



Fidei Holdings Limited v Kenya Railways Corporation Limited & another (Environment & Land Case 263 of 2019) [2023] KEELC 16720 (KLR) (29 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16720 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 263 OF 2019**

**JO MBOYA, J
MARCH 29, 2023**

BETWEEN

FIDEI HOLDINGS LIMITED PLAINTIFF

AND

KENYA RAILWAYS CORPORATION LIMITED 1ST DEFENDANT

NATIONAL LAND COMMISSION 2ND DEFENDANT

JUDGMENT

1. The Plaintiff herein is the lawful and registered proprietor of LR No 15053, I.R No 50705, (hereafter referred to as the suit property), situate at Embakasi area, within the City County of Nairobi.
2. On or about October 2014, the 2nd Respondent herein generated and issued various gazette notices, wherein same expressed her desire to compulsorily acquire various properties, for and on behalf of the 1st defendant herein. For clarity, the various properties, which were affected by the impugned notices included, inter-alia, the suit property herein.
3. Subsequently, the 2nd defendant carried out and undertook the requisite statutory Inquiry pertaining and attendant to the compulsory acquisition in respect of the suit Property. In this regard, the 2nd defendant ultimately generated an award in the sum of kes.69, 000, 000/= only, to and in favor of the Plaintiff.
4. Suffice it to point out that the Plaintiff thereafter signified and intimated her acceptance of the award. Consequently, one (read, a reasonable Person), would have expected that upon receipt of the letter of acceptance, the 2nd defendant would process and release the monies/compensation at the foot of the award.



5. Nevertheless, the 2nd Defendant herein failed to process and to release the compensation at the foot of the Letter of award and thus provoking the exchange of a plethora of correspondence between the Plaintiff and the 2nd Defendant.
6. Be that as it may, the 2nd defendant herein failed and neglected to process and pay out the requisite compensation. Consequently, the impugned failure provoked the filing of the current suit.
7. *Vide* Plaint dated the August 13, 2019, the Plaintiff herein has approached the Honourable court seeking for the following reliefs;
 - i. The said Defendants be compelled to forthwith pay to the Plaintiff the sum of Kes.69, 000, 000/= only.
 - ii. Interest on (a) above until payment in full.
 - iii. Costs of the suit
8. Upon being served with the summons to enter appearance, the 1st Defendant duly entered appearance on the September 27, 2019 and thereafter filed a Statement of Defense on the October 16, 2019, wherein the 1st Defendant contended, inter-alia, that same was a stranger to the claim/compensation sought by the Plaintiff.
9. On the other hand, the 2nd Defendant similarly entered appearance and filed a statement of defense, wherein (sic) same similarly disputed the claim by and on behalf of the Plaintiff herein.
10. Upon the close of pleadings, the subject matter underwent the usual Pre-trial/ Case conference and thereafter same was confirmed ready for hearing.

Evidence by the Parties

a. Plaintiff's Case:

11. The Plaintiff's case revolves and gravitates around the Evidence of one witness, namely, George Kariuki, who testified as PW1.
12. It was the evidence of the witness that same is a Director of the Plaintiff company and thus same is conversant with and knowledgeable of the facts pertaining to and concerning the subject matter.
13. In addition, the witness averred that the Plaintiff herein is the lawful and registered proprietor of the property otherwise known as LR no 15035, measuring approximately 0.81 Ha and situate at Embakasi Area, within the City of Nairobi.
14. Furthermore, the witness testified that on or about the year 2014, the 2nd Defendant herein sought to compulsorily acquire land for purposes of the construction of the Standard Gauge Railway (SGR) and in this regard, several parcels of lands, inter-alia, the suit property were identified and earmarked for compulsory acquisition.
15. It was the further testimony of the witness that upon the suit property being earmarked for compulsory acquisition, the Plaintiff herein was served with the requisite statutory notices, inviting same to attend and participate in the requisite inquiries, for purposes of determining the compensation due and payable.
16. On the other hand, the witness testified that pursuant to and in compliance with the various notices that were served upon the Plaintiff, same attended the inquiry/meeting, wherein deliberations were carried out and undertaken culminating into an award being arrived at.



17. Additionally, the witness testified that upon the award being arrived at and confirmed, the 2nd defendant herein generated a Letter of award dated the October 14, 2016 and wherein the 2nd defendant awarded and certified the sum of Kes.69, 000, 000/= as due and payable.
18. Other than the foregoing, the witness also testified that upon the issuance of the letter of award, the Plaintiff herein proceeded to and generated a letter of acceptance, wherein the Plaintiff confirmed her acceptance of the terms of the award.
19. Besides, the witness testified that upon the issuance of the letter of acceptance, the Plaintiff herein developed a legitimate expectation that the 2nd Defendant, in liaison with the 1st Defendant, would facilitate the release and payment of the compensation.
20. Nevertheless, it was the testimony of the witness that despite frantic and concerted efforts, the Defendants herein failed to process and pay out the compensation in terms of the Letter of award. In this regard, the witness pointed out that the Plaintiff was therefore constrained to and indeed filed the instant suit.
21. Other than the foregoing, the witness alluded to the witness statement dated the 28th March 2022 and same sought to adopt and rely on the said witness statement. In this regard, the witness statement was duly adopted and admitted as evidence in chief.
22. Furthermore, the witness also alluded to the List and Bundle of documents dated the March 28, 2022 and same sought to adopt and produce the named Documents as Exhibits on behalf of the Plaintiff.
23. In the absence of any objection from the counsel for the Defendants, the documents at the foot of the List dated the March 28, 2022 was duly admitted as exhibits P1 to P7, respectively.
24. On cross examination by counsel for the 1st Defendant, the witness herein pointed out that the transaction that was carried out and undertaken by the 2nd Defendant, culminating into the letter of award was carried out above-board.
25. On the other hand, the witness also pointed out that upon the issuance of the letter of award, the Plaintiff made several follow-ups to procure and obtain payments from the 2nd Defendant, albeit to no avail.
26. Be that as it may, the witness added that the 2nd defendant kept writing to the 1st defendant *vide* various letters, *inter-alia*, the letter dated the January 9, 2019, wherein the 2nd defendant intimated to the 1st defendant to process and facilitate the payment of the compensation.
27. In addition, the witness pointed out that the letter dated the 9th January 2019 was lawfully procured and obtained. In this regard, the witness disputed a suggestion that the impugned letter was illegally procured and obtained.
28. On cross examination by counsel for the 2nd defendant, the witness pointed out that the Plaintiff herein bought and/or purchased the suit property in the year 1990. Besides, the witness added that the suit property was bought from a person who had hitherto been allocated same.
29. In respect to a question pertaining to whether same had brought before the court a copy of the Sale Agreement, the witness pointed out that no Sale agreement had been placed before the Honourable court.
30. Furthermore, the witness also averred that same had also not brought before the Honourable court any evidence of transfer instrument, relating to and concerning the transfer of the suit property into the name of the Plaintiff.



31. Additionally, the witness averred that the suit property was acquired from one Honorable Darius Darius Mbela, who was hitherto the registered proprietor/owner of the suit property.
32. On the other hand, the witness testified that the Plaintiff herein was thereafter issued with the requisite certificate of title, confirming and authenticating that the Plaintiff is the lawful and legitimate proprietor of the suit property.
33. Whilst under further cross examination, the witness pointed out that the acreage of the suit property is defined vide the Part Development Plan which was prepared by the Director of Physical Planning and a copy of which is attached to the certificate of title.
34. Furthermore, the witness pointed out that the suit property measures 0.8 Ha and that the acreage is reflected in the Part Development Plan.
35. Other than the foregoing, the witness averred that during the Inquiry, the 2nd Defendant herein carried out and undertook a survey on the suit property and the outcome of the survey was thereafter acted upon in assessing and arriving at the award.
36. In this respect, the witness avers that the letter of award captures and reflects the acreage 0.81 Ha.
37. As to discrepancies between the area reflected on the PDP and the one shown in the Letter of award, the witness pointed out that the discrepancies may have arisen because acreages are approximated and not exact.
38. In any event, the witness testified that the acreage shown at the foot of the letter of award arose from the survey carried out and conducted by the 2nd Defendant and not otherwise.
39. Furthermore, the witness added that the suit property is currently under the occupation and possession of the 1st Defendant, who has constructed/erected various infrastructural facilities pertaining to and concerning the Standard Gauge Railways (SGR).
40. On re-examination, the witness herein pointed out that during the Inquiry, the 2nd Defendant undertook an exhaustive interrogation of the Plaintiff's title and also verified records obtaining at the Land Registry. In this regard, the witness added that the 2nd Defendant was duly satisfied about ownership and Title of the suit property.
41. Additionally, the witness also stated that no one and/or no organization has ever challenged or sought to impugn the authenticity of the certificate of title in the name of the Plaintiff herein.
42. On the other hand, the witness also pointed out that the acreage shown and reflected in the Letter of award arose/ resulted from a survey exercise undertaken and conducted by the 2nd Respondent.
43. Finally, the witness pointed out that the suit property is currently in the possession of the 1st Defendant, who is using same for own activities/purposes.
44. With the foregoing testimony, the Plaintiff's case was duly closed.

b. The 1st Defendant's Case

45. Though the 1st Defendant duly entered appearance and thereafter filed a Statement of Defense, it is imperative to state and underscore that the 1st Defendant neither filed any List and Bundle of documents or any witness statement, at all.



46. Having not filed any List and Bundle of documents and witness statement(s), the 1st Defendant intimated to the Honourable court that same would neither be calling any witness nor producing any documents.
47. In this regard, the 1st Defendant's case was duly closed, albeit without calling for any evidence.

c. The 2nd Defendant's Case

48. Similarly, even though the 2nd Defendant also entered appearance and filed a Statement of Defense, same neither filed any List/Bundle of documents nor witness statement, in respect of the subject matter.
49. Suffice it to point out that counsel for the 2nd Defendant also intimated to the Honourable Court that the 2nd Defendant would not be calling any witness nor producing any document in evidence.
50. In view of the foregoing, the 2nd Defendant's case was also closed, albeit without any witness and evidence, whatsoever.

Submissions By The Parties:

a. Plaintiff's Submissions:

51. The Plaintiff filed Written submissions dated the March 15, 2023; and in respect of which, the Plaintiff raised, highlighted and amplified three (3) issues for consideration and determination by the Honourable court.
52. Firstly, learned counsel for the Plaintiff submitted that the Plaintiff herein was the lawful and legitimate proprietor in respect of LR No 15053, which is the suit property that was the subject of compulsory acquisition.
53. In this regard, learned counsel for the Plaintiff has pointed out that prior to and/or before the compulsory acquisition, the Plaintiff was duly issued with the requisite certificate of title pertaining to and concerning the suit property. For clarity, learned counsel invited the Honourable court to take cognizance of Exhibit P5, being the certificate of title pertaining to and concerning the suit property.
54. On the basis of the certificate of title, which was produced as exhibit P5, learned counsel submitted that the Plaintiff was the lawful, registered and legitimate proprietor of the suit property.
55. Furthermore, learned counsel for the Plaintiff further submitted that the legality of the certificate of title in the name of the Plaintiff was neither raised nor ventilated by the 2nd Defendant herein or at all.
56. Secondly, learned counsel for the Plaintiff has further submitted that the suit property was the subject of an Inquiry, which was carried out and undertaken by the 2nd Defendant, in accordance with the provisions of sections 107 to 113 of the *Land Act*, 2012 (2016), culminating into an award in favor of the Plaintiff.
57. Additionally, learned counsel has submitted that prior to and before arriving at the award/compensation, the 2nd Defendant undertook an in-depth analysis of the Plaintiff's title and the commensurate compensation, due and payable to the Plaintiff.
58. Owing to the foregoing, learned counsel for the Plaintiff has therefore contended and submitted that the suit property was compulsorily acquired by and at the instance of the 2nd Defendant herein.



59. Thirdly, learned counsel for the Plaintiff has submitted that at the conclusion of the Inquiry pertaining to and in respect of the suit property, the 2nd Defendant generated a letter of award, wherein same signified/intimated the compensation due and payable at the foot of the suit property.
60. To the extent that the 2nd Defendant has generated an award to and in favor of the Plaintiff, learned counsel for the Plaintiff has submitted that it is therefore incumbent upon the 2nd Defendant to facilitate and process the payment of the award.
61. In support of the foregoing submissions, learned counsel for the Plaintiff has cited and quoted *inter-alia*, the decision in the case of *Geyser International Assets Ltd v The Attorney General & 3 others* (2021)eKLR, *Sparkle Properties Ltd v National Land Commission & another* (2022)eKLR and *Patrick Musimba v National Land Commission & 4 others* (2016)eKLR, respectively.
62. In a nutshell, learned counsel for the plaintiff has therefore implored the Honourable court to find and hold that the plaintiff has established and proved her claim as against the defendants on a balance of probabilities.

b. The 1st Defendant's Submissions

63. On behalf of the 1st Defendant, learned counsel filed submissions, wherein Counsel raised, highlighted and amplified one issue for consideration by the Honourable Court.
64. In this regard, learned counsel for the 1st Defendant contended that upon the issuance of the Letter of award, the Ethic and Anti-Corruption Commission wrote to the 2nd Defendant and the 1st Defendant, respectively, wherein she indicated that the same was investigating the propriety and legality of an award/compensation touching on LR No 209/12060.
65. Owing to the fact that the Ethics and Anti-Corruption Commission had indicated that same were investigating the propriety and validity on compensation touching on the named property, learned counsel for the 1st Defendant has therefore submitted that the 1st Defendant was obligated to withhold any payments pending further advise and/or communication from the Ethic and Anti-Corruption Commission.
66. Furthermore, learned counsel added that the Ethics and Anti-Corruption Commission has never reverted back up-date, on the status or outcome of (sic) the investigations that were being undertaken in respect of LR No 209/12060.
67. In view of the foregoing, learned counsel for the 1st Defendant therefore sought to have the Plaintiff's suit dismissed with costs.

c. The 2nd Defendant's Submissions

68. Though the 2nd Defendant was present when directions pertaining to the filing of written submissions were issued, same however, failed and/ or neglected to file written submissions in respect of the subject matter.
69. In short, no written submissions were filed by and on behalf of the 2nd Defendant.

Issues for Determination

70. Having reviewed and evaluated the Plaint dated the August 13, 2019, together with the documents filed therewith and upon considering the Statement of Defense filed on behalf of the Defendants and upon taking into account the oral evidence tendered by and on behalf of the Parties, and finally, upon



considering the written submission filed on behalf of the Parties, the following issues are pertinent and thus worthy of determination;

- i. Whether the suit Property was compulsorily acquired by the 2nd Defendant, albeit on behalf of the 1st Defendant herein.
- ii. Whether the Plaintiff herein is entitled to payments/ Settlement of the amount at the foot of the Letter of Award Issued by the 2ND Defendant herein?

Analysis and Determination

Issue Number 1

Whether the suit property was compulsorily acquired by the 2nd Defendant, albeit on behalf of the 1st Defendant herein.

71. It is common ground and beyond peradventure that the suit property, namely, LR No 15053, belonged to and was registered in the name of the Plaintiff herein.
72. Subsequently, the 2nd Defendant herein, in exercise of her constitutional and statutory mandate sought to compulsorily acquire the suit property for and on behalf of the 1st Defendant. For clarity, the compulsory acquisition was for purposes of the construction of the Standard Gauge Railway and ancillary facilities.
73. As a result of the intended compulsory acquisition, the 2nd Defendant herein generated and published various gazette notices, wherein same invited, inter-alia, the Plaintiff to attend the requisite meetings relating to the determination of (sic) the requisite award/compensation.
74. It is not in doubt that pursuant to and upon the issuance of the requisite statutory notices, the witness who testified on behalf of the Plaintiff duly attended the scheduled meetings and presented the requisite documents on behalf the Plaintiff.
75. Additionally, after due consideration of the title documents which were surrendered and submitted by the Plaintiff's witness, the 2nd Defendant undertook due analysis and appraisal and thereafter same came to the conclusion that the suit property was worth; and was thereafter, assessed and certified to be worth Kes.69, 000, 000/= only, on account of compensation.
76. It is not lost on the Honourable court, that the process of compulsory acquisition is statutorily circumscribed and well defined under the law. Nevertheless, it must be underscored that the process towards and for compulsory acquisition is undertaken and carried out by the National Land Commission, albeit on behalf of the acquiring authority.
77. Furthermore, the processes involved towards compulsorily acquisition are so detailed, elaborate and intricate, so as to ensure that the rights and interests of the citizens/subject whose rights and interests are being expropriated, are duly protected and vindicated.
78. To be able to understand the nature and extent of the process underpinning compulsory acquisition, it is appropriate to take cognizance of the holding in the case of *Geyser International Assets Ltd v the Attorney General & 3 others* (2021)eKLR, where the Honourable court stated as hereunder;

“Under this sub heading, first and foremost, it’s imperative to extrapolate indepth on the concept of Land Compulsory acquisition and in Kenya. The current law or statutory framework governing compulsory acquisition of interest in land is founded under part VIII, sections 107 to 133 of the *Land Act* No 6 of 2012 and article 40 (1), (2) and (3) of the



Constitution of Kenya (See Viranda Ramji Gudka & 3 others v The AG (2014)eKLR as read together with part V of the Land Regulations of 2017. The process of the compulsory acquisition is in summary provided as follows:-

The article 40 (3) provides 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; and
 - (ii) Allows any person who has an interest in, or right over, that property a right of access to a court of law.

27. Under the provisions of the Land Act, 2012, section 107 of the Act holds that, the NLC - the 3rd Respondent herein is ordinarily prompted by the request of the National or County Government through the Cabinet Secretary or County Executive member respectively for authentication of the compulsory acquisition of land are required to submit the request to NLC providing a reason for the land acquisition which must not be remote or fanciful. Strictly, the Land must be acquired for public purpose or in public interest and not any other purpose as dictated by article 40 (3) of the Constitution of Kenya. In this case the threshold must be met.

Significant variation in the law includes section 107 (3) of the Land Act, of 2012 which gives the NLC powers to reject a request for acquisition if it establishes that the requirement prescribed in Section 107 (3) of the Land Act and article 40 (3) of the Constitution of Kenya.

Upon the conclusion of the inquiry, the NLC makes compensatory awards to every person whom it has determined to be interested in the land after serving such person with a notice of award and offer of compensation. (See. Sections 113 & 114). Adequate and conclusive compensation can also be in form of land if available, whose value is not exceed that amount of money the NLC considers should have been awarded (See. See Section 142 (2)). Once the award is accepted, it must be promptly paid by the NLC, after which the process of compulsory acquisition of land is completed by the taking possession of the Land in question being taken by the NLC. The property is 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.

- 79. Having taken into account the elaborate holding in the case (supra), I wish to add my voice and to shortly, state as hereunder:
- 80. The 2nd Defendant herein published various gazette notices, wherein same intimated her intention to compulsorily acquire, inter-alia, the suit property.
- 81. Arising from the impugned gazette notices, the Plaintiff and the other persons, whose interests were affected by the intended compulsory acquisition, were called upon to attend the scheduled meetings



for purposes of deliberations and determination of the requisite awards/compensation, if any, payable on account of their interests on the suit property.

82. Additionally, upon undertaking the requisite statutory inquiry, the 2nd Defendant herein ultimately generated and issued a letter of award, signifying the amount that had been certified and arrived at as due compensation. See the letter of award dated the October 14, 2016.
83. Upon the issuance of the letter of award, whose details and terms have not been contested, the process of compulsory acquisition was concluded and hence became, irreversible.
84. To surmise, I find and hold that the suit property, which hitherto belonged to and was registered in the name of the Plaintiff, was compulsorily acquired by the 2nd Defendant, albeit on behalf of the 1st Defendant.
85. Furthermore, evidence was tendered before the Honourable court that upon the compulsory acquisition, the 1st Defendant entered upon and took possession of the suit property. In addition, it was stated that the 1st Defendant has since erected and built various infrastructural facilities pertaining to and in respect of the SGR.
86. In the premises, there is no gainsaying that the suit property was compulsorily acquired by the 2nd Defendant and thereafter, the same was placed under the occupation and possession of the Second Defendant herein.

Issue Number 2

Whether the Plaintiff herein is entitled to Payment/ Settlement of the amount at the foot of the letter of award generated by the Second Defendant?

87. There is no gainsaying that upon the conclusion of the statutory inquiry as provided and stipulated in terms of section 113 and 114 of the *Land Act* 2012, the National Land Commission is called upon to issue a letter of award, intimating the quantum of compensation due and payable to the concerned party/parties.
88. In this respect, there is no doubt that the 2nd Defendant duly generated and issued a letter of award dated the October 14, 2016 to and in favor of the Plaintiff and wherein the 2nd Defendant intimated that the compensation had been assessed and certified in the sum of Kes.69, 000, 000/= only.
89. Upon the issuance of the Letter of award, the Plaintiff herein was called upon to signify and or intimate her acceptance of the letter of award.
90. To this end, PW1 testified that upon receipt of the letter of award, the Plaintiff wrote to and in favor of the 2nd Defendant and intimated that the award contained at the foot of the letter dated the October 14, 2016, had been duly accepted.
91. In my humble view, upon receipt of the letter of acceptance, it behooved the 2nd Defendant in liaison with the 1st Defendant herein to process and facilitate the payment of the compensation certified at the foot of the letter of award, albeit without undue delay and/or dithering.
92. Be that as it may, it is not lost on this Honourable court that the 2nd Defendant failed and neglected to arrange, process and facilitate the payment of the compensation to and in favor of the Plaintiff herein.
93. Worse still, even though the 2nd Defendant failed to facilitate the processing of the ultimate payment of the compensation in favor of the Plaintiff, the 2nd Defendant has however allowed and authorized the acquiring authority (read the 1st Defendant), to enter upon and take possession of the suit property.



94. In this regard, it must recalled that PW1 testified and indicated that the suit property is currently under the use and possession of the 1st Defendant. In any event, the witness added that the 1st Defendant has since constructed various infrastructural facilities thereon.
95. Despite the foregoing, the Plaintiff whose land was compulsorily acquired has to date not been paid or at all. Clearly, the manner in which the Plaintiff has been treated does not fall within the requirements of article 10(2) of the Constitution 2010, which enshrines and espouses the National Values and Principles good governance.
96. Additionally, the taking away vide compulsory acquisition of the Plaintiff's land, albeit without due and prompt compensation, violates and infringes upon the provisions of article 40(3) of the Constitution 2010.
97. For coherence, it is appropriate to reproduce the salient features of article 40(3) of the Constitution 2010.
98. In this regard, same are reproduced as hereunder;

40. Protection of right to property

- (1) Subject to article 65, every person has the right, either individually or in association with others, to acquire and own property—
- (a) of any description; and
 - (b) in any part of Kenya.
- (2) Parliament shall not enact a law that permits the State or any person—
- (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
 - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).
- (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—
 - (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.

99. Premised on the foregoing, I come to the conclusion that the 2nd Defendant herein has acted contrary to and in contravention of the Constitutional values, inter-alia, the Rule of law and Due compensation,



where the rights/interests of a person (read Plaintiff) are invaded on the basis of (sic) compulsory acquisition.

100. In this respect, I beg to adopt and reiterate the holding of the Five-Judge bench in the case of *Patrick Musimba v The National Land Commission & 4 others* (2016)eKLR, where the Honourable court stated and held as hereunder;

114. The power to expropriate private property as donated to the State by both the *Constitution* and statute law (the *Land Act*) leaves the private land owner with no alternative. The power involves the taking of a person's land against his will. It is a serious invasion of his proprietary rights through the use of statutory authority. The private land owner has no alternative but wait for compensation. It is consequently necessary that the court must remain vigilant to see to it that the State or any organ of the state does not abuse the constitutional and statutory authority to expropriate private property. It is on this basis that courts have consistently held that the use of statutory authority to destroy proprietary rights requires to be most carefully scrutinized: see *Commissioner of Lands v Coastal Aquaculture Limited* [1997]1 KLR (L&E) 264. See also the Australian case of *R & R Fazzolari Pty Ltd v Parramatta City Council* [2009] HCA 12 where the court held the view that such scrutiny must invite and also involve common law as well as statutory protections. Just compensation is consequently mandatory.

115. It is for the court consequently to ensure that the process is free from any rebuke and in this regard; the statutory provisions must be followed and be adhered to strictly.

116. The law allows compensation to take the form of either an alternative parcel of land or cash in lieu: see Section 114(2) of the *Land Act*.

117. With regard to the instant case, the compensation was to take the form of monetary payments. We can only point out what the framers of the *Constitution* had hoped to achieve by making provision for compensation.

118. 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”.

119. 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.



120. 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 reference to the market value of the land.
101. Consequently and in view of the foregoing, the 2nd Defendant herein cannot be allowed to withhold the payment of the compensation at the foot of the letter of award any longer or otherwise.
102. In any event, the 2nd Defendant herself had written to the 1st Defendant herein vide letter dated the January 3, 2019 and in respect of which same was imploring the 1st Defendant to release the monies at the foot of the letter of award.
103. Clearly, the 2nd Defendant duly appreciated and understood her statutory obligation to facilitate the prompt, timeous and efficacious payments of the compensation to the Plaintiff herein.
104. In any event, it is the duty and statutory mandate of the 2nd Defendant to ensure timeous and prompt payment of the compensation at the foot of the compulsory acquisition. In this regard, the provisions of Section 125 of the Land Act, 2012, is succinct and apt.
105. For ease of reference, the provisions of section 125(1) of the Land Act 2012 provides as hereunder;
- 125.(1) The Commission shall, as soon as is practicable, before taking possession, pay full and just compensation to all persons interested in the land.
106. In a nutshell, I come to the conclusion that the 2nd Defendant herein in liaison with the 1st Defendant, has the statutory obligation to ensue and facilitate, due, timely and prompt payment of the compensation to and in favour of the Plaintiff.

Final disposition:

107. Having duly analyzed and appraised the issues that were highlighted in the body of the Judgment, it is now appropriate to bring the subject matter to a close. In any event, it must have become evident that the Plaintiff’s claim is meritorious.
108. Consequently and in the premises, I am minded to enter Judgment in favor of the Plaintiff on the following terms;
- i. Payment of the sum of Kes69, 000, 000/= only, to and in favor of the Plaintiff.
 - ii. Interests be and is hereby awarded on the compensation sum at court rates (14%) per annum, from the date of the letter of award, namely, October 14, 2016, until payment in full.
 - iii. Costs of the suit to be borne by the defendants jointly and or severally and same to be agreed upon and/or taxed by the deputy registrar of the honourable court.
109. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF MARCH 2023.

OGUTTU MBOYA,.



JUDGE

In the Presence of;

Benson Court Assistant

Mr. Mwangi h/b for Mr. Agimba for the Plaintiff.

Mr. Cheptumo for the 1st Defendant

Mr. Mbuthia for the 2nd Defendant

