Sato Nyumbaz Limited v National Land Commission (Tribunal Case E012 of 2024) [2024] KELAT 670 (KLR) (16 May 2024) (Judgment)

Neutral citation: [2024] KELAT 670 (KLR)

REPUBLIC OF KENYA

IN THE LAND ACQUISITION TRIBUNAL

TRIBUNAL CASE E012 OF 2024

NM ORINA, CHAIR & G SUPEYO, MEMBER

MAY 16, 2024

BETWEEN

SATO NYUMBAZ LIMITED ..... COMPLAINANT

AND

THE NATIONAL LAND COMMISSION ..... RESPONDENT

JUDGMENT

1. Vide Gazette Notice Number 7672 of 8th July 2011 the Commissioner of Lands, in exercise of his powers under the Land Acquisition Act, cap 295 of the laws of Kenya (now repealed), published a notice of intention to acquire certain properties within Nairobi for the purposes of construction of a Commuter Rail System. Contemporaneously, the Commissioner of lands published Gazette Notice Number 7673 of the same day being a notice of inquiry for the earmarked properties for acquisition pursuant to Section 9(1) of the said Land Acquisition Act.

2. Subsequently, the Commissioner of Lands published Gazette Notice Number 11257 of 16th September 2011, being an addendum of Gazette Notice Numbers 7672 and 7673 of 8th July 2011. This addendum included property known as L.R. No. 24910 (hereinafter, "the suit property") belonging to the Complainant – Messrs. Sato Nyumbaz Limited as part of those parcels of land that were to be acquired and identified the area to be acquired to be 1.6 hectares.

3. The Complainant is the registered proprietor of all that parcel of land known as L.R. No. 24910 which was originally a Grant issued under the Registration of Titles Act, Cap 281 laws of Kenya (now repealed) in the name of Joseph Kiprop Arap Samoei and Esther Jebet Leting trading as Eesom Clearing And Forwarding Agencies, who later transferred it to the Complainant. The totality of the Complainant's land was 2.488 hectares.

4. Prior to the acquisition process, part of the Complainant's land had been found to be overlapping onto L.R. No. 9810, an issue which was amicably resolved between the parties and a settlement reached

which entailed the excision of part of the Complainant's land that was overlapping onto L.R. No. 9810. This was confirmed by the letter dated 18th August 2009 from the Commissioner of Lands to the Director of Surveys and reiterated in the letter dated 5th October 2009. The Director of Surveys was further requested to prepare fresh surveys for both properties. These letters were availed in evidence by the Complainant.

5. Consequently, and upon the resurvey of the suit property, albeit many years later, the excision was approved by the Director of Surveys who cancelled the initial survey for the suit property and issued the same with a new number being Nairobi Block 125/2161. This was done through letter dated 20th September 2022 from the Director of Surveys addressed to the Complainant's surveyor, Mr. Erastus C. Mwangi.

6. Upon excision of the overlapping portion of the suit property which measured 0.4293 hectares, the remaining parcel of land now measured 2.059 hectares. Out of this, 1.6 hectares had been compulsorily acquired as stated above leaving a portion of 0.459 hectares which forms the substratum of this case.

The Complainant's Case

7. Through a Complaint dated 9th February 2024, the Complainant has invoked this Tribunal's jurisdiction under Section 133C (8) which grants us jurisdiction to, "...in matters relating to compulsory acquisition of land, hear and determine a complaint before it, arising under articles 23(2) and 47(3) of *the Constitution*, using the framework set out under the *Fair Administrative Action Act* or any other law."

8. It is the Complainant's case that Kenya Railways Corporation (the acquiring authority) took up the whole land belonging to the Complainant measuring 2.059 hectares despite having compulsorily acquired, through the Commissioner of Lands, land measuring 1.6 hectares. The Complainant avers that it has not been compensated for this extra land that measures 0.459 hectares despite several correspondences to the Respondent as well as the acquiring authority.

9. The Complainant presented in evidence a survey report prepared by its surveyor, Mr. Mwangi T/A Beacon Land Systems dated 13th October 2023 which shows that the acquiring authority occupies the whole of the suit property. In the said report, the surveyor concludes that as per the survey plan F/R 529/45, the area of the suit property before the acquisition is estimated at 2.059 hectares. This area, the report asserts, is wholly occupied by the acquiring authority's infrastructure and assigns.

10. The Complainant avers that effective 4th January 2012 when the notice of vesting pursuant to Section 19(1) of the Land Acquisition Act (now repealed) came into effect, the acquiring authority took possession of the whole parcel of the suit property measuring 2.059 hectares and thereby consequently divesting it of access to and utilization of its remaining portion of land measuring 0.459 hectares.

11. These events, the Complainant asserts, have occasioned a violation of its fundamental rights and losses which continue to accrue to date. Specifically, the Complainant pleads, its rights under Article 40(3) have been violated. The provision prohibits the state from depriving a person of any property or an interest in land, or title to "land unless the deprivation results from an acquisition in accordance with Chapter 5 of *the Constitution* or is for a public purpose or in the public interest and is carried out in accordance with *the Constitution* and any act of parliament that requires prompt payment in full of just compensation to the person."

12. Furthermore, the Complainant alleges that the Respondent has violated its constitutional rights under Articles 35, 47(2) and Article 67.

13. The Complainant prays that this Tribunal awards certain reliefs in order to make up for loss allegedly suffered from plans to develop commercial go downs/warehouses on the suit property. The Complainant asserts that it has lost commercial value of the suit property which is industrial as well as the income that would have been generated therefrom. Through the services of a valuer, the Complainant computes the loss suffered, which it claims from the Tribunal together with interest, as follows:

    a. Loss of appreciation of asset Kshs 52,676,000.00

    b. Loss of income Kshs 154,658,026.00

    c. Loss of land Kshs 136,104,000.00

    d. Gross sum Kshs 343,438,026.00

    e. Disturbance @15% Kshs 15,515,703.00

    f. Total Claim Kshs 394,953,729.00

14. It is the Complainant's plea, therefore, that this Tribunal makes a declaration that its rights have been violated as enumerated and a declaration that the Complainants are entitled to compensation for the commensurate current value of the land acquired by the Respondent and compensation for loss of use of the suit land for a period of 12 years at a total cost of Kshs. 394,953,729.00 together with interest and costs of the suit.

Respondent's Case

15. The Respondent has opposed this suit through a Replying Affidavit sworn on 22nd March 2024 by Joyceline Makena – the Respondent's Director of Valuation and Taxation.

16. Ms. Makena acknowledges that the process of compulsory acquisition in respect of the suit property was undertaken by the Ministry of Lands prior to the establishment of the Respondent through *the Constitution* of Kenya 2010 and operationalization through the *Land Act* and the *National Land Commission Act*.

17. Ms. Makena further reiterates the sequence of events which is uncontested between the parties as follows:

    a. Part of the suit property was acquired vide Gazette Notice No. 11257 of 16th September 2011 which was an addendum to Gazette Notices Number 7672 and 7673 of 8th July 2011;

    b. An award of Kshs. 90,418,750.00 was issued to the Complainant and paid as compensation for the acquisition of 1.6 hectares of the suit property;

    c. The suit property was subsequently vested in the acquiring authority and an Inland Container Depot facility was constructed on site;

    d. That the Complainant was advised by the Ministry of Lands to request for additional acquisition from the acquiring authority;

    e. That the Complainant sought compensation from the acquiring authority but was advised to seek a fresh survey to correct the overlap that existed before the acquisition process;

    f. A fresh survey (FR. No. 529/45) was prepared and the suit property was assigned a new number being No. 2161.

18. Despite generally agreeing with the Complainant on the background facts of this case, the Respondent distances itself from the alleged violations by stating that it only acquires land on behalf of acquiring authorities and can only invoke the provisions of Part VIII of the *Land Act* upon receipt of such a request or on lawful orders issued by a court of law. The Respondent, therefore, seeks to be absolved from any responsibility in this regard.

Rejoinder

19. In rejoinder, Mr. Anil Bharmal Shah, a director of the Complainant swore a Further Supplementary Affidavit pursuant to leave granted by this Tribunal on 8th April 2024.

    The Affidavit was sworn on 11th April 2024. Mr. Shah reiterates that the Complainant had severally written to the government seeking compensation for the 0.459 hectares.

20. Mr. Shah further avers that even though a fresh survey FR No. 529/45 was prepared and the remaining portion of land after the acquisition assigned a new reference number being 2161, a new title could not be issued to the Complainant as the land was now public land. Mr. Shah also states that the parcel of land was not available on the Ardhisasa platform and therefore it was not possible to generate a new title.

Analysis and Determination

21. When this matter came up for hearing, the parties mutually agreed to have the same disposed of by way of documentary evidence and submissions. Both parties have filed submissions identifying issues that the Tribunal should pronounce itself on.

22. The Complainant has adopted the following issues for resolution by the Tribunal:

    a. Whether the government of Kenya is in occupation of the extra land measuring 0.459 hectares;

    b. Whether a new notice of intention to acquire and inquiry ought to be issued against the new Parcel Number L.R. No. 2161;

    c. Whether the Complainant's fundamental rights have been breached by the manner in which the compulsory acquisition to L.R. No. 24910 was undertaken;

    d. Whether the Respondent should compensate the Complainant under the old title;

    e. Who should bear costs of the suit.

23. On its part, the Respondent identifies three issues for determination:

    a. Jurisdiction of the Honourable Tribunal to entertain and determine the Complaint;

    b. Whether the orders sought by the Complainant can issue;

    c. Additional compensation where an area acquired is found to be greater.

24. From the two sets of issues identified by the parties, it is clear to us that we have been invited to determine a factual question on whether extra land belonging to the Complainant is occupied by the Government in addition to 1.6 hectares that was compulsorily acquired. If we find in the affirmative, we have also been invited to determine whether this situation amounts to a violation of the Complainant's fundamental rights as guaranteed in *the Constitution* and, finally, what remedies, if any, the Complainant would be entitled to. In our view, the resolution of the three issues will settle

all questions raised by the parties. But first, the Respondent contests this Tribunal's jurisdiction to entertain the complaint.

25. As rightly pointed out by the Respondent, jurisdiction "is everything and without it a Court must down its tools". This adage has gained sufficient notoriety and is borrowed from the judgement of Nyarangi, JA (as he then was) in the locus classicus case of Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1. It is settled law that once a question of jurisdiction has been raised then it must necessarily be addressed first.

26. It is the submission of the Respondent that there is no decision of the Commission that would trigger our jurisdiction under Section 133C of the *Land Act*. In the alternative, the Respondent submits that the complaint is prematurely before the Tribunal, absent a decision.

27. Section 133C of the *Land Act* provides as follows:

Jurisdiction of the Tribunal

1. 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.
4. Despite subsection (3), the Tribunal may, for sufficient cause shown, extend the time prescribed for doing any act or taking any proceedings before it upon such terms and conditions, if any, as may appear just and expedient.
5. If, on an application to the Tribunal, the form or sum which in the opinion of the Tribunal ought to have been awarded as compensation is greater than the sum which the Commission did award, the Tribunal may direct that the Commission shall pay interest on the excess at the prescribed rate.
6. 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.
7. Subject to this Act, the Tribunal has power to confirm, vary or quash the decision of the Commission.
8. The Tribunal may, in matters relating to compulsory acquisition of land, hear and determine a complaint before it arising under Articles 23 (2) and 47 (3) of *the Constitution*, using the framework set out under the Fair Administrative Act or any other law.

28. We have previously had an opportunity to pronounce ourselves on the question of our jurisdiction in the case of Tom Mwachiti Mwero (Suing as a representative of the Estate of Fredrick Johnson Mwachiti (Deceased) vs. Kenya Railways Corporation and National land Commission (TRLAP/E001/2023)

where we held as follows in regard to the Tribunal's jurisdiction especially under Section 133C (8) which the Complainant has invoked:

> The language used in the *Land Act* is a "matter relating to" compulsory acquisition of land in relation to the Tribunal's jurisdiction under Sections 133C (6) and (8). The Oxford Learner's Dictionary (online edition) defines "related" as "connected with something." This Tribunal's jurisdiction, therefore, extends to any matter that is connected to the process of compulsory acquisition.[1]

29. We further held as follows:

> There is no doubt in our mind that a question of whether the acquiring authority took possession of the correct acreage of the acquired land is certainly a matter relating to compulsory acquisition of land within the meaning of Sections 133C (6) and (8) of the *Land Act*.[2]

30. We are, therefore, of the firm view that a party who alleges a violation of its fundamental rights as a result of the process of compulsory acquisition can seek audience before the Tribunal. The Complainant has correctly invoked this Tribunal's jurisdiction.

Is the acquiring authority in occupation of the extra 0.459 hectares?

31. The second matter for our determination is the question whether the 0.459 hectares that allegedly belongs to the Complainant is occupied by Kenya Railways Corporation without having been acquired compulsorily as per the law.

32. First, it is an uncontested fact that the Complainant was the registered proprietor of the suit property prior to the compulsory acquisition that was commenced by the then Commissioner of lands in the year 2011. It is also undisputed that the suit property initially measured 2.488 hectares before part of it was excised due to an overlap into a

neighboring parcel of land. As a result of the excision, the suit property measured 2.059 hectares out of which 1.6 hectares was compulsorily acquired by the government.

33. The bone of contention is whether the remaining 0.459 hectares is occupied by the acquiring authority. The Claimant has presented in evidence a survey report by Mr. Erastus Chege Mwangi trading as Beacon Land Systems which is annexed as Document no. 12 in the Complainant's list and bundle of documents dated 9th February 2024. In the said report (dated 13th October 2023) the surveyor asserts that he conducted a site visit which revealed that the suit property was wholly occupied by Kenya Railways Corporation or its lessee (Syokimau ICD) which has built a container yard. The report also identifies a meter gauge railway traversing the suit property serving the Syokimau Railway Station and another one serving the Syokimau ICD container yard. The report concludes that these assets and services occupy the entire portion of the suit property including the 0.459 hectares in contention.

34. This evidence has not been controverted by the Respondent. The Respondent has not presented a contrary position to the one given by the Complainant's evidence in regard to occupation of the suit property. The Respondent has merely asserted that it is not in use or occupation of the suit property, which is not the contention in this case. We, therefore, reach the conclusion that the acquiring

1 Para. 16

2 Para 19.

authority being Kenya Railways Corporation is in occupation of the entire suit property including the 0.459 hectares belonging to the Complainant.

Has the Occupation of 0.459 hectares belonging to the Complainant occasioned a violation of the Complainant's fundamental rights?

35. The Complainant alleges violation of its fundamental rights specifically under Article 40(3) and Article 47(1) of *the Constitution* by the State by depriving it part of the suit property measuring 0.459 hectares without compensation.

36. Article 40(3) of *the Constitution* provides that:

> 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.

37. Article 47 (1) of *the Constitution*, on the other hand, is to the effect that, "every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."

38. Pursuant to the provisions of Article 40(3) of *the Constitution*, the only available means of depriving a private landowner of their land is through the process of compulsory acquisition. It follows, therefore, that any deprivation that is not pursuant to compulsory acquisition as provided for under the *Land Act* is in violation of the affected party's fundamental rights. In *Attorney General v. Zinj Limited (Petition 1 of 2020)* [2021], the Supreme Court pronounced itself as follows:

> The only way the Government could lawfully deprive the respondent of part or all of its property, was through a compulsory acquisition, in conformity with the provisions of article 40(3) of *the Constitution*, and the procedure stipulated in the Land Acquisition Act (now repealed) which was the applicable law at the time. Towards this end, can it be said that the Government acquired the portion of the suit property compulsorily? The facts on record do not that way point. Being the custodian of the Land Register, and the guarantor of titles emanating there-from, the Government was acutely aware that the suit property was privately owned by the respondent.[3]

39. There is no evidence on record that the government acquired the portion measuring 0.459 hectares which is occupied by Kenya Railways Corporation through the process of compulsory acquisition as detailed under the Land Acquisition Act (now repealed) or the *Land Act*. There is, however, evidence that the acquiring authority which acquired part of the suit property has occupied the whole suit property and has leased part of it to a private entity. This occupation is tantamount to trespass and a flagrant violation of the rights of the Complainant under Article 40(3) of *the Constitution* of Kenya

[3] Para. 27.

40. The Complainant has demonstrated through numerous correspondences forming part of the Complainant's bundle of documents that it sought compensation for the extra land that was occupied by the acquiring authority. These letters are attached as documents 5, 6, and 10. The Complainant also wrote a letter to the Respondent annexed as document number 11 demanding for compensation for the land unlawfully occupied by the acquiring authority. There is also evidence that the Complainant has been stonewalled for over 12 years as it sought to resolve the question of the extra land occupied by the acquiring authority. The evidence on record demonstrates that the Complainant reached out to the Ministry of Lands seeking to have an authenticated survey plan for the suit property in vein. These letters were sent to the Commissioner of Lands and the Director of Surveys and they were submitted in evidence as documents 8 and 9.

41. It is, therefore, clear to us that the Complainant's rights to fair administrative action were also violated by the failure of various State office holders to correct the injustice that had been meted on the Complainant. Indeed, *the Constitution* imposes a duty on the State to not only refrain from violating fundamental rights protected under the bill

of rights but to also take positive steps to "observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights."[4] Furthermore, as observed by Majanja J in Serah Mweru Muhu v Commissioner Of Lands & 2 others [2014] eKLR, *the Constitution*, under Article 232, "... enunciates various values and principles of public service including "(c) responsive, prompt, effective, impartial and equitable provision of services" and "(f) transparency and provision to the public of timely, accurate information."

42. The sequence of events in this case necessitates the reiteration of Mwita J's words in

> Kenya Human Rights Commission & another v Non-Governmental Organizations Co-ordination Board & another [2018] eKLR where he observed as follows:
>
> It cannot be the case therefore, that state organs, administrative bodies or public officers should act in flagrant disobedience and or violation of *the Constitution* and laws of the land. They have an obligation to obey the Constitutional command and the law and in the event they violate any of them, their actions will in no doubt be declared unconstitutional and illegal. That is why Article 23 of *the Constitution* grants Courts of this country authority to step in whenever there is allegation of violation or threat to violation of rights and fundamental freedoms in the Bill of Rights and grant appropriate reliefs.

43. In this case, it was expected that the Respondent having been notified of the events in issue (some which preceded its existence), ought to have taken the necessary steps in exercise of its mandate and in a prompt manner to arrest the continuing violation of the Complainant's rights. It is our finding that the Respondent as the successor of the Commissioner of Lands in matters of compulsory acquisition has the powers to take measures as per law to conclude pending matters from acquisitions that were commenced by the Commissioner of Lands. Under Article 67 of *the Constitution*, the

Respondent is established, to inter alia, manage public land on behalf of the national and county governments. Furthermore, having taken over the role that was previously held by the Commissioner of Lands when the acquisition in respect of the suit property happened, the Respondent had a duty under Section 118(1) of the *Land Act* to cause a final survey of land that has been compulsorily acquired to be conducted where part of the land comprised in documents of title has been acquired. This exercise would then lead to an excision of the compulsorily acquired part of the land from the original land and issuance of new title documents to reflect this excision as per Section 118(2) of the *Land Act*.

[4] Article 21(1).

44. Instead, the Complainant has been turned into a pendulum, forced to oscillate from one public office to another in vain. It is our finding therefore that the Respondent violated Article 47(1) of *the Constitution* by its inaction through the failure to either acquire the remainder of the suit property on behalf of the acquiring authority or failure to cause the excision of the same through a final survey that would have led to the issuance of a new certificate of title to the Complainant. Had the Respondent undertaken a final survey, the outcome would have confirmed, as we have ascertained in the evidence in this case, that the acquiring authority had occupied more land than was gazetted. In this case then, the Respondent would have triggered the process of compulsory acquisition in respect of the extra 0.459 hectares.

45. We must reiterate that the 2010 Constitutional order together with the *Land Act* put a lot of expectation on the Respondent in regard to streamlining management of public land including the exercise of the State's power of eminent domain. The legislature made a deliberate effort in correcting the arbitrariness with which compulsory acquisition was previously conducted. The expectation on the Respondent is, therefore, that whenever an issue relating to compulsory acquisition is brought to its attention then

the same ought to be handled scrupulously in order to protect the affected parties' rights under Articles 40(3) and 47(1) of *the Constitution*. This was not the case.

Remedies

46. A finding of violation of the Complainant's fundamental rights entails a consideration of the appropriate remedies. The Supreme Court in Attorney General v. Zinj Limited (supra) held as follows:

> Under article 22(1) of *the Constitution*, every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or is threatened. Among the reliefs that a court may grant upon proof of violation of a fundamental right, is an order for compensation (article 23 (3)(e)). The quantum of damages to be awarded, depends on the nature of the right that is proven to have been violated, the extent of the violation, and the gravity of the injury caused.

47. We do find that an order for compensation is appropriate in this case to redress the violations of the Complainant's fundamental rights. The Complainant has submitted that the appropriate compensation would be compensation for loss of the land as well as loss of income. In this regard, the Complainant has submitted a valuation report appearing as document number 13 in the Complainant's list of documents in support of its case. In the said valuation report, the value of the 0.459 hectares is placed at Kshs. 136,104,000.00. The report also calculates loss of income on the basis of three approaches being: proposed development approach, income approach, and sales approach, and arrives at an average figure of Kshs. 154,658,026.70 for twelve (12) years. The Complainant also seeks compensation of Kshs. 52,676,000/= being loss of appreciation of asset. In total, together with an additional disturbance allowance of 15% percent, the Complainant seeks Kshs. 394,953,729.90.

48. The Respondent has not provided a valuation report to counter the Complainant's valuation but urges the Tribunal to disregard the values captured in the Complainant's valuation for being arbitrary and unsupported. The Respondent, however, does not dispute that the Complainant is entitled to compensation if the size of land acquired is less than the land that is actually occupied by the acquiring authority. We have already established this above.

49. In Attorney General v. Zinj Limited (supra), the Supreme Court determined as follows:

> The main basis upon which special damages can be granted for the deprivation of property, is the market value of the said property. In case of general damages, a court of law exercises discretion guided by the circumstances of each case.[5]

50. In our assessment, therefore, we shall determine what amount of compensation the Complainant is entitled to under the two heads. Under special damages, it is settled that the market value is the measure for compensation to make up for the loss of land. In arriving at the value of the suit property, the Complainant's Valuation Report relies on land values provided by the Ministry of Lands for similar or nearby properties. We are satisfied that the report is based on an ascertainable methodology which relies on comparables obtained from the Ministry of Lands. We, therefore, find that the figure of Kshs. 136,104,000.00 arrived at is reflective of the current value of the portion of the suit property in contention. Furthermore, the Respondent has not presented a contrary valuation report. To this amount, the Complainant is also entitled to a statutory disturbance allowance of 15% which is recognized under Rule 6 of the Land (Assessment of Just Compensation) Rules, 2017.

51. On general damages, we find that the Complainant is entitled to compensation for income that would have been derived from the suit property for the period of twelve (12) years that the Complainant has been deprived of the property. The Complainant is

entitled to these damages for the unlawful continued occupation of the acquiring authority on part of the suit property measuring 0.459 hectares. Whether characterized as loss of income or mesne profits or damages for trespass, a party who succeeds in a claim for unlawful occupation of its property may be awarded such damages if pleaded.

52. The essence of such damages is to make up for the loss the affected party has suffered as a result of the unlawful occupation of its property. As held by the Court of Appeal in Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees [2020] eKLR:

> The damages so awarded are intended to return the party back to the position he or she was in before the wrongful act was committed. Halsbury's Laws of England 4th Edition Volume 45 para 26 1503 provides as follows on computation of damages in an action for trespass:
>
> a) If the Plaintiff proves the trespass, he is entitled to recover nominal damages even if he has not suffered any actual loss
>
> b) If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss
>
> c) Where the Defendant has made use of the Plaintiff's land, the Plaintiff is entitled to receive by way of damages such an amount as would reasonably be paid for that use
>
> d) Where there is an oppressive, arbitrary or unconstitutional trespass by a Government official or where the Defendant cynically disregards the rights of the Plaintiff in the land with the object of making a gain by his unlawful conduct, damages may be awarded

[5] Para. 30.

e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, general damages may be increased" Emphasis ours.

53. The evidence on record demonstrates that the acquiring authority has leased part of the suit property to a third party who has constructed an Inland Container Depot. Part of the suit property is also occupied by a metre railway line traversing the suit property and serving Syokimau Railway Station, and a meter railway siding serving the container yard. Although it is not pinpointed what kind of infrastructure falls on the extra 0.459 hectares that was not subject of compulsory acquisition, it is clear from the surveyor's report annexed as document number 12, that there is no distinction between the portion of land measuring 1.6 hectares which was compulsorily acquired and the portion of land measuring 0.459 hectares that was not subject of compulsory acquisition. In essence, and according to the surveyor report, the whole area is occupied by Kenya Railways Corporation who has leased part of it to a third party.

54. The Complainant has urged us to find that it has suffered loss of income that is assessed at Kshs. 154,658,026.70. This figure is drawn from an average of three approaches being the "proposed warehouse development approach", "income approach", and "sales approach". To our minds and considering the commercial nature of this area and the close proximity to main transport hubs being the Nairobi Terminus of the Standard Gauge Railway and the Jomo Kenyatta International Airport, a proper assessment of loss would be the income approach which would take into consideration income likely

to be derived from a warehouse. In this regard, the Complainant arrives at a figure of Kshs. 15,695,827.20 as the approximate yearly rental income that would have been derived from the portion of the suit property in contention. We are satisfied that a net annual figure of Kshs. 12,000,000.00 is sufficient to cover the loss of income during this period. This translates to Kshs. 144,000,000.00 for the twelve (12) year period.

Final orders

55. The upshot of the above analysis is that the Complainant's claim succeeds in the following terms:

a. A declaration be and is hereby issued that the Complainant's rights under Article 40(3) of *the Constitution* of Kenya and Sections 111, 122 and 123 of the *Land Act*, 2012 have been contravened by the Government of Kenya and the Respondent;

b. A declaration be and is hereby issued that the Complainant's rights to fair administrative action under Article 47 of *the Constitution* have been contravened by the Respondent;

c. A mandatory injunction be and is hereby issued directing the Respondent to pay the Complainant, within twenty-one (21) days of the date hereof, the following sums:

i. Special Damages (Loss of Land) Kshs.136,104,000.00

ii. Add 15% disturbance allowance Kshs. 20,415,600.00

iii. General Damages (Loss of Income) Kshs.144,000,000.00

Total Kshs. 300,519,600.00

d. Interest on the awarded sums at court rates from the date hereof until payment in full; and

e. Costs of this suit.

56. Orders accordingly.

Dated And Delivered Virtually At Nairobi This 16th Day Of May 2024.

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Dr. Nabil M. Orina Mr. George Supeyo

Chairperson Member

Before: -

Mr. Simiyu for the Complainant

Mr. Mbuthia for the Respondent

Everlyne – C/A

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