



**Hiuhu v National Land Commission & another (Environment & Land Case E219 of 2021) [2023] KEELC 609 (KLR) (31 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 609 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E219 OF 2021  
EK WABWOTO, J  
JANUARY 31, 2023**

**BETWEEN**

**MICHAEL GICHERU HIUHU ..... PLAINTIFF**

**AND**

**NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> DEFENDANT**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By a Plaint dated April 27, 2018, the plaintiff sought for the following reliefs against the 1<sup>st</sup> and 2<sup>nd</sup> defendant;
  - a. A permanent injunction be issued against the defendants restraining them and or their servants from entering, trespassing, being upon, utilizing, or in any other way interfering with the land parcel L.R No. Sigona/700.
  - b. A declaration that the plaintiff's protected right to property has been violated by the respondent's acts of encroachment onto the trespass upon and damage to the plaintiff's property.
  - c. A declaration that the encroachment onto trespass upon expropriation of the plaintiff's property known as L.R No. Sigona/700 by the defendants for the expansion of the James Gichuru – Rironi Junction road is illegal, null and void.
  - d. An order that the defendants do adequately compensate by making an award as per the valuation report conducted by the plaintiff by the land measuring 0.031 ha from parcel of land known as L.R No. SIGONA/700.
  - e. An order compelling the defendants to pay damages to the plaintiff for the loss and damage suffered.



- f. Costs of the suit.
2. It was the plaintiff's case that he is the absolute and indefeasible owner of land known as L.R No. Signona/700 with an approximate area 0.08 hectares. By gazette notice No. 2533 of 16<sup>th</sup> March 2018, the 1<sup>st</sup> defendant declared its intention to acquire a portion of the suit property for the purposes of construction of James Gichuru -Rironi Road which project is still ongoing. The land intended to be acquired comprised of 0.0223Ha hived out of L.R No. Sigona/700.
  3. During the hearing of the suit the plaintiff testified as PW1, He relied his witness statement and bundle of documents dated on 15<sup>th</sup> June 2021 as part of his evidence in chief.
  4. He stated that the 1<sup>st</sup> Defendant valued the portion of land to be acquired and the improvements thereon at 41,166,700/- as compensation for the plot which he was paid.
  5. It was also his testimony that the defendants also sent surveyors to place beacons on the acquired land and mark the same as a road reserve. They placed beacons further into the plaintiff's property which meant that the compulsory acquired portion was 0.031Ha as opposed to 0.0223Ha that appeared in the gazette notice. It was also the plaintiff's case that if the defendants acquired 0.031 Ha it will make his block of flats inhabitable since the staircase and party of the building beyond the stair case falls within the 0.031Ha.
  6. The plaintiff also stated that he tried following up the matter with the defendants on several occasions but the same was ignored.
  7. Margaret Sarah Wanjiru Njoroge, a land surveyor testified as PW2. She stated that she visited the property on 17<sup>th</sup> February 2021. She prepared a surveyor's report which was produced as PExhibit 4. At the site, she identified the extend of the boundaries and established the 4 beacons. She also stated that the beacons delineating the road on the suit property were encroaching on the remainder part of the property. Her recommendation was that the 2<sup>nd</sup> Respondent needs to revisit the survey owing to an error on their part since it needs to accurate conform to the Kenya Gazette.
  8. Hezekiah Githu Muiruri, a valuer testified as PW3. He produced two valuation reports dated 17<sup>th</sup> March 2021 and 12<sup>th</sup> March 2021. He stated that in valuation report dated 17<sup>th</sup> March 2021 the value of acquiring the 0.031Ha together with the improvements thereon would be 77,200,000/- or Ksh 76,985,600/- as per the other report dated 12<sup>th</sup> March 2021.
  9. The 1<sup>st</sup> Defendant never filed any statement of defence in respect to the suit herein neither did they call any witness to testify on their behalf. The 2<sup>nd</sup> Defendant filed a statement of defence dated October 29, 2021 but did not call any witness to testify on their behalf.
  10. I have considered the plaintiff case, the oral evidence tendered and the documentary evidence that was produced in respect to this suit and the main issues for determination are:-
    - i. Whether the Plaintiff have proved his case against the Defendants to the required standard.
    - ii. Whether the Plaintiff is entitled to reliefs sought.
  11. I will now proceed to analyze all the two issues sequentially.
  12. The process of land acquisition is vested under article 40 of *the Constitution*. The process through which the 1<sup>st</sup> Defendant is to compulsorily acquire land is further set forth under the provisions of the



Land Act part VIII on the Compulsory Acquisition of interests in land from Section 107. 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— 30 Constitution of Kenya, 2010
    - (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. It is thus not in doubt that the Constitution requires that any award and or compensation that is made to a person whose land is being compulsorily acquired to be prompt, in full and just. In the case of Patrick Musimba ... Vs...National Land Commission & 4 others [2016] eKLR the Court 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 though 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.’

14. Therefore, it is not in doubt that once a land has been acquired, the Plaintiff is required to be compensated for the equivalent of that which had been acquired. The Plaintiff’s contention that the Defendants compulsory acquired portion was 0.031 Ha as opposed to 0.0223 Ha that appeared in the Kenya Gazette Notice was not controverted. Further the letters sent to the Defendants had not yielded any response.
15. In the absence of any defence and or controverting evidence, this court is satisfied that the Plaintiff has proved his case in so far as the ownership of the suit property is concerned.
16. Article 67 of the Constitution establishes the National Land Commission with mandate over public land including land that has been compulsorily acquired. The Land Act (2012) governs the process of Compulsory Land Acquisition in Kenya and mandates at section 111(1) 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:

“If land is acquired compulsorily under this Act, just compensation shall be paid promptly in full to all persons whose interests in the land have been determined.

  - (2) The Commission shall make rules to regulate the assessment of just compensation.”
17. The Land Value Amendment Act 2019 which made amendments to the Land Act (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.”
18. Section 133C(6) of the Land Act provides that: “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.” This means 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. 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.
19. However, this court was not informed whether the Tribunal has been constituted. In view of the foregoing, the orders sought by the Plaintiff in respect the compensation as per the valuation report submitted in his evidence cannot be granted at this stage.
20. On whether or not the plaintiff is entitled to damages, it was submitted that the area to be acquired had improvements as the plaintiff had constructed a block of flats that have been rendered inhabitable by the acquisition of 0.031 Ha. The 1<sup>st</sup> Defendant had already carried out the demolitions to pave way for the construction of the road.



21. The said evidence was never controverted and it is indeed the finding of this court that the plaintiff is entitled to compensation for general damages. In his submissions, the plaintiff urged this court to award him 3,000,000/- as adequate damages and reliance was made to the case of *Muchene (the sole Executrix of the Estate of George Muchene Kirumba) vs Attorney General & 4 Others* (Environment & Land Petition 14 of 2017) [2022] (Judgment) in support.
22. Being guided by the above case and considering the circumstances of necessity the filling of the instant suit, I will proceed to award a figure of Kshs.2,000,000/= being compensation for damages.
23. On the issue of costs, section 27 of the *Civil Procedure Act* gives the Court the discretion to grant costs. Ordinarily, costs usually follow the event, unless special circumstances are presented to the Court. In the instant case the Plaintiff claim has partially succeeded as against the defendants and in the circumstances, I will direct each party to bear own costs of the suit.
24. Consequently, the Court makes the following orders;
  - a. A declaration be and is hereby made that the Plaintiff's right to property has been violated by the Respondents acts of encroachment, trespass, damage to the property and expropriation of the Plaintiff's property known as L.R No. Sigona/700.
  - b. The 1<sup>st</sup> Respondent be and is hereby directed to conduct a survey, inspection and valuation in respect of LR No. Sigona/700, belonging to the Plaintiff within 60 days from the date hereof.
  - c. General damages are awarded to the Plaintiff in the sum of Kshs. 2,000,000/=
  - d. Each party to bear own costs of the suit.
  - e. Parties be at liberty to apply where appropriate.

Judgment accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31<sup>ST</sup> DAY OF JANAUARY, 2023**

**E.K. WABWOTO**

**JUDGE**

In the Presence of

Ms. Kihika for the Plaintiff.

N/A for the 1<sup>st</sup> Defendant.

N/A for the 2<sup>nd</sup> Defendant.

Court Assistants– Caroline Nafuna and Philomena Mwangi.

