



**Kiare v National Land Commission & another (Tribunal Case
E015 of 2024) [2024] KELAT 832 (KLR) (1 July 2024) (Judgment)**

Neutral citation: [2024] KELAT 832 (KLR)

**REPUBLIC OF KENYA
IN THE LAND ACQUISITION TRIBUNAL
TRIBUNAL CASE E015 OF 2024
NM ORINA, CHAIR
JULY 1, 2024**

BETWEEN

ELIUD NJOROGE KIARIE PLAINTIFF

AND

THE NATIONAL LAND COMMISSION 1ST DEFENDANT

KENYA RAILWAYS CORPORATION 2ND DEFENDANT

JUDGMENT

1. The Plaintiff avers that he is the registered proprietor of land known as Longonot/Kijabe Block 6/378 measuring approximately 4.06 hectares (the suit property). It is also his case that on 10th May 2018, he entered into an award agreement with the 1st Defendant for compensation following the compulsory acquisition of the suit property for the construction of the Standard Gauge Railway Phase 2A Nairobi – Naivasha. The Plaintiff states that he was offered the sum of Kshs. 10,856,929.00 which he accepted.
2. The Plaintiff asserts that compensation due to this compulsory acquisition delayed because of an ongoing dispute in Case Number Naivasha HCJR No. 6 of 2015 which was finalized on 27th February 2020. Following this determination in his favour, the Plaintiff wrote to the Defendants demanding the payment of the compensation as contained in the award dated 10th May 2018.
3. It is the Plaintiff's case that he was verbally informed by the 1st Defendant's valuation officers that the award of Kshs. 10,856,929.00 had been reduced to Kshs. 4,620,522.00. He rejected this revised award and lodged this complaint. In his case, the Plaintiff states that the value of the suit property is approximated at Kshs. 50,000,000.00 as the current market value for 1 acre of land in the area is Kshs. 5,000,000.00.
4. The Plaintiff, therefore, prays for the following: -



- a. A declaration that the 1st Defendant's revocation of the award of Kshs. 10,856,929.00 and issuance of an award of Kshs. 4,620,522.00 is null and void, illegal, unlawful, cruel, oppressive and unjustified;
 - b. An order for immediate payment of Kshs. 10,856,929.00 to the Plaintiff and court interest rate from 10th May 2018 until the date of judgement and until payment in full;
 - c. In the alternative, an order for payment of the current market value of Kshs. 50,000,000.00 and interest until payment in full; (this prayer was abandoned)
 - d. General damages for breach of award agreement dated 10th May 2018 plus interest from the date of judgement;
 - e. Costs; and
 - f. Any other appropriate reliefs.
5. The 1st Defendant filed a Defence on 22nd April 2024 opposing the Plaintiff's case. The 1st Defendant acknowledges that the Plaintiff was offered the award of Kshs. 10,856,929.00 on 10th May 2018. However, the 1st Defendant avers that the award was subsequently revoked via Gazette Notice No. 11371 of 2nd November 2018 and a new award issued in line with a land value schedule which had been prepared by the Ministry of Lands and Physical Planning.
 6. The 1st Defendant, therefore, avers that project affected persons were advised to visit the 1st Defendant's office in order to collect their new awards. In regard to the suit property, it fell within the Kajiado County Corridor sub-market 73km-79km which was valued at approximately Kshs. 400,000.00 per acre. The Plaintiff was presented with a new award of Kshs. 4,620,522.00 as per this survey which he rejected. The 1st Defendant prays for the suit to be dismissed with costs.
 7. The 2nd Defendant filed an application dated 27th May 2024 wherein it prayed for orders that the suit against the 2nd Defendant be struck out for failure to disclose any reasonable cause of action against the 2nd Defendant. The 2nd Defendant also sought costs. This application was based on the grounds that it is only the 1st Defendant who is mandated to undertake the process of compulsory acquisition and to conduct valuation for land which is subject of compulsory acquisition. The 2nd Defendant also contended that it does not have a role to play in the process of compulsory acquisition and that there is no issue which had been raised in the suit for determination as between the Plaintiff and the 2nd Defendant.
 8. By consent of the parties when they appeared before the tribunal on 28th May 2024, the 2nd Defendant's application dated 27th May 2024 will be considered together with this judgement.
 9. The Plaintiff filed a reply to the 1st Defendant's Defence on 21st May 2024 wherein he reiterated the contents of the Complaint and joined issue with the 1st Defendant's Defence. The Plaintiff reiterates that the purported revocation of the award dated 10th May 2018 was unilateral as he was not informed hence the said revocation was illegal, unlawful and unjustified.

Analysis and Determination

10. Preliminarily, we have been invited by the 2nd Defendant to dismiss the suit against it for failure to disclose any reasonable cause of action. We note that the Plaintiff's claim is entirely against the 1st Defendant on the subject matter of compensation. We are persuaded by the 2nd Defendant's argument that the orders sought do not affect them directly. We are further guided by the Environment and Land



Court (L.L. Naikuni, J.) decision in *Geyser International Assets Limited vs. Attorney General & 3 Others* [2021] eKLR where the court held as follows:

...the law does impose the full responsibility on payment to the National Land Commission and nobody else. Where the National Land Commission fails to do so and land is possessed by the acquiring authority before payment is made the obligations to ensure payment is made falls squarely on the commission...In this case the 2nd and 4th Respondents notwithstanding being the acquiring body is immaterial they cannot be liable and hence the law does not impose any responsibility on them.

11. The suit against the 2nd Defendant is hereby dismissed, in limine. There shall be no orders as to costs.
12. The bone of contention between the Plaintiff and the 1st Defendant is whether the Plaintiff ought to be paid the sum of Kshs. 10,856,929.00 which is contained in an award dated 10th May 2018 which was subsequently revoked by the 1st Defendant through Gazette Notice No. 11371 of 2nd November 2018. The dispute between the Plaintiff and the 1st Defendant is, therefore, on the value of the suit property following its compulsory acquisition. Both parties are in agreement on the background facts relevant to this case.
13. What we are called upon to determine in this case may also be split into two limbs being - whether the revocation of the award dated 10th May 2018 was procedural, and, secondly, whether the subsequent award of Kshs. 4,620,522.00 is just compensation for acquiring the suit property. We have had occasion to delve into the question of what constitutes just compensation and the relevant legal architecture. In the case of [*Nguku Product Twenty Ten Limited v National Land Commission \(Tribunal Case E003 of 2023\)*](#) [2024] Tribunal 421 (KLR) (29 April 2024) (Judgment) we held as follows:
 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

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



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 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.

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



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.”
14. Our determination in *Nguku Products Twenty Ten Limited* (supra) is that there is a legal procedure in arriving at just compensation for a project affected person. This legal architecture flowing from Article 40(3) of *the Constitution* is elaborated in the *Land Act* as well as the Land (Assessment of just Compensation) Rules, 2017. The 1st Defendant is, therefore, under an obligation to issue awards only in accordance with the law to ensure that project affected persons receive just compensation and public coffers are safeguarded from plunder.
15. The Plaintiff has urged us to find that the award dated 10th May 2018 was a valid agreement between the Plaintiff and the 1st Defendant and hence the 1st Defendant is under an obligation to perform its part. Although no evidence has been urged before us to show how the award was arrived at, we take cognizance of the provisions of Section 113 (2) which provides, “Subject to Article 40(2) (sic) of *the Constitution* and Section 122 and 128 of this Act, an award – (a) shall be final and conclusive evidence of – ... (ii) The value, in the opinion of the commission, of the land...” The plain interpretation of this provision is that the award once issued by the 1st Defendant is final and can only be subjected to review as per the provisions of *the Constitution* and the *Land Act*.
16. However, we have also held that the 1st Respondent may review an award in appropriate cases to correct an error or in a case where the same was obtained through fraud.³ In the instant case, the 1st Defendant submits that the award in respect of the suit property was reviewed for the reason that, “the initial offers were arrived at due to significant errors in the valuation process and the Plaintiff’s property had been overvalued in the initial valuation.”⁴
17. The 1st Defendant did not submit in evidence the valuation that was relied upon in issuing the award dated 10th May 2018. Further, the 1st Defendant didn’t specify the errors that were noted in the valuation that was conducted in regard to the suit property. Curiously, the Gazette Notice no. 11371 of 2nd November 2018 through which the revocation of the awards was communicated did not mention any errors in regard to valuations as the reason for revocation. The Gazette Notice identified the following as the reasons for the revocation:

“The Commission cancelled the awards as a result of the following reasons:

³ See, *Registered Trustees of Ruiru Sports Club v Kenya National Highways Authority & another (Tribunal Case E002 of 2023)* [2023] KELAT 1373 (KLR) (13 December 2023) (Judgment), para 46.

⁴ 1st Defendant’s Submissions dated 27th May 2024.



The awards had discrepancies in computations Had omissions and errors in areas acquired Changes in size of land acquired as result of project realignment causing some of the remaining portions of land being uneconomical and inaccessible Some major developments were partially affected hence need to acquire whole Other parcels of land were severely affected by the project by either splitting them into none (sic) useful and uneconomical portions Overlapping of boundaries.”⁵

18. We find that the cancellation or revocation of the award dated 10th May 2018 was done arbitrarily in contravention of Article 47(1) of *the Constitution* and Section 113 (2) of the *Land Act*. The 1st Defendant is obliged to give reasons to a project affected person clearly identifying the errors sought to be corrected in an award before the same can be reviewed. The project affected person has a right at this point to make representations before a new award can be issued.
19. Be that as it may, the 1st Defendant has now submitted that the initial award given to the Plaintiff was due to over valuation of his property. In the alternative, the 1st Defendant has urged us to find that the new award of Kshs. 4,620,522.00 was just compensation for the suit property. This amount was arrived at, according to the 1st Defendant, from land value surveys supplied by the Ministry of Lands.
20. We are at pains to understand the legal basis for issuance of an award on the basis of “land value surveys” supplied by the Ministry of Lands. As held above in the case of Nguku Product Twenty Ten, the legally recognized criteria for valuing land for purposes of compensation under the *land Act* and the Land (Assessment of Just Compensation) Rules, 2017 is the market value of the land. It is incumbent upon the 1st Defendant to determine the value of compensation in accordance with a legally recognizable criteria before making an award. Further, pursuant to the provisions of Article 47(1), the 1st Defendant is under a duty to give reasons detailing the basis for making an award of compensation. We are of the firm view that a detailed valuation report would satisfy this constitutional imperative.
21. To streamline the process of compensation, the legislature through the Land Value (Amendment) Act, 2019 (which amended the *land Act*) introduced a land value index as a criteria for assessment of value for purposes of compensation. The said section provides as follows:

107A.
 - (1) Valuation of freehold land and community land for purposes of compensation under this Act shall be based on the provisions of this Part and the land value index developed for that purpose by the Cabinet Secretary in consultation with county governments and approved by the National Assembly and the Senate.
 - (2) The land value index under subsection (1) shall be developed within six months of the commencement of this Act.
 - (3) For purposes of this Part, “land value index” means an analytical representation showing the spatial distribution of land values in a given geographical area at a specific time.
22. A “land value index” established under Section 107A is one of the innovative ways to ensure predictability of compensation values in case of compulsory acquisition. This criteria would by all means eliminate arbitrariness and wastage of public funds in cases of overvaluation. Unfortunately, the same has not been developed. The index is required to be developed in consultation with both houses of Parliament before being published in the Kenya Gazette. The land value survey that the 1st Defendant relied upon in arriving at the revised award of Kshs. 4,620,522.00 is not the land value index and is not a legally recognizable criteria.

⁵ Gazette Notice No. 11371 of 2nd November 2018.



23. Although the land value survey relied upon by the 1st Defendant was done before the amendments introduced in the [Land Act](#) that require the development of a Land Value Index, the same is not a determinate criteria for issuing an award for two main reasons. First, the land value survey, without a legal framework for its development, lacks methodological transparency which is key in demonstrating how the same was developed and the comparables relied upon. Secondly, there is no information on when the same was developed and if any adjustments need to be made to reflect appreciation of land values. In a nutshell, an internal Ministry of Lands document, on its own, cannot form basis for issuance of awards for compensation.
24. It is important that the 1st Defendant understands that it cannot delegate its mandate to a third party but must issue an award in each case upon a legally recognizable criteria. Whereas the figures contained in the Ministry of Lands Letter dated 28th March 2018 to the Chairperson of the 1st Defendant may have been indicative prices for parcels of land within the areas identified at some point, the same cannot form a basis for issuance of an award without evidence of recent comparables that would enable the 1st Defendant to conduct a valuation and issue an award.
25. A proper determination of values for purposes of compensation must determine the market value of the land at the time of acquisition. Absent a legally developed land value index contemplated under Section 107A, the 1st Respondent is under a duty to obtain ascertainable recent comparables of lands in the vicinity in order to conduct a valuation and to justify adjustments made in the approximated value, if any. It is after this process has been undertaken that an award can be issued to a project affected person.
26. We also take note that the 1st Defendant was in possession of the letter from the Ministry of Lands at the time of issuance of the award dated 10th May 2018. The stamped copy of the letter from the Ministry of lands shows that it was received by the 1st Defendant on 4th April 2018. On what basis then was the award dated 10th May 2018 issued if the 1st Defendant had sought to rely on the indicative prices from the Ministry of Lands? On this basis, we find that the award dated 10th May 2018 was not transparently issued and the same cannot be relied upon as the basis for compensation despite the unprocedural manner in which it was revoked by the 1st Defendant.
27. We, therefore, reach the conclusion that the first award and the revised award did not adhere to the legally provided criteria for assessing value for purposes of compensation. Having made this determination, we have examined the valuation report filed in evidence by the Plaintiff. The report is done by Legit Valuers Ltd and is dated 15th May 2024. The report adopts the market value approach in valuing the property and indicates that it relies on recent sales of similar properties in reaching a value of Kshs. 12,000,000.00 for the suit property. These comparables have, however, not been provided in the report. We are unable to rely on the report as reflecting the current value of the suit property in its state without evidence of comparables relied upon.
28. For the above reasons, we hereby make a finding that the 1st Defendant has not complied with [the Constitution](#), the [Land Act](#) and the Land (Assessment of Just Compensation) Rules, 2017 in issuing an award to the Plaintiff. The appropriate remedy at this point is to order that the 1st Respondent issue a new award of compensation in accordance with the guidelines we have provided herein. This exercise shall be done within the next twenty-one (21) days from the date hereof. All the other prayers are dismissed, and each party shall bear its own costs.
29. To ensure compliance with the Orders issued in paragraph 28 above, the 1st Defendant shall file a compliance report before this tribunal within 30 days, hereof. The file shall be mentioned on 6th August 2024 to confirm the same.



DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 1ST DAY OF JULY 2024.

.....
DR. NABIL M. ORINA MR. GEORGE SUPEYO

CHAIRPERSON MEMBER

Before: -

Mr. Gitau for the Plaintiff

Ms. Juma Holding Brief for Mr. Muturi for the 2nd Defendant

No Appearance for the 1st Defendant

Everlyne – C/A

