



**Igainya Limited v National Land Commission & 2 others; County Government of Machakos  
(Interested Party) (Tribunal Case 2 of 2024) [2024] KELAT 809 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KELAT 809 (KLR)

**REPUBLIC OF KENYA  
IN THE LAND ACQUISITION TRIBUNAL  
TRIBUNAL CASE 2 OF 2024  
NM ORINA, CHAIR & G SUPEYO, MEMBER  
JUNE 6, 2024**

**BETWEEN**

**IGAINYA LIMITED ..... PETITIONER**

**AND**

**THE NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**KENYA NATIONAL HIGHWAY AUTHORITY ..... 2<sup>ND</sup> RESPONDENT**

**HON. ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**COUNTY GOVERNMENT OF MACHAKOS ..... INTERESTED PARTY**

**JUDGMENT**

1. Vide a Petition dated 29<sup>th</sup> July 2021, the Petitioner alleges violation of its fundamental rights under [\*the Constitution\*](#) of Kenya 2010. Specifically, the Petitioner alleges that its rights under Article 40 have been violated.
2. The genesis of the dispute arises from the compulsory acquisition of part of the Petitioner's land known as LR No. 7815/8 (hereinafter the "suit property") situated in Lukenya Area, Machakos County for purposes of the construction of Second Carriageway of Athi River-Machakos Turnoff Road.
3. On 29<sup>th</sup> September 2017, the National Land Commission (1<sup>st</sup> Respondent) published a notice of intention to acquire land through Kenya Gazette Notice No. 9536 where it identified the Petitioner's land as part of parcels of land earmarked for acquisition for the above stated project. Subsequently, a notice of inquiry was published in Gazette Notice No. 11424 of 17<sup>th</sup> November 2017.



4. Following the inquiry, which was conducted on 19<sup>th</sup> December 2017, the Petitioner herein was awarded the sum of Kshs. 646,316,243.00 as compensation for the compulsory acquisition of 5.6861 hectares of the suit property through award dated 23<sup>rd</sup> January 2018. This award was accepted by the Petitioner and a deposit of 10% was soon thereafter paid. The balance of 90% has not been paid to date and forms the substratum of this case.

### **The Petitioner's Case**

5. The Petitioner alleges that the 1<sup>st</sup> Respondent has neglected and/ or refused to pay the balance of the compensation since the year 2018 when the deposit was paid. As a result of this refusal, the Petitioner avers, its rights under Article 40 of the Constitution which requires just, and prompt payment of compensation have been violated.
6. At the hearing of this case, the Petitioner's Director, Engineer Isaac Wanjohi (PW1) testified that he was given an award on behalf of the Petitioner for the sum of Kshs. 646,316,243.00 on 23<sup>rd</sup> January 2018 and subsequently a sum of Kshs. 64,631,624.00 was paid into the Petitioner's accounts. This was done through a bank transfer on 1<sup>st</sup> November 2018 as confirmed by the Petitioner's bank statement annexed as "IW7" in the bundle of documents. Mr. Wanjohi testified that upon following up on the balance of the compensation money, he was directed to the valuation department where he was handed another document and informed that the map for the road had been revised. Prior to this, it was his testimony, he had not been served with the changed plan and no one had explained to him the reasons behind the change.
7. On cross-examination by Mr. Maruti for the 2<sup>nd</sup> Respondent, Mr. Wanjohi confirmed that through Gazette Notice No. 1919 of 6<sup>th</sup> March 2020, the 1<sup>st</sup> Respondent had reduced the acreage to 2.222 hectares from the initial 5.6861 hectares. On cross-examination by Ms. Aiyabei, the witness confirmed that he was presented with a fresh award dated 25<sup>th</sup> June 2021 at the 1<sup>st</sup> Respondent's office which he rejected.
8. PW2 was Mr. Dennis Mutai Bett, a land surveyor. He adopted the survey report dated 28<sup>th</sup> February 2024 and relied on the same. The witness explained that the difference between the first acquisition and the later revised acquisition was that the initial acquisition had acquired a block of land measuring 5.6861 hectares whereas the revised acquisition was a strip that measured 2.222 hectares. The witness further testified that the acquisition of a strip rather than a block as initially envisioned left an island in the middle.
9. In his testimony, PW2 also took the tribunal through a sketch map of the suit property and specifically the area that was acquired as a result of the revised plan. In his testimony, the witness explained that by only acquiring the strip rather than a block, a "toe-to-toe" situation had arisen which meant that the ramp for the interchange would end at the boundary line of the property left out of the acquisition. This situation, according to the witness, meant that a car would fall from the ramp onto the remaining property in the middle since there was no buffer zone.
10. On cross-examination by Mr. Maruti for the 2<sup>nd</sup> Respondent, the witness confirmed that the revised acquisition for the road has provision for a road reserve.

### **The 1<sup>st</sup> Respondent's case**

11. The 1<sup>st</sup> Respondent opposed the Petition and relied on the Replying Affidavit of Jacob Kipah sworn on 11<sup>th</sup> April 2024. In the said affidavit, Mr. Kipah confirms the factual background of this matter but avers that the 1<sup>st</sup> Respondent received a letter from the Ethics and Anti-Corruption Commission



(EACC) dated 16<sup>th</sup> August 2019 to the effect that the EACC was investigating cases of fraud prompting the 1<sup>st</sup> Respondent to withhold payment of compensation.

12. Mr. Kipah also states that the 1<sup>st</sup> Respondent received another letter from the 2<sup>nd</sup> Respondent to the effect that they had effected a revised road design that would lead to minimal land acquisition. This letter was also accompanied by a revised acquisition map and schedule of properties which was subsequently published in Kenya Gazette No. 1919 of 6<sup>th</sup> March 2020.
13. That following these two interventions, the 1<sup>st</sup> Respondent revalued the portion of the suit property that was now subject of acquisition at Kshs. 123,537,645.00. It was Mr. Kipah's assertion that the suit property had been initially grossly overvalued, a situation which would have occasioned loss of public funds.
14. Mr. Kipah testified on 15<sup>th</sup> April 2024, virtually and adopted his Affidavit. On cross-examination, Mr. Kipah stated that the project affected persons were notified through gazette notice and a public meeting was held in Mavoko. Mr. Kipah could however not confirm that the Petitioner had been served in person. It was, however, confirmed that a second inquiry had not been conducted as it was just a correction.
15. On the variation and reasons thereof, Mr. Kipah confirmed that the Petitioner had not been informed by the 1<sup>st</sup> Respondent of the same and the reasons for the variation. Mr. Kipah further testified that the allegation of overvaluation had come from the EACC but the same had not been verified.

#### **The 2<sup>nd</sup> Respondent's case**

16. The 2<sup>nd</sup> Respondent opposed the Petition and relied on the Replying Affidavit of one Milcah Muendo. At the hearing, Ms. Muendo testified on behalf of the 2<sup>nd</sup> Respondent and adopted her witness statement and relied on the list and bundle of documents supplied by the 2<sup>nd</sup> Respondent. Ms. Muendo is a licenced surveyor and currently works as Assistant Director in the Directorate of Highway Design and Safety. It was Ms. Muendo's testimony that the award amount was reduced due to the repackaging of the construction works on the road.
17. On cross-examination by Ms. Akello for the Petitioner, Ms. Muendo indicated that the valuation had been done by the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent had not been involved. In regard to the redesigning of the road that affected the suit property, Ms. Muendo testified that a consultant had been involved who reviewed the plans and advised the 2<sup>nd</sup> Respondent on how the acquired portion of the land could be reduced. The consultant, Ms. Muendo testified, made a determination that the road could fit in a smaller area and that the remaining portion of land could be put into use.

#### **Analysis and determination**

18. The parties have filed submissions and have asked us to address various issues arising from the case, in their opinion. The Petitioner's issues centre around the question of whether the second award issued on 25<sup>th</sup> June 2021 is valid and if the same is not then what compensation is payable. The Respondents have also invited us to determine if the Petitioner is entitled to the orders sought.
19. Whereas the facts in this case remain uncontested, the parties take starkly different paths at the point where the 2<sup>nd</sup> Respondent issued a new award and rescinded the earlier award. It is therefore important for us to trace this process in order to be satisfied that the same was in compliance with the law.



20. The process of compulsory acquisition of land is quite elaborate under the [Land Act](#), 2012. This process has been reiterated in case law and prominently in the locus classicus case of Patrick Musimba vs. National Land Commission & 4 others [2016] eKLR:

Process of compulsory acquisition

85. In summary, the process of compulsory acquisition now runs as follows.
88. Under Section 107 of the [Land Act](#), the National Land Commission (the 1<sup>st</sup> Respondent herein) is ordinarily prompted by the national or county government through the Cabinet Secretary or County Executive member respectively. The land must be acquired for a public purpose or in public interest as dictated by Article 40(3) of [the Constitution](#). In our view, the threshold must be met: the reason for the acquisition must not be remote or fanciful. The National Land Commission needs to be satisfied in these respects and this it can do by undertaking the necessary diligent inquiries including interviewing the body intending to acquire the property.
87. Under Sections 107 and 110 of the [Land Act](#), the National Land Commission must then publish in the gazette a notice of the intention to acquire the land. The notice is also to be delivered to the Registrar as well as every person who appears to have an interest in the land.
88. As part of the National Land Commission's due diligence strategy, the National Land Commission must also ensure that the land to be acquired is authenticated by the survey department for the rather obvious reason that the owner be identified. In the course of such inquiries, the National Land Commission is also to inspect the land and do all things as may be necessary to ascertain whether the land is suitable for the intended purpose: see Section 108 of the [Land Act](#).
89. The foregoing process constitutes the preliminary or pre-inquiry stage of the acquisition.
90. The burden at this stage is then cast upon the National Land Commission and as can be apparent from a methodical reading of Sections 107 through 110 of the [Land Act](#), the landowner's role is limited to that of a distant bystander with substantial interest.
91. Section 112 of the [Land Act](#) then involves the landowner directly for purposes of determining proprietary interest and compensation. The section has an elaborate procedure with the National Land Commission enjoined to gazette an intended inquiry and the service of the notice of inquiry on every person attached. The inquiry hearing determines the persons interested and who are to be compensated. The National Land Commission exercises quasi-judicial powers at this stage.
92. On completion of the inquiry the National Land Commission makes a separate award of compensation for every person determined to be interested in the land and then offers compensation. The compensation may take either of the two forms prescribed. It could be a monetary award. It could also be land in lieu of the monetary award, if land of equivalent value, is available.



Once the award is accepted, it must be promptly paid by the National Land Commission. Where it is not accepted then the payment is to be made into a special compensation account held by the National Land Commission: see Sections 113- 119 of the Land Act.

93. 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.
21. Whereas there is no contention that this process was followed from the beginning until a deposit of the award was paid, what followed thereafter raises questions that invite this Tribunal's scrutiny. There are two items in that regard that are in contention. The first one is the revision of the road project that led to the reduction of the land that was earmarked for compulsory acquisition. The second item is the revaluation that ensued afterwards.
22. The issuance of an award pursuant to Section 113(1) and (2)(a) of the Land Act is the final process of acquisition before compensation is paid. The said award, according to Section 113(2)(a) represents the final and conclusive evidence of – the size of the land to be acquired and the value thereof. The import of this section is that the acquiring entity working with the 1<sup>st</sup> Respondent have ascertained the exact acreage of land required and this award should be the final confirmation.
23. As we held in *The Registered Trustees of Ruiru Sports Club vs. Kenya National Highways Authority and National Land Commission* (TRLAP/E002/2023), even if the law does not give room to reopen this process, the 1<sup>st</sup> Respondent is not precluded from revising the award in case the same contains errors or is as a result of fraud.
24. In this case though, the Respondents have urged us to find that they acted within the law in purporting to rescind an initial award and replacing it with another one which presented a significant difference in acreage and amount of award. In this regard, the 2<sup>nd</sup> Respondent argues that the reduction of area to be acquired was occasioned by a redesigning of the project which reduced the area to be acquired from an initial block area to a strip. The 2<sup>nd</sup> Respondent has not presented any evidence that the initial design upon which the acquisition was done was a mistake. Instead, the 2<sup>nd</sup> Respondent urges the Tribunal to find that the redesigning was necessary and in effect the Petitioner is entitled to the revised sum.
25. It has also been contended that the said revision was only a correction and did not necessitate the involvement of the Petitioner in a new inquiry before a new award was issued. We will come back to the legality of the revision but at this point we wish to reiterate the importance of involving project affected persons both at the point of publishing a notice of intention to acquire (or a corrigendum thereof) and an inquiry and how the same ought to be conducted in accordance with the law. In *James Finlays (Kenya) Ltd vs. National Land Commission and County Government of Kericho* [2024] Tribunal 79 (KLR) on the importance of this notification being served on the project affected persons we held as follows:

The issuance of the notice under Section 107(5) is, in our considered view, not a “box-ticking” exercise but should afford a meaningful chance to the affected parties to engage with the 1<sup>st</sup> Respondent before their land is compulsorily acquired. This engagement, as detailed in Rule 23(1) of the Land Regulations, 2017 gives an opportunity to the persons who are



being deprived of their land through the exercise of the state's power of eminent domain, a chance to also present their views on the location, area to be acquired, the proposed land use, existing use of the land, improvements on the land, how the compulsory acquisition will affect them, and any other relevant information.<sup>1</sup> Emphasis added

26. It follows therefore that in a case where the 1<sup>st</sup> Respondent intends to correct the area contained in the notice of intention to acquire, the Gazette Notice so published must be served on the project affected persons to enable them engage with the 1<sup>st</sup> Respondent effectively. It is not enough to assert that the project affected persons were notified through the Kenya Gazette. Such notices must be served personally on the project affected persons.
27. In this case, there is uncontroverted evidence that the Petitioner had plans to set up a cement factory just before the acquisition happened. The Respondents did not involve the Petitioner in any way in the revised design for the project which directly affected the use of the Petitioner's land and specifically in regard to any land use on the remaining portion of the land.
28. To the extent that the Respondents and especially the 1<sup>st</sup> Respondent did not notify the Petitioner in person about the revised plan that was communicated through Gazette Notice No. 1919 of 6<sup>th</sup> March 2020, the 1<sup>st</sup> Respondent violated the Petitioner's rights under Article 40 of *the Constitution*. Furthermore, we hereby find that the 1<sup>st</sup> Respondent was under a legal duty to conduct a fresh inquiry and involve the Petitioner before a new award was issued. The import of an inquiry which is conducted in a quasi judicial manner is to afford project affected persons a chance to make representations not only on the interests on the property but also the value of the property as well as the effect of the acquisition on the remaining portion of land and whether the same ought to be acquired if it wont serve its intended purpose.
29. In this regard we find that the 1<sup>st</sup> Respondent failed to afford the Petitioner a chance to participate in an inquiry by not conducting one after the purported revision of the plan of the project that affected the Petitioner's land significantly. In any case, the Petitioner was entitled to reasons pursuant to Article 47(2) of *the Constitution* for the administrative action by the 1<sup>st</sup> Respondent which affected the Petitioner's right to property.
30. The revision of the road design that in effect changed the area to be acquired from the initial 5.6861 hectares to 2.222 hectares was arbitrary and did not take into account the effect it would have on the land use by the Petitioner. Whereas the 2<sup>nd</sup> Respondent has urged us to find that the same was necessary in order to cut down costs of the project, we find that the reasons offered by the 2<sup>nd</sup> Respondents are not sufficient and the same cannot be used to outweigh the Petitioner's interest in use of its land. Prior to the project, the Petitioner had a plan to undertake an industrial project on the property which was interfered with by the acquisition. Walking back the decision to acquire the whole portion of the 5.6861 hectares and effectively leaving a canyon in the middle violated the Petitioner's rights under Article 40 of *the Constitution*.
31. We agree with the evidence of the Petitioner's PW2 and the submissions that the remaining portion of land after the revised road project is unusable or is not fit for the intended purpose and the same ought not to have been excluded in the purported revision. It was also confirmed through a site visit conducted by the Tribunal that the remaining portion of land is effectively a canyon cut off from the rest of the Petitioner's land which may not have any useful economic purpose.

<sup>1</sup> Para 28.





32. The 1<sup>st</sup> Respondent is called upon to exercise scrupulousness in acquisition of land not just to ensure that there is prudent use of public resources but to also ensure that the project affected persons are not subjected to unnecessary hardships, having had no say on whether their land can be acquired. Indeed, the Land Act foresaw a situation where a portion of the land subject to compulsory acquisition may be rendered unusable and in that case Section 122(3) requires the 1<sup>st</sup> Respondent to instruct an acquiring entity to acquire such land. Such land may be used for other public purposes or be included in the Land Bank.
33. There is no doubt that the portion of land remaining in this acquisition after the purported revision of the road project is cut-off from the rest of the Petitioner's land and the same may not be of any use to the Petitioner especially since the Petitioner's land is industrial in nature.
34. Finally, the 1<sup>st</sup> Respondent has not justified the purported revaluation of the suit property to lower rates than its initial valuation. Whereas the 1<sup>st</sup> respondent alleged that the revaluation was occasioned by the investigation into fraud by EACC, there was no evidence shown that there was fraud in this case and that the first valuation was fraudulent.
35. The upshot of the above analysis is that the Petitioner's case succeeds and the same is allowed in the following terms:
- A declaration be and is hereby issued that the Respondents violated the Petitioner's rights under Article 40 and Article 47 of the Constitution of Kenya 2010;
  - An order of certiorari be and is hereby issued quashing Gazette Notice No. 1919 of 6<sup>th</sup> March 2020 to the extent that it purported to reduce the amount of acreage of the suit property to be acquired from 5.6861 hectares to 2.222 hectares;
  - An order of certiorari be and is hereby issued quashing the 1<sup>st</sup> Respondent's award issued on 25<sup>th</sup> June 2021;
  - An order be and is hereby issued directing the 1<sup>st</sup> Respondent to pay the Petitioner, within 30 days hereof, the sum of Kshs. 581,684,619.00 being the balance of award for compensation issued on 23<sup>rd</sup> January 2018;
  - Interest on (d) above at court rates until payment in full;
  - Costs of these proceedings shall be borne by the Respondents, jointly.

**DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 6<sup>TH</sup> DAY OF JUNE 2024.**

.....  
**DR. NABIL M. ORINA.....CHAIRPERSON**

**MR. GEORGE SUPEYO .....MEMBER**

Before: -

Ms. Akello for the Petitioner

No Appearance for the Respondents

Everlyne – C/A

