Registered Trustees of Ruiru Sports Club v Kenya National Highways Authority & another (Tribunal Case E002 of 2023) [2024] KELAT 891 (KLR) (10 July 2024) (Ruling)

Neutral citation: [2024] KELAT 891 (KLR)

REPUBLIC OF KENYA

IN THE LAND ACQUISITION TRIBUNAL

TRIBUNAL CASE E002 OF 2023

NM ORINA, CHAIR & G SUPEYO, MEMBER

JULY 10, 2024

BETWEEN

THE REGISTERED TRUSTEES OF RUIRU SPORTS CLUB ..... COMPLAINANT

AND

KENYA NATIONAL HIGHWAYS AUTHORITY ..... 1ST RESPONDENT

NATIONAL LAND COMMISSION ..... 2ND RESPONDENT

RULING

1. On 13th December 2023, we issued a judgement allowing the Complainant's case in the following terms: -

    a. A declaration is hereby issued that the 2nd Respondent has violated the Complainant's rights under Article 40 (3) of *the Constitution* of Kenya 2010, and Sections 111 (1) and 115(1) of the *Land Act* for failing to compensate the Complainant promptly following the compulsory acquisition of a portion of its property known as L.R. No. 122/4;

    b. A declaration is hereby issued that the 2nd Respondent has violated the Complainant's rights to fair administrative action under Article 47(1) of *the Constitution* of Kenya 2010 and the *Fair Administrative Action Act*;

    c. A declaration is hereby issued that the Complainant is entitled to payment of compensation in regard to a portion of its property known as L.R. No. 122/4 in terms of the award issued on 23rd July 2018 for the sum of Kshs. 516,117,522.00;

    d. An order is hereby issued directing the 2nd Respondent to, within twenty-one (21) days hereof, remit to the Complainant the sum of Kshs. 317,694,656.00 held in its accounts to the Complainant;

e. An order is hereby issued directing the 2nd Respondent to pay the Complainant the interest earned on (c) above at commercial rates from the time the money was disbursed to its accounts until payment in full;

f. An order is hereby issued directing the 2nd Respondent to communicate this judgement to the Principal Secretary, State Department for Lands and Physical Planning in the Ministry of lands, Housing and Urban Development, for purposes of disbursement of the sum of Kshs. 71,486,990.00 previously held by the Commissioner of lands for compensation of the subject land to the Complainant

g. An order is hereby issued directing the 1st Respondent to pay, within 21 days, the balance of the compensation amount being Kshs. 126,935,876.00 to the Complainant;

h. Costs of this suit to be borne by the 2nd Respondent.

2. The 1st Respondent was aggrieved by this judgement and pursuant to Section 80, and Section 3A of the *Civil Procedure Act* and under Order XLV Rule 1 of the Civil Procedure Rules, the 1st Respondent (hereinafter, the Applicant) has sought review of the said judgement and specifically order (g) which directed the payment of Kshs. 126,935,876.00 directly to the Complainant within twenty-one (21) days. This Application was filed on 15th March 2024 together with a Supporting Affidavit sworn by Daniel K. Mbuteti of the same date.

3. It is the Applicant's case that the said judgement contains an error on the face of the record. In this regard, the 1st Respondent avers that the judgement violates Article 67 of *the Constitution* of Kenya, 2010 as well as Section 109 (sic) of the *Land Act*, 2012 that mandates the National Land Commission to initiate and facilitate the entire process of compulsory land acquisition. According to the Applicant, an order directing it to make payment directly to the Complainant amounts to a usurp of the National Land Commission's mandate and therefore is an error on the face of the record that ought to be reviewed.

4. Furthermore, the Applicant contends that the judgement contains an error on the face of the record for failing to appreciate that it is a State Agency that is fully reliant on state funding and is subject to the national budgetary process. To that effect, the Applicant avers that an order directing payment within twenty-one (21) days is erroneous and ought to be a subject of review.

5. The Claimant (now Respondent) opposed this Application through a Replying Affidavit sworn on 10th May 2024 by Gabriel Muindi Muthwale. The Respondent avers that the Application does not meet the threshold for grant of orders of review and specifically that:

a. The alleged apparent error or mistake referred to by the Applicant is not self-evident;

b. The alleged apparent error or mistake was a careful decision made by the tribunal out of a review of facts placed before the tribunal;

c. The tribunal arrived at the correct conclusion in ordering the applicant to pay the Complainant directly since the National Land Commission was unjustly withholding the monies remitted to it by the applicant;

d. There is no mistake or error apparent on the face of the record and no other sufficient reason has been proffered to warrant a review of the judgement of the tribunal;

e. The Application for review lacks specificity and is therefore not merited;

f. The Application is confusing. Does the Applicant require more time to settle or a review? Is it a budget issue or a review Application?

g. For the argument that there is an error on the record to suffice, the error must be obvious and strike one by merely looking at the record and should not require a long process of reasoning as the Applicant has attempted herein;

h. There is no provision in law that prohibits the payment of compensation directly;

i. Government agencies should obey court orders, dutifully as well as promptly satisfy decrees passed by the courts and tribunals;

j. The twenty-one (21) days granted for complying have lapsed. The 1st Respondent is in default and not entitled to the orders sought;

k. The Applicant receives government resources from the exchequer, development partners, own source revenue, private public partnerships and has had ample time to allocate the said funds over the years.

6. The 2nd Respondent did not take part in these proceedings.

7. Section 80 of the *Civil Procedure Act* provides as follows: -

80. Any person who considers himself aggrieved –

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act,

May apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

8. The rules for effecting Section 80 above are set out under Order 45 Rule 1 of the Civil Procedure Rules which provides as follows:-

45 Rule 1 (1) Any person considering himself aggrieved –

a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b. By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay."

9. First, the Applicant argues that there is an error on the face of the record in order (g) directing it to make a direct payment to the Complainant. The Applicant's argument is premised on the grounds that the 2nd Respondent (National Land Commission) is responsible for carrying out all the processes of compulsory acquisition including payment of compensation. In this case, the tribunal found that the 2nd Respondent had violated the Complainant's rights under Article 40(3) of *the Constitution* and Sections 111 (1) and 115(1) of the *Land Act* for failing to compensate the Complainant promptly

following the compulsory acquisition of a portion of its property known as L.R. No. 122/4. We also made a finding that the 2nd Respondent had failed to remit to the Complainant the sum of Kshs. 317,694,656.00 which it had received from the Applicant herein for purposes of paying compensation to the Complainant. It was also our finding that the Applicant herein had not remitted the balance of the compensation totaling Kshs. 126,935,876.00 to the 2nd Respondent for purposes of compensating the Complainant.

10. We are aware of the provisions of Section 111 of the *Land Act* which require the acquiring authority to deposit with the National Land Commission the compensation fund, "before the acquisition is undertaken." Further, Section 115 of the *Land Act* requires the Commission to promptly pay compensation in accordance with the award to project affected persons. The Applicant's argument in this regard, therefore, is that our order requiring the payment of the balance of the compensation money directly to the Complainant usurps the role of the National Land Commission.

11. The law in regard to what constitutes an error that warrants review by a court is as good as settled. In National bank of Kenya Limited vs. Ndungu Njau [1997] eKLR, the Court of Appeal held as follows:-

> A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of the law cannot be a ground for review.

12. This position has also been reiterated in many other cases including Republic v. Advocates Disciplinary Tribunal Ex Parte Apollo Mboya [2019] eKLR, where Mativo J held as follows:-

> The starting point is that a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of the law. Misconstruing a statute or other provision of law cannot be a ground for review.

13. It is clear to us that the Applicant invites us to sit on appeal on our decision ordering the then 1st Respondent to pay directly to the Complainant sums that it ought to have transferred to the National Land Commission for purposes of compensation. We reject such an invitation. The matter before us that culminated in the judgement of 13th December 2023 was fully canvassed before us and we reached a determination which, in our considered view, was an appropriate remedy to the violation of the Complainant's rights under Article 40(3) of *the Constitution* and the *Land Act*.

14. In our view, an order directing the 1st Respondent to pay the part of the compensation amount that it had failed to remit to the Commission for purposes of compensation was the appropriate one considering the Commission had also failed to pay the part compensation from the money that had already been remitted to it. It should be borne in mind that in ordering relief in enforcement of the bill of rights, a court of law has the discretion to grant a relief it considers appropriate. The list under Article 23(3) is non-exhaustive. It is our position that if the Applicant was aggrieved with our orders

contained in the judgement of 13th December 2023 then the appropriate forum for ventilating such would have been on appeal. Mativo J in the Apollo Mboya case (supra) opined as follows in this regard:

> In any event, whether the judgement offended the provisions of Order 21 of the Civil Procedure Rules is in my view a ground of appeal as opposed to a ground for review. It is important to distinguish grounds of appeal and grounds for review.

15. The second matter that the Applicant raises in this application is that the order to make payment within a period of twenty-one (21) days violates provisions on the budgetary process. This argument is unsustainable and must fail for the following reasons. First, the argument that goes to what needs to be done to satisfy a court order is not an argument that would necessitate an application for review. The Applicant is under a legal duty to comply with orders of this tribunal and to raise any arguments about compliance in the necessary forum. Even then, in Waweru Gatonye and Co. Advocates v. *Insurance Regulatory Authority and 4 Others, Misc. App. No. E207 of 2019*, Mabeya J held as follows:-

> The objection by the Judgment debtor was that it requires approvals from the board and the national treasury. That it had not budgeted for the said amount. A simple answer to that, it is high time public bodies realized that they cannot incur obligations and fail to honour them. The accounting officers have a duty to factor in their work plans and budgets, settlement of court decrees as are other liabilities.

16. By requiring the Applicant to satisfy its obligations in paying compensation to the Complainant, the tribunal was not imposing new financial obligations on the Applicant that the Applicant did not know about. The Applicant has been aware about this obligation since 23rd July 2017 when the award for compensation was issued in favour of the Complainant. Subsequently, and in satisfaction of that award, the Applicant remitted a total of Kshs. 389,181,646.00 to the bank accounts of the National Land Commission towards the settlement of the award. Indeed, the Applicant reiterated in its pleadings in this case that it was ready and willing to complete the payment of the outstanding balance of Kshs. 126,935,876.00. The order to require the Applicant to make payment of these pending sums was, therefore, made after careful examination of evidence and the same does not contain an apparent error.

17. Secondly, our duty as a tribunal is to make a determination on questions before us and to offer the appropriate remedy. There is no error in the order for payment within a period of twenty-one (21) days that would be apparent on the face of the record. The question whether a court can order a State Agency to make payment within a specific time period in satisfaction of a decree is one that would require long-drawn arguments for its resolution. This is clear from the legal arguments the Applicant has put forward in support of this application. The Applicant has posited that the order violates Articles 221, 222 and 223 of *the Constitution* which provisions deal extensively with the budget making process. We are guided by the Apollo Mboya case (supra) where Mativo J held:-

> An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by an order of review.

18. Finally, we are also not satisfied that this application met the final condition outlined under Order 45 Rule 1 and that is that the same ought to be brought without unreasonable delay. We take cognizance that what amounts to "unreasonable delay" has to be interpreted taking into account the circumstances of each case. In this case, the judgement of the tribunal was issued Sixty (60) days after the case had been

filed in compliance with the statutory timelines under the *Land Act*. It should also be noted that the Respondents were required to satisfy the judgements within twenty-one (21) days. The Applicant was represented by counsel throughout the proceedings and on the date the judgement was delivered. The Applicant has not given any reason why the application for review was filed more than four months from the date the judgement was delivered. In Kenfreight E.A Ltd vs Star E.A Co. Ltd (2002) 2 K.L.R 783, the Court found that a delay of three months was unreasonable. In Abdulrahman Hassan Vs National Bank Of Kenya Kisumu H.C.C.C NO. 446 OF 2001 (KSM), the Court observed that an unexplained delay of three months was unreasonable. We, therefore, hold that an unexplained delay of four (4) months before filing an application for review in this case amounts to an unreasonable delay.

19. For the above reasons, the 1st Respondent/Applicant's application for review dated 15th March 2024 fails and is hereby dismissed with costs to the Complainant/Respondent.

DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 10TH DAY OF JULY 2024.

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DR. NABIL M. ORINA - CHAIRPERSON

GEORGE SUPEYO - MEMBER

In the presence of:

Ms. Ochako for the Applicant/1st Respondent

Mr. Monda for the Respondent/Complainant

Everlyne - Court Assistant