Omwoyo v National Land Commission (Tribunal Case E008 of 2024) [2024] KELAT 819 (KLR) (24 June 2024) (Judgment)

Neutral citation: [2024] KELAT 819 (KLR)

REPUBLIC OF KENYA

IN THE LAND ACQUISITION TRIBUNAL

TRIBUNAL CASE E008 OF 2024

NM ORINA, CHAIR & G SUPEYO, MEMBER

JUNE 24, 2024

BETWEEN

HENRY OMWOYO ..... APPELLANT

AND

NATIONAL LAND COMMISSION ..... RESPONDENT

JUDGMENT

1. Pursuant to leave granted by this Tribunal on 8th March 2024, the Appellant herein, Henry Omwoyo, filed a Memorandum of Appeal dated 8th March 2024 accompanied with supporting documents.

2. The Appellant impugns the Respondent's decision contained in an award of compensation dated 27th November 2023 in respect of land parcel number Kajiado/Kitengela/330 (the suit property). The suit property was acquired vide Gazette Notice number 6373 of 25th June 2021 for purposes of the construction of the Nairobi-Naivasha Standard Gauge Railways project.

3. It is the Appellant's case that sometimes in the year 2022, he came to know about the intended compulsory acquisition of his land through a meeting held in the local chief's office. He avers that the Respondent promised to individually contact all those who were to be affected by this project but this was not to be.

4. Later, in November 2023, the Appellant alleges that he got to learn from his neighbors that the process of compulsory acquisition was complete. At this time, the Appellant avers that he had neither received notification of the intended acquisition nor been informed of any inquiry process that was conducted. For these reasons, the Appellant impugns the whole process of compulsorily acquiring the suit property for not complying with the law.

5. It is the Appellant's case that upon learning that the Respondent had completed the process of compulsory acquisition of the suit property, he followed up with the Respondent who then issued him with the award letter dated 27th November 2023 for a total compensation of Kshs 7,153,000.00.

6. The Appellant is dissatisfied with the compensation and contests the same on three fronts. First, the Appellant avers that his property was undervalued and, in this regard, he presents a valuation report carried out by his own valuer (Messrs. Njihia Njoroge & Company) which indicates that the market value of the land and developments thereon is Kshs 16,882,000.00 (inclusive of the 15% disturbance allowance).

7. On a related issue, the Appellant contends that the Respondent failed to make an award for the value of the land contrary to the law. In the said award, the Respondent indicates the value of the land to be 0.00.

8. Thirdly, the Appellant contends that the portion of the suit property left to him after the said compulsory acquisition is less than 0.045ha and thus too small for the Appellant to carry thereon any gainful economic activity including any development.

9. The Appellant, therefore, prays for the following orders:

    a. A declaration that the process of compulsory acquisition against the Appellant's property known as Kajiado/Kitengela/330 was not carried out as required by law;

    b. A declaration that the compensation amount contained in the letter of award dated 27th November 2023 is too low and arrived at contrary to the principles on which compensation is to be determined as per the law;

    c. The suit premises be surveyed and valued afresh to determine the correct and accurate value of the Appellant's property;

    d. Compensation for the sum of Kshs 14,860,800.00 together with 15% disturbance allowance thus totaling to Kshs 16,882,000.00 being fair and adequate compensation award for the entire parcel of land;

    e. Costs and interest.

10. The Respondent opposed the Appeal through a Replying Affidavit sworn on 3rd May 2024 by Ms. Isabel Njeru, the Respondent's Chief Valuation Officer. According to Ms. Njeru, the Respondent complied with all the laws in the acquisition of the suit property.

11. Specifically, the Respondent avers that it received a request from Kenya Railways Corporation (the acquiring entity) for acquisition of land for the Standard Gauge Railway. Subsequently, a notice of intention to acquire was published in Gazette Notice no. 6373 of 25th June 2021 as well as a notice of inquiries in Gazette Notice no. 6374 of the same date. The inquiries in regard to the suit property and others were conducted on 26th August 2021 at Kandisi Chief's Office and the Appellant was in attendance as well as other persons who were resident on the suit property. The Respondent has submitted in evidence copies of signed sheets (Annexure "IN3") and a copy of the inquiry form (Annexure "IN4") which was signed by the Appellant.

12. In regard to valuation, the Respondent contends that the Appellant did not produce ownership documents and thus the land was not included in the valuation and award. The award given to the Appellant was, therefore, for the developments done on the suit property, only. The valuations, the Respondent avers, were done accurately and transparently in regard to the improvements. The respondent submitted in evidence a table showing how the valuation was arrived at as Annexure "IN6".

13. Lastly, on the request by the Appellant for the acquisition of the whole parcel of land, the Respondent acknowledges that it received the request from the Appellant and the same had been forwarded for

deliberation. The Respondent communicated to the Appellant via letter dated 22nd February 2024 which is submitted in evidence as Annexure "IN5".

14. By leave of the Tribunal and considering the issues which had been raised in the Replying Affidavit of Ms. Njeru, the Appellant was granted a second bite at the cherry which he took through a further affidavit sworn on 15th May 2024. In the said affidavit, the Appellant addressed the issue of ownership of the suit property.

15. The Appellant contends that he has ownership rights to the suit property by virtue of a sale agreement dated 14th January 2014. The said sale agreement is submitted in evidence and marked as "HO-1". The Appellant further asserts that his parcel of land is distinct and clearly identifiable from its existing boundary features and has no known disputes from owners of the neighboring parcels of land or any other person.

16. The Appellant further avers that the suit property is subject of an ongoing succession cause of the estate of the vendor. Regardless, the Appellant contends, the Respondent should have compensated him and the other property owners of the suit property since each property owner occupies a distinct portion of the suit property. Besides, the Appellant asserts, the Respondent has not demonstrated that there are any disputes in regard to the suit property that would prejudice any compensation due to him.

Analysis and Determination

17. The issues which the parties have invited us to determine revolve around the questions, (i) whether the Respondent carried out the compulsory acquisition in accordance with the law, (ii) whether the award of compensation was adequate, and (iii) whether the Respondent should have acquired the remaining portion of the land. We will address these issues in the analysis below.

18. The exercise of the power of eminent domain by the government is sanctioned under Article 40(3) as follows:

> The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-
>
> a. results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
>
> b. is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that-
>
> i. requires prompt payment in full, of just compensation to the person; and
>
> ii. allows any person who has an interest in, or right over, that property a right of access to a court of law.

19. It is a constitutional imperative that deprivation of private property by the state must be in accordance with the *Constitution* and statute. The elaborate provisions of the *Land Act* enacted in 2012 give effect to this constitutional provision. These provisions have been summarized in case law and they warrant our reiteration. In the now locus classicus case of *Patrick Musimba v National Land Commission & 4 others* [2016] eKLR the High Court stated as follows:

> Process of compulsory acquisition
>
> 85. In summary, the process of compulsory acquisition now runs as follows.

86. Under Section 107 of the *Land Act*, the National Land Commission (the 1st 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*.

20. The Appellant contends that the Respondent did not follow the laid down procedure in acquiring the suit property. First, the Appellant alleges that he was not issued with any notice of the intended acquisition and the subsequent inquiry that was conducted. From the evidence presented, although the Respondent has not shown that the Appellant was served with the two notices that were published in the Kenya Gazette of 25th June 2021, in person, there is evidence that the Appellant was present at the inquiry which was conducted on 26th August 2021 at Kandisi Chief's Office contrary to his assertions that he came to know about the acquisition in the year 2022. The Respondent produced evidence marked as "IN4" being a copy of the inquiry form signed by the Appellant. This evidence has not been controverted by the Appellant and we are, therefore, satisfied that the Appellant was duly notified of the intended acquisition and the inquiry that was conducted which he attended.

21. The second matter raised by the Appellant that impugns the process undertaken by the Respondent is the alleged failure to award compensation for the land. Although the Appellant has urged this issue as one of undervaluation, it is clear to us that the contention is whether or not the Appellant should have been given an award in relation to the suit property. The Respondent has categorically stated that the Appellant did not produce ownership documents for the land at the inquiry and hence could not be given an award for land. The impugned award was only in relation to the developments on the suit property.

22. On his part, the Appellant argues that the sale agreement produced before the tribunal demonstrates his ownership rights over the suit property and that the Respondent ought to have awarded compensation to him. It is the Appellant's further contention that in the absence of any controversy over ownership of the property, the Respondent should have compensated him.

23. It is trite law that *prima facie* proof of ownership in respect of registered land is through a certificate of title. It is, therefore, a reasonable expectation that a person who lays claim to land which is subject of compulsory acquisition should produce a certificate of title as proof of ownership. The Respondent is obliged, upon satisfaction that the said party has shown conclusive evidence of ownership to issue an award of compensation. If a dispute arises as to ownership, the Respondent is expected to withhold any compensation pending resolution of such a dispute.

24. In this case, the Appellant has only produced a sale agreement as proof of ownership. We agree with the Respondent that the said sale agreement is not sufficient proof of ownership. It is noteworthy that the said sale agreement was executed more than 10 years ago. The only explanation which has been offered by the Appellant as to why he has not been issued with a certificate of title is that there is an ongoing succession cause in respect of the estate of the vendor before a transfer can be done in his favour. Unfortunately, this is not enough for the Respondent to issue an award in his favour. A sale agreement is not conclusive proof of ownership and even if the same may be relied upon by courts in

tracing the root of title to property, on its own it cannot prove ownership. We are guided by L. Gacheru, J in *Kimani v Njeri & 3 others* (Environment & Land Case 10 of 2022) [2023] KEELC 17771 (KLR) where the learned judge held:

> Section 107(1) of the *Evidence Act* required of the Plaintiff to lead evidence to support his claim of ownership. There being no title deed or any executed transfer forms, the Sale agreement cannot be used as conclusive evidence of ownership of land but mere expression of intention.[1] (Emphasis added)

25. We are, therefore, not convinced that the Respondent failed to adhere to the process of compulsory acquisition as alleged by the Appellant by the failure to issue an award in regard to the land. We find that the Respondent exercised due prudence in withholding any award in respect to the suit property in order to ascertain conclusively the ownership of the suit property. It is incumbent upon the Appellant to expedite the process of obtaining the certificate of title in respect of the suit property and thereafter to pursue his claim of compensation before the respondent. Before then, the Respondent is under a duty to withhold making any award in order to avert potential loss of public funds if a wrong party is compensated.

26. On the question whether the awarded compensation was sufficient – in regard to the developments, we have perused the pleadings and the supporting documents especially the valuation report prepared by Njihia Njoroge & Company as well as the Respondent's supporting documents especially annexure "IN6" which is a table showing the compensation awarded and basis.

27. The parties differ on two fronts. First, the plinth area identified in the Appellant's valuation report for the portion of the block of flats forming part of the developments is 196 sq. m. On the other hand, the Respondent indicates the plinth area as 156 sq. m. Neither of the parties proffers an explanation where this difference originates from. On his part, the Appellant has also sought compensation for a plinth area of 24 sq. m occupied by an ablution block. Secondly, the parties have taken different paths in regard to the assigned price per unit. Whereas the Respondent values this at Kshs 30,000 per sq. m, the Appellant's valuer puts the figure at Kshs 35,000 per sq. m.

28. As the party impugning the valuation conducted by the Respondent, it was upon the Appellant to convince us that the figure of Kshs 35,000 per sq. m relied upon by his valuer is the most appropriate one. The Appellant's valuation does not contain a methodological explanation and sources to justify a higher rate than that adopted by the Respondent. Absent such a justification, we do not see a reason to disturb the valuation of Kshs 30,000.00 per sq. m applied by the Respondent as it seems fair, transparent and a just compensation for the developments.

29. However, in regard to the plinth area subject to compensation, we agree with the finding of the Appellant's valuer that demolishing only a part of the block of flats will compromise the structural integrity of the remainder of the building. It also goes without saying that the economic activity carried out by the Appellant will be seriously impeded and will not be viable anymore if the remaining portion of the flats is cut off from the ablution block which will be demolished. In this regard, therefore, the Respondent was under a duty to ensure that the Appellant is compensated in regard to the whole development by instructing the acquiring entity to acquire the whole portion of the development. This is the essence of Section 122(3) of the *Land Act*.

30. In relation to the last issue, we find that the Respondent ought to have compensated for the whole portion of the development. This does not necessarily mean that the portion of the land where part

[1] Para. 40.

of the development had been left out needs to be acquired. We shall leave that to the Respondent to exercise its mandate and professional assessment at the point of issuing an award in regard to the land.

31. The above analysis leads to the conclusion that the Appellant's Appeal has partly succeeded and is hereby allowed in the following terms:

    a. The award issued on 27th November 2023 is hereby set aside;

    b. The Respondent is hereby directed to issue a new award within forty-five (45) days taking into account the plinth area of the whole development on the suit property belonging to the Appellant;

    c. All the other prayers are dismissed;

    d. Each party shall bear its own costs.

32. Orders accordingly.

DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF JUNE 2024.

....

DR. NABIL M. ORINA

CHAIRPERSON

....

MR. GEORGE SUPEYO

MEMBER

Before: -

Ms. Bosire h/b for Mr. Mayogi for the Appellant

Ms. Masinde for the Respondent

Everlyne – C/A