



**Nguku Product Twenty Ten Limited v National Land Commission (Tribunal
Case E003 of 2023) [2024] KELAT 892 (KLR) (29 April 2024) (Judgment)**

Neutral citation: [2024] KELAT 892 (KLR)

**REPUBLIC OF KENYA
IN THE LAND ACQUISITION TRIBUNAL
TRIBUNAL CASE E003 OF 2023
NM ORINA, CHAIR & G SUPEYO, MEMBER
APRIL 29, 2024**

BETWEEN

NGUKU PRODUCT TWENTY TEN LIMITED APPELLANT

AND

NATIONAL LAND COMMISSION RESPONDENT

JUDGMENT

Background

1. Pursuant to the leave granted by this Tribunal on 26th January 2024, the Appellant herein, Nguku Product Twenty Ten Limited, filed an undated Memorandum of Appeal accompanied by a supporting affidavit of Joseph Nyamai Mwangangi sworn on 16th February 2024.
2. The Appellant's appeal which is brought under Section 133 C (1) & (2) of the Land Act, 2012 impugns the decision of the Respondent contained in a revised award dated 28th June 2021 which revised the sum of compensation due to the Appellant from the initial award of Kshs. 92,478,659/= contained in an award dated 23rd January 2018, to a sum of Kshs. 38,461,591/= contained in the said impugned decision.
3. There is no contention that the Appellant is the registered owner of the property known as Athi River/ Athi River Block 1/31 which was subject of compulsory acquisition for the purposes of construction of the second carriageway of Athi River – Machakos turnoff Road project through gazette notices no. 9536 of 29th September 2017 and 11424 of 17th November 2017 (hereinafter, the suit property). Copies of these notices were provided in evidence through the Supporting Affidavit of Joseph Nyamai Mwangangi as Exhibit numbers "JNM-1a" and "JNM-1b), respectively.
4. It is also stated in evidence, and not controverted, that the Respondent carried out an inquiry and issued an award for the sum of Kshs. 92,478,656/= in favour of the Appellant. This award dated 23rd



January 2018 is marked as Exhibit number “JNM-2” in the said Supporting Affidavit. Subsequently, the Appellant was paid a deposit of Kshs. 15,000,000/= towards settlement of that award.

5. It is the Appellant’s case that through its own valuation conducted on 26th December 2017, the suit property was valued at Kshs. 77,910,324/=. This valuation is marked as Exhibit “JNM-3” in the Appellant’s Supporting Affidavit.
6. In a nutshell, the Appellant argues that the suit property was grossly undervalued by the Respondent in the valuation preceding the revised award. The Appellant, therefore, urges the Tribunal to uphold the award of Kshs. 92,478,659/= contained in the award dated 23rd January 2018 and to order the Respondent to pay the Appellant the balance of Kshs. 77,478,659/= being the balance of compensation from the initial award. The Appellant has also asked for interest and costs of this suit.
7. Having been aggrieved by the said revision, the Appellant initially filed a Petition before the Environment and Land Court at Machakos. On 30th November 2023, the ELC found that the Respondent adhered to the process under the Land Act in issuing a revised award and that the Ethics and Anti-Corruption Commission was properly within its mandate in conducting investigations that led to a re-valuation and subsequently a revised award. The ELC struck out the petition but allowed the Petitioner (now Appellant) to file an appeal before the Tribunal on the question whether the Respondent assessed the compensation correctly in its revised award.
8. The Appeal is opposed by the Respondent who filed a Replying Affidavit sworn on 26th February 2024 by Austin Odhiambo, a Senior Valuation and Taxation Officer of the Respondent. In the said Replying Affidavit, the Respondent details the process of compulsory acquisition undertaken in respect of the suit property and asserts that it complied with all the laid down procedures of compulsory acquisition.
9. In regard to the matters in contention, the Respondent states that despite complying with the whole process of compulsory acquisition culminating in issuance of an award and payment of a deposit of Kshs. 15,000,000/= towards satisfaction of the said award, the Respondent received a letter from the Ethics and Anti-Corruption Commission (EACC) dated 16th August 2018 requiring it to stop all payments in respect of certain acquisitions which included the acquisition on the suit property. This was to enable the EACC to conduct investigations into alleged cases of fraud emanating from the said process of compulsory acquisition.
10. The Respondent states that it subsequently received a letter from the acquiring agency, Kenya National Highways Authority (KENHA), advising that KENHA had revised the road design which entailed omission of service roads and review of the main road, essentially a reduction of the land to be acquired along a 20 kilometer stretch.
11. These two letters, from EACC and from KENHA, the Respondent avers, prompted it to conduct a re-valuation of the suit property alongside others, chiefly, with the intention of ensuring that public funds were safeguarded from misappropriation.
12. The Respondent asserts that the re-valuation exercise was not done arbitrarily and was not unlawful as it accorded with its constitutional and statutory mandate. The ensuing re-valuation process, which was carried out jointly with the Ministry of Lands resulted in the valuation of the suit property at Kshs. 38,461,591/= for a portion of the suit property being 0.8203 hectares out of the 0.8256 hectares.
13. Finally, the Respondent avers that from the exercise of re-valuation, it was clear that the suit property had been grossly over-valued in the initial valuation. The new award had, therefore, taken into consideration the valuation report presented by the Petitioner as well as the provisions of Part VII of the Land Act and the provisions of the Land (Assessment of Just Compensation) Rules 2017.



14. The Respondent prays for the suit to be dismissed with costs.
15. In rejoinder, the Appellant filed a Supplementary Affidavit sworn on 19th March 2024 by Joseph Nyamai Mwangangi. In the said Affidavit, the Appellant impugns the valuation report dated 24th June 2021 which led to the revised award. It is the Appellant's contention that the re-valuation was not done as part of a legally prescribed process and in any case the Respondent having conducted the initial valuation that arrived at a value of Kshs. 92,478,659/=, any subsequent issues arising that would have required re-valuation ought to have been done independently and with the participation of the Appellant.
16. Specifically, the Appellant takes issue with the re-valuation dated 24th June 2021 as follows:
 - a. The comparable property quoted in the said report lies several kilometers away from Mombasa Road whereas the suit property touches Mombasa Road;
 - b. The acreage of the comparable property is 0.2 acres whereas the suit property is more than 10 times (10x) larger;
 - c. The value of the comparable property with acreage of 0.2 acres valued at 4.5 million is a far cry from the acreage of the suit property and its value;
 - d. The report is silent on the value of parcels of land adjacent to the suit property. It is my humble opinion that the adjacent properties would be the logical comparable transaction to utilize;
 - e. The Respondent proceeded to gazette and acquire the adjacent properties being parcels of land Nos. Athi River/ Athi River Block 30,31,33,36 and 40. These parcels are within the same region as the suit property and the proprietors have been fully compensated. The fact that the Respondent omitted mentioning the said parcels of land in its report. This demonstrates deceit, bias and outright illegality;
 - f. That the Respondent performing after the fact valuation on behalf of itself was a clear conflict of interest."
17. The Appellant further contends that the road design did not significantly affect the acreage as the difference was a mere 0.0053 hectares which could not occasion a significant change in the re-valuation. In any case, the Appellant contends, this portion of 0.0053 hectares is of no economic value for development or for any use whatsoever.

Analysis and Determination

18. The main contention in this suit is whether the Appellant is entitled to the sum of Kshs. 92,478,659/= that was contained in the initial award following the compulsory acquisition of the suit property. In resolving this question, we will interrogate what the law is in regard to just compensation for compulsorily acquired land and the two valuation reports submitted before us before we arrive at a determination.
19. The starting point for determining what a project affected person is entitled to when property is acquired by government through the exercise of eminent domain is [the Constitution](#) of Kenya, 2010. [The Constitution](#) in Article 40(3)(b) recognises the exercise of eminent domain as the exception to the Constitutional dictate that the State shall not deprive a person of property. Tied to that exception



is the requirement that the land so acquired is for a public purpose or in the public interest and the requirement for prompt payment in full, of just compensation.¹

20. Concomitant to the Constitutional dictates under Article 40(3) are the provisions of the [Land Act, 2012](#) which is the implementing legislation. Section 125(1) of the said Act requires that the Respondent (the National Land Commission) shall pay full and just compensation to all persons interested in the land. To provide clarity on the amount of compensation due to a project affected person, the Respondent issued the Land (Assessment of Just Compensation) Rules, 2017. In the said rules, “The Commission shall consider the following factors when assessing compensation:
- a. the market value of the land;
 - b. damage sustained or likely to be sustained by persons interested at the time of the Commission's taking possession of the land by reason of severing the land from his or her other land;
 - c. damage sustained or likely to be sustained by persons interested at the time of the Commission's taking possession of the land by reason of the acquisition injuriously affecting his or her other property, whether moveable or immovable, in any other manner or his or her actual earnings;
 - d. reasonable expenses incidental to the relocation any of the persons interested or who will be compelled to change residence or place of business as a consequence of the acquisition; and
 - e. damage genuinely resulting from diminution of the profits of the land between the date of publication in the Gazette of the notice of intention to acquire the land and the date the Commission takes possession of the land.”²

Emphasis added

21. Market value has been defined in Rule 2 thereof as “the value of the land at the date of publication in the Gazette of the notice of intention to acquire the land.” This is the value that should be paid to a project affected person plus an additional 15% disturbance allowance in accordance with Rule 6.
22. Additionally, there have been several cases before the Superior Courts of record that have addressed the question of just compensation. In interpreting the constitutional imperative of just compensation the High Court in *Patrick Musimba v National Land Commission & 4 others* [2016] eKLR held as follows:

“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

¹ Article 40(3)(b)(i), [Constitution of Kenya, 2010](#).

² Rule 3, Land (Assessment of Just Compensation) Rules, 2017.



compensation would not be equivalent to the compulsory sacrifice”. Effectively Lord Scott’s statement gave rise to the unabated proposition that the compensation of compulsorily acquired property be quantified in accordance with the principle of equivalence. A person is entitled to compensation for losses fairly attributed to the taking of his land but not to any greater amount as “fair compensation requires that he should be paid for the value of the land to him, not its value generally or its value to the acquiring authority”: see *Director of Buildings and Lands –v- Shun Fung Wouworks Ltd* [1995] AC 111,125. We see no reason why the same approach should not be adopted locally. *The Constitution* decrees “just compensation” which must be paid promptly and in full. *The Constitution* dictates that the compensation be equitable and lawful when the word “just” is applied as according to Black’s Law Dictionary 9th Ed page 881 the word “just” means “legally right; lawful; equitable”. In our view, the only equitable compensation for compulsory acquisition of land should be one which equates restitution. Once the property is acquired and there is direct loss by reason of the acquisition the owner is entitled to be paid the equivalent. One must receive a price equal to his pecuniary detriment; he is not to receive less or more. This can be achieved to the satisfaction of the owner of land by Appeal to the market value of the land.’

23. There is indeed ample jurisprudence and concurrence that just compensation entails the compensation that reflects putting the project affected person as close as possible to the position they were in before the acquisition. It is akin to restitution as held in the Patrick Musimba case. Still, that concurrence does not resolve the contestations over what amounts to market value of a property. In *Many v. The Collector* (1957 E: A 125) a clarification was attempted as follows:

“The market value of land as the basis on which compensation must be assessed is the price which a willing vendor might be expected to obtain from a willing purchaser and a willing purchaser is one who although he may be a speculator is not a wild or unreasonable speculator”.

24. Indeed, the Respondent has a duty to ensure that in compensating project affected persons it must ensure that public coffers are safeguarded from not only “a wild or unreasonable speculator(s)” but also misappropriation through fraudulent dealings that may be propagated by corrupt public officers in collusion with project affected persons.
25. Whereas it may not be a reasonable expectation to expect that two sets of valuations will arrive at the same figure for compensation, figures that are too far apart leave more questions than answers. That is the situation obtaining in this case. There are not two but three different sets of figures that are too far apart. Nevertheless, we will dissect the three figures as we resolve the question before us.
26. As an independent arbiter, we will be persuaded by a valuation whose methodology and outcome is ascertainable. For the two valuations presented before us, both the Appellant and the Respondent have adopted the same methodology in arriving at the market value. Whereas the Appellant employs the “sales comparison method” and the Respondent uses the “comparative market analysis” method, both methods refer to collection of sales data of comparables within the same locality. These approaches which the parties rely on have been described by Jones Kimutai as follows:

a valuer determines the Market value of a property by comparing it with other similar properties that have been sold in the recent past and situated in the same locality. This approach is based on the principle of substitution that states that when similar or commensurate commodities, goods or services are available the one with lowest price attracts the greatest demand and widest distribution. This follows that; a buyer will not pay more for



one property than for another that is equally desirable. The above principle was an extension by the revealed preference theory which states that one can merely observe empirically the actual behaviour of consumers to demonstrate the general properties of demand curves.³

27. Going by this methodology, one would be able to approximate the value of a property going by how much adjacent properties, or properties within the same locality have been sold for in the recent past. If two independent valuers were to follow this approach then it is expected that with well explained adjustments, their figures shouldn't be too far from each other. But that is not the case.
28. Of course, this method is not without its own limitations and may be especially hindered by a lack of data on current sales in the same locality. It may also be the case that some properties in the same locality are sold for way above their market price while others are sold below the market price. Sellers sell their properties for various reasons and may not enjoy the same latitude to sell as and when they wish.
29. While it is feasible that the use of different comparables may occasion a variation in valuations, proper valuations have in-built mechanisms of making adjustments to ensure that the value given is as close as possible to the market value of the property in question.
30. The Appellant's valuation report prepared by the firm of Njihia Muoka Rashid Co. Ltd employed the use of two comparables which are in the same block with the subject property. The sales, however, took place at different times. The first comparable of which puts the value of a 2 acre piece of land at Kshs. 36, 000,000.00 was sold in 2013 and the second comparable which places the value of the same piece of land at Kshs. 50,000,000.00 was sold in 2016. The valuer has added an appreciation adjustment of 10% per annum for the value of the property sold in 2013 which brings about the adjusted price of Ksh 28,900, 891.00 per acre as at 2017, according to the valuer. The valuer also adds an appreciation adjustment of 10% for one (1) year for the second comparable sold in the year 2016. This translates to an approximated value of Kshs. 27, 500,000.00 per acre as at 2017.
31. We are unable to rely on this valuation approach which is based on comparable figures from five (5) years and one (1) year, respectively before the acquisition process then adjusted by an appreciation of 10%. Although the valuer explains the difficulty encountered in obtaining data on recent sales, assigning an adjustment of 10% as appreciation is arbitrary and without basis. The valuer has not explained any drastic changes that happened in this period to warrant such a high appreciation value. The problem with this approach, therefore, is the lack of transparency in the assigned appreciation percentage.
32. On the other hand, the valuation report produced by the Respondent as the basis for the revised award is based on comparables that are not too similar in size and location. For the first comparable, it is not clear which block the plots were subdivided from. The use of a smaller sized comparables entails a calculation to convert the smaller units to one (1) acre in order to get the value per acre based on these comparables. While the first comparable in regard to land measuring 50x100 (an eighth of an acre) was valued for purposes of a mortgage at Kshs. 2,000,000.00 which translates to Kshs. 16,000,000/= an acre, comparable two measuring 0.2 acres was being offered for sale at Kshs. 4,500,000/= which translates to Kshs. 22,500,000/= per acre. The Respondent's valuer concludes by stating that adjustments were made and a value of Kshs. 16,500,000/= per acre was arrived at as the value of the suit property. The valuer does not explain what kind of adjustments were made in order to assist the end user to understand how the figure was arrived at.
33. When assessed against the backdrop of the enunciated principles above, the award of Kshs. 92,478,659/= issued to the Appellants was without basis and arbitrary. The same can, therefore, not form a basis

³ Kimutai Barnabas Jones, 'An Analysis of the Causes for Variation in Valuation for Land Compensation' (Unpublished Thesis) 1995.



for compensation for the reason that the award is not reflective of any assessment of the market value of the suit property as at the time of gazettment of the notice of intention to acquire. Whereas the award was issued on 23rd January 2018 and having considered the Appellant's own valuation of Kshs. 77,910,324/= dated 26th December 2017, the Respondent issued an award that was not supported even by the Appellant's own valuation. The Respondent was, therefore, justified in setting aside the said award and conducting a fresh valuation.

34. When it comes to the two valuations by the parties herein, we are persuaded that the Respondent's valuation followed the right methodology in compliance with the Land (Assessment of Just Compensation) Rules, 2017 but failed to justify the adjustments made in order to reach its determination of value. To our mind, the adjustment that ought to have been applied should have taken into account the fact that smaller portions of land attract lower prices as compared to bigger portions of land. This is with the exception of certain circumstances where smaller portions of land attract higher prices in urban areas due to, "high demand, location, development costs, investment potential, zoning regulations, subdivision limitations, and land speculation."⁴ In this case, comparable one which is an eighth of an acre valued at approximately Kshs. 16,000,000.00 per acre shouldn't have been the indicative value for a larger portion of land measuring 2 acres while a portion of land measuring 0.2 acres is sold at approximately Kshs. 22,500,000.00 in this locality. The correct adjustment, therefore, since the portion of land being valued is a bigger portion, should have been closer to Kshs. 22,500,000.00. Taking into consideration the proximity of this portion to the main highway and its size, we are of the firm view that a valuation of Kshs. 22,500,000.00 per acre is a fair estimation to ensure just compensation for the Appellant. This value is also close to the value of the second comparable supplied in the Appellant's valuation without the adjustments for appreciation.
35. Finally, we note that the revised design of the road left out a small portion of land measuring 0.0053 hectares from acquisition. This land, as contended by the Appellant, is an insignificant portion that would be of no economic or of any value to the Appellant. We agree with the Appellant in this regard and make a finding that the Respondent ought to have instructed the acquiring authority pursuant to Section 122(3) of the Land Act to acquire the remaining portion of the suit property. Having made that determination, we hereby calculate the amount of compensation due to the Appellant for the entire portion of land known as Athi River/ Athi River Block 1/ 31 measuring 0.8256 hectares as follows:
- a. Area of land acquired 0.8256 Ha Approx.
 - b. The Value of the land Kshs. 45,900,000/=
 - c. The total compensation payable for the land inclusive of 15% disturbance allowance Kshs 52,785,000/=
36. The above analysis leads to the conclusion that the Appellant's Appeal has partly succeeded and is hereby allowed in the following terms:
- a. That the award of Kshs. 38,461,591/= is hereby set aside;
 - b. That the Appellant is hereby awarded the sum of Kshs. 52,785,000/= as just compensation for acquisition of land known as Athi River/ Athi River Block 1/ 31 measuring 0.8256 hectares;
 - c. That the Respondent shall pay the Appellant Kshs. 37,785,000/= being the balance of (b);
 - d. Interest on (c) shall accrue at the base lending rate set by the Central Bank of Kenya and prevailing from the date of this judgement, until paid in full;

⁴ See, Lilian Makena, 'Exploring the Cost Disparity: Why Smaller Land Plots Command Higher Prices,' BuyRentKenya, 14th September 2023. Available at <https://www.buyrentkenya.com/discover/smaller-land-plots-higher-prices>



e. Each party shall bear its own costs.

37. Orders accordingly.

DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29TH DAY OF APRIL 2024.

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Dr. Nabil M. Orina - Chairperson

Mr. George Supeyo - Member

Before: -

Ms. Thiong'o for the Appellant

No Appearance for the Respondent

Everlyne – C/A

