeking to enjoin the Charman National Land Commission. The application was granted on 29<sup>th</sup> September 2014 but there is no indication whether the National Land Commission have been served with the pleadings herein and the Order of 29<sup>th</sup> September 2014 enjoining them. The only document served on The National Land Commission according to the affidavit of service sworn by Mitchell J. B. Menezes on 10<sup>th</sup> April 2015 is a hearing notice dated 2<sup>nd</sup> April 2015. The National Land Commission did not participate in the proceedings.

**6.** On the 15<sup>th</sup> April 2015 Counsel for the Exparte Applicant and Respondents agreed to have the notice of motion dated 23<sup>rd</sup> April 2013 dealt with through written submissions. The submission for the Exparte Applicant dated 7<sup>th</sup> May 2015 were filed on 12<sup>th</sup> May 2015 while those for the Respondents dated 9<sup>th</sup>

June 2015 were filed on the 10<sup>th</sup> June 2015.

7. The issue for determination is whether on the facts presented, the compulsory acquisition process undertaken by the Respondents was in accordance with the law and whether the Judicial review orders sought should issue.

8. The court has considered the grounds on the application, statements of facts, supporting, replying and further affidavits plus the submissions by Counsel and come to the following determination:

(a) That the copy of the title deed for Kisumu/Kasule/5522 issued on 29<sup>th</sup> March 2011 and annexed to the verifying affidavit indicates its size as 0.21 hectares. It also shows that the parcel is a " Subdivision of plot 4500 " and that it was registered in the names of the Exparte applicant NAS AUTO SPARES LIMITED on 28<sup>th</sup> March 2011.

(b) That also annexed to the verifying affidavit is a copy of the register for Kisumu/Kusule/5222 measuring 0.05 hectares. This parcel is indicated to be a "Subdivision of plot 398 " and was registered in the names of Thomas Osome Kidiga on 7<sup>th</sup> December 2009.

(c) That the fourth document annexed to the verifying affidavit is an award from the Ministry of Lands dated 11<sup>th</sup> July 2012 in respect of " Plot No. Kisumu/Kasule/1777".

The Award is addressed to one Henry Awouth Odago. Attached to the award is a document bearing a date of 19<sup>th</sup> July 2013 and has a signature at part B. The other portions or areas including where the plot number and owners should be filled are left blank.

(d) That as can be seen in the above findings, the title deed, copy of the register and the award refer to three different parcels of land owned by three different persons. The Exparte Applicant has not provided the nexus between the parcel registered in their name, that is Kisumu/Kasule/5522 which is 0.021 hectares, and the two others, that is Kisumu/Kasule/5222 and 1777. The award under the letter dated 11<sup>th</sup> July 2012 was in relation to land parcel Kisumu/Kasule/1777 and not Kisumu/Kasule/5522.

(e) That the copy of the register for Kisumu/Kasule/5522 annexed to the further affidavit shows the plot is a "subdivision of plot 440" and that the register was opened on 9<sup>th</sup> December 2010. It also indicates that the plot appears on registry map number 13. These details contradict those in the copy of the title deed that had been annexed to the verifying affidavit earlier. The title deed as shown in (a) above shows the parcel was subdivided from plot 4500. It further shows the register was opened on 18<sup>th</sup> August 2010 and that the plot appears on registry map number 10.

The Exparte Applicant did not offer any explanations on these glaring and apparent differences in the two documents they provided through the verifying and further affidavits. The contradictions and the origin of parcel Kisumu/Kasule/5522 whether from plot 4500 or 440, when its register was opened and whether it appears on registry map No.10 or 13 leaves the court with doubt as to the veracity and genuineness of the documents of ownership of the parcel which the Exparte Applicant has provided.

(f) That the mutation forms attached to the affidavit of Agnes Adhiambo Seda sworn on 12<sup>th</sup> November 2013 and attached to the further affidavit shows the subdivision was registered on 19<sup>th</sup> October 1989. The said Agnes Adhiambo Seda got registered as proprietor of Kisumu/Kasule/5522 on 9<sup>th</sup> December 2010 and was issued with the title deed on 26<sup>th</sup> January 2011 (see the copy of the register annexed to the further affidavit).

(g) That, flowing from the finding in (f) above, Agnes Adhiambo Seda therefore appears to have been the registered proprietor of Kisumu/Kasule/5522 by the time the Gazette notice Numbers 8753 and 8754 of 23<sup>rd</sup> July 2010 were issued. Though Elias Gitari Rwigi, the deponent of the replying affidavit sworn on 14<sup>th</sup> October 2013 did not attach the letters/documents mentioned in paragraphs 3, 4 and 13 of the

said affidavit, the court has taken note of the fact that Agnes Adhiambo Seda has not faulted the acquisition process but confirms that compensation due should be in favour of the Exparte Applicant to whom, she sold the plot in 2011.

(h) That as the Exparte Applicant was not the registered proprietor of the plot Kisumu/Kasule/5522 until after they got registered with it on 28<sup>th</sup> March 2011, there was no way they could complain about the process that had taken place before that date. It is however surprising that the Exparte Applicant got registered as proprietors of a parcel of land that had been compulsorily acquired by the Government. According to the Respondent, the acquisition process had been completed and awards dated 15<sup>th</sup> February 2011 issued. {See paragraph 13 of the replying affidavit}.

(i). That flowing from (h) above, the court find that contrary to the Exparte Applicant's position, the acquisition process herein was completed before the Land Act number 6 of 2012 came into operation on 2nd May 2012. The process was commenced and completed under the Land Acquisition Act Chapter 295 of Laws of Kenya which was later repealed under Section 161 of the Land Act on 2<sup>nd</sup> May 2012.

(j) That under the Land Acquisition Act, any party not satisfied with the award could have lodged an appeal with the Land Acquisition Compensation Tribunal. There is nothing to show that Agnes Adhiambo Seda or any other person claiming beneficial interests over Kisumu/Kasule/5522 lodged any appeal.

(k) That as the court in its Judicial review jurisdiction is concerned with the process in the decision making of public bodies rather than the merit of the decision the Exparte Applicant has failed to show the Respondents did not follow the the due process in the acquisition process in respect of Kisumu/Kasule 5522. The Respondent issued the requisite notices, conducted hearings, did the valuations and issued the awards to those with recognisable legal interests. The Exparte Applicant has not indicated that the Respondents had declined to grant them an opportunity to be heard during the process.

For reasons set out above, the court finds, that the Exparte Applicant's notice of motion dated 23<sup>rd</sup> April 2013 is without merit and is dismissed with costs.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

Dated and Delivered this **28th day of October 2015**

In presence of

Applicant N/A

Respondent N/A

Counsel Mr Indimuli for Nyamweya for applicants.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**28/10/2015**

28/10/2015

S.M. Kibunja J.

Oyugi court clerk

Parties absent

Mr Indimuli for Mr Nyamweya for Applicants

The A.G for Respondents absent

Court: Judgment delivered in open court in presence of Mr. Indimuli for Mr Nyamweya for the Applicants.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**28/10/2015**

Mr Indimuli: I seek leave to appeal.

Court: Right of appeal is automatic but nevertheless granted.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**28/10/2015**