**Muambi Properties Limited v Kenya Urban Roads Authority & another (Land Acquisition Case E028 of 2024) [2024] KELAT 1361 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KELAT 1361 (KLR)

**REPUBLIC OF KENYA**

**IN THE LAND ACQUISITION TRIBUNAL**

**LAND ACQUISITION CASE E028 OF 2024**

**NM ORINA, CHAIR & G SUPEYO, MEMBER**

**SEPTEMBER 26, 2024**

**BETWEEN**

**MUAMBI PROPERTIES LIMITED ..... PLAINTIFF**

**AND**

**KENYA URBAN ROADS AUTHORITY ..... 1ST DEFENDANT**

**NATIONAL LAND COMMISSION ..... 2ND DEFENDANT**

## JUDGMENT

1. It is established that the Plaintiff is the registered proprietor of all that property known as L.R. No. 7374/3 located along Mombasa road near Konza city. The same shall hereinafter be referred to as the suit property.

2. On 29th March 2018 through Gazette Notice no. 3215 the 2nd Defendant, acting on behalf of the 1st Defendant, published a notice of intention to acquire part of the suit property, measuring approximately 0.7972 hectares, for purposes of the construction of "Kathekakai – Machakos Road".

3. Subsequently, the 2nd Defendant invited the project affected persons for an inquiry through Gazette Notice Number 5264 of 31st May 2018. This was followed by an award of Kshs. 52,632,888/= issued on 14th August 2018 to the Plaintiff which was promptly accepted on 15th August 2018.

4. This award was, however, not paid. The 1st Defendant, upon receiving the schedule for payment from the 2nd Defendant, wrote to the Chairman of the 2nd Defendant informing him that the amount of the award was above the budget line for the project. The 1st Defendant, therefore, requested the 2nd Defendant to cancel the compulsory acquisition in regard to part of the suit property.

5. Following this request, the 2nd Defendant issued another Gazette Notice no. 7666 on 2nd October 2020, two years later, revoking the acquisition of part of the suit property on the reason that "the

land parcel...is no longer required for the construction of the Kathekakai-Machakos (Konza-Vota-Katumani) Road." This wasn't the end of the matter, though.

6. On 25th June 2021, the 2nd Defendant placed a notice in the Kenya Gazette of an intention to create a right of way traversing the portion of the suit property that had been compulsorily acquired earlier. Upon this notice being published, the 1st Defendant moved into the suit property and started construction of a public road on the portion earmarked for acquisition.

7. These developments prompted the filing of Machakos ELC case no. E078 of 2021. In this case, the court made the following findings:

> From the evidence I have analysed above, and in applying the facts of the case to the circumstances at hand, I am of the view that since NLC commenced creating a public right of way over the suit land and KURA already took possession, the process of compulsory acquisition begun. I opine that the Defendants' should have engaged the Plaintiff. I hence find that they breached the Plaintiff's rights by entering into the suit land, without following the strict procedure as set out, by the *Land Act*. Further, I note there is now a right of way over the suit land, but there is no evidence that the Plaintiff has been compensated for the said road traversing its land.[1]

8. It is clear from the evidence and from the findings of the court in ELC case no. E078 of 2021 that a portion of the suit property is now in possession of the 1st Defendant although no compensation has been done for the same. The instant suit originates from the directions of the ELC in Machakos for the Plaintiff to file a suit before the tribunal for assessment of the correct compensation due to the Plaintiff for the creation of the public right of way on the suit property.

9. Our task is clearly cut out. There is no dispute that the Plaintiff's portion of the suit property has been acquired and that a road has been constructed upon the land upon issuance of the notice of intention to create a public right of way by the 2nd Defendant. The task before us and the question we must answer as guided by the ELC is what amount of compensation the Plaintiff is entitled to.

10. Section 148 of the *Land Act* provides as follows:

Compensation in respect of public right of way

1. Compensation shall be payable to any person for the use of land, of which the person is in lawful or actual occupation, as a communal right of way and, with respect to a wayleave, in addition to any compensation for the use of land for any damage suffered in respect of tree crops and buildings as shall, in cases of private land, be based on the value of the land as determined by a qualified valuer. Emphasis added.

11. The Plaintiff is, therefore, entitled to the value of the land that has been affected by the creation of the public right of way. That value was assessed by the 2nd Defendant as Kshs. 52,632,888/= through a process of valuation as provided for under the law. None of the Defendants have contested the figure or provided a contrary valuation in this case. Despite the 1st Defendant indicating that the assessed compensation was extremely high and above the prevailing market rate, they have not filed a contrary valuation to impugn the 1st Defendant's award. We have no reason to disturb that award and we, therefore, hold that the Plaintiff is entitled to compensation of the sum of Kshs. 52,632,888/=.

[1] Muambi Properties Limited v Kenya Urban Roads Authority & 2 others (Environment & Land Case E078 of 2021) [2024] KEELC 4307 (KLR) (23 May 2024) (Judgment), para. 11.

12. Having determined how much compensation is due to the Plaintiff, it is now necessary to clarify where that compensation is payable from. The Defendants have kept the Plaintiff in the dark for more than three years. From the time the notice of intention to acquire was published, the 2nd Defendant published the revocation two and half years later. This was also two years after the Plaintiff had been issued with an award for compensation. Even though the 2nd Defendant knew that the 1st Defendant was no longer interested in the compulsory acquisition, the 2nd Defendant did not communicate that soon enough.

13. While both Defendants have urged the tribunal to dismiss the Plaintiff's claim for compensation, none of them have addressed us on what happens to the Plaintiff's right to compensation emanating from Article 40(3). It is clear to us that both Defendants are engaging in responsibility shifting to the detriment of the Plaintiff. It is also clear that the 1st Defendant has taken possession of the portion of the suit property in question and built a road there. It seems to us, therefore, that the original intention of acquiring the portion of the suit property was achieved at no cost at all for the 1st Defendant. This is a blatant violation of the Plaintiff's rights under Article 40(3) of *the Constitution*. We reiterate that the 1st Defendant has not followed the correct procedure in acquiring part of the suit property for purposes of creation of a public right of way thus far. That violation can only be cured by the payment of compensation and not responsibility shifting.

14. It is also necessary to note that the 2nd Defendant was under a legal obligation to ascertain existence of funds before embarking on the process of compulsory acquisition in the first place. Whereas the 2nd Defendant can revoke an intended process of compulsory acquisition, "anytime before possession is taken..." pursuant to Section 123(1) of the *Land Act*, 2012, a reading of Section 111(1A) of the same Act makes it clear that lack of a budgetary allocation is not one of those reasons contemplated under Section 123(1). Section 111(1A) provides that, "the acquiring authority shall deposit with the Commission the compensation funds...before the acquisition is undertaken." The legal assumption in the process of compulsory acquisition is that at the time of publishing a notice of intention to acquire, the 2nd Defendant has ascertained that the acquiring authority has sufficient funds to pay compensation. As this Tribunal held in Thuo & 151 others *v National Land Commission & 5 others (Land Acquisition Petition 3 of 2024*) [2024] KELAT 1142 (KLR) (12 August 2024) (Judgment):

> The Commission as the body mandated to acquire land on behalf of the State is ... under a legal obligation to ensure that the acquiring authority has set aside funds for the said acquisition. This requirement which is a statutory one under Section 111(1A) of the *Land Act* flows from the Constitutional imperative under Article 40(3) to ensure that compensation is promptly done. It is also necessary for the Commission to have confirmation of the funds in order to be satisfied that the intended use of the land by the acquiring authority is not "fanciful" but has been budgeted for and funds have been allocated for the project.[2]

15. The above notwithstanding, the Plaintiff is still entitled to compensation regardless of the process undertaken for deprivation of land – whether through compulsory acquisition or through creation of a public right of way. Pursuant to Section 148 (4) of the *Land Act*, 2012:

> The duty to pay compensation payable under this section shall lie with the State Department, county government, public authority or corporate body that applied for the public right of way and that duty shall be complied with promptly.

2 Para. 58.

16. The 2nd Defendant states in paragraph 13 of the "2nd Defendant Statement of Defence" that the 1st Defendant is the "acquiring entity" for the public road on the Plaintiff's property. It is also not controverted that the 1st Defendant took possession of the portion of the suit property. The 1st Defendant only notes that it is upon the 2nd Defendant to finalise the declaratory process.

17. What is not in doubt in this case is that the 2nd Defendant has not complied with the process of creation of a public right of way. It is stated in evidence that the creation of the public right of way was prompted by the recommendation of the National Assembly. While this is not contested, the responsibility to pay compensation does not lie on the National Assembly as per the provisions of Section 148(4) of the *Land Act*. The lack of transparency and scrupulousness on the part of the 2nd Defendant in undertaking this process is not only an abdication of its duty under the law but leaves the Plaintiff in an unknown limbo. Despite this road being created as a "public right of way", we find that such a designation was only for convenience and did not take away the responsibility from the 1st Defendant to pay for the acquisition of land for its creation. A close reading of Section 148(4) does not place this responsibility on any other entity other than the 1st Defendant. The 1st Defendant is the entity that triggered the process that led to the acquisition of the Plaintiff's land.

18. We are also inclined to award nominal damages for the trespass upon the suit property as pleaded by the Plaintiff. 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
>
> e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, general damages may be increased"

19. The sum of our analysis is, therefore, that the Plaintiff's case succeeds and is allowed in the following terms:

a. An order be and is hereby issued that the Plaintiff is entitled to compensation by the 1st Defendant for acquisition of part of the parcel of land known as L.R. No. 7374/3 for the sum of Kshs. 52,632,888/=;

b. That the said compensation of Kshs. 52,632,888/= shall be paid together with interest at court rates from 25th June 2021 until payment in full;

c. The 1st Defendant shall pay general damages of Kshs. 1,000,000/= together with interest from the date of this judgement until payment in full.

d. Costs of this suit shall be borne by the 1st and 2nd Defendants equally.

e. The above sums shall be paid within a period of 90 days.

20. It is so ordered.

**DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF SEPTEMBER 2024.**

..... .....

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

**MR. GEORGE SUPEYO - MEMBER**

Before: -

Mr. Kivuva for the Plaintiff

Ms. Mwalozi for the 1st Defendant

Ms. Aiyabei for the 2nd Defendant

Everlyne – C/A