Wairagu v National Land Commission (Tribunal Case E019 of 2024)
[2024] KELAT 1280 (KLR) (9 September 2024) (Judgment)

Neutral citation: [2024] KELAT 1280 (KLR)

REPUBLIC OF KENYA

IN THE LAND ACQUISITION TRIBUNAL

TRIBUNAL CASE E019 OF 2024

NM ORINA, CHAIR & G SUPEYO, MEMBER

SEPTEMBER 9, 2024

BETWEEN

NANCY MUTHONI WAIRAGU ..... APPELLANT

AND

NATIONAL LAND COMMISSION ..... RESPONDENT

JUDGMENT

Background

1. This suit is a sequel to ELCA No. 34B of 2020 (the ELC suit). In the ELC suit, the Appellant had contested the process of compulsory acquisition in respect of her land known as L.R. No. Muguga/Gitaru/2437 (the suit property). While agreeing with her, the court found that the Respondent had failed to adhere to the process of compulsory acquisition as provided for in the *Land Act*. The Respondent was therefore ordered to conduct the process afresh and, specifically, to conduct a fresh inquiry in respect to the suit land within 60 days from the date of judgement.

2. It is from this process that the Appellant is now aggrieved having been issued with a new award of compensation for the sum of Kshs. 55,451,170/- through a letter dated 2nd November 2022 to the Appellant's advocates (the award). Following leave of this Tribunal granted on 16th May 2024, the Appellant filed a Memorandum of Appeal dated 20th May 2024 and a Supporting Affidavit dated 21st May 2024. The appeal is also supported by the affidavits of Christopher Omare, M.D. Kamau, and Zacharia Makenzi Ndeti; all sworn on 21st June 2024

3. The instant Appeal is based on several grounds which can be summed as follows:

    a. That the award issued is not reflective of a fair and just compensation for the suit land; and

    b. That the Respondent failed to appreciate that the partial acquisition of the suit land rendered the remaining area of the land economically unviable.

4. The Appellant avers that the award is not only in contravention of the Decree of the Environment and Land Court but also a gross undervaluation of the suit property. On the first limb, the Appellant asserts that the Respondent disregarded the Court Order issued on 8th February 2022 by the ELC by failing to conduct inquiries on compensation within a period of 60 days. Further, on the second limb, the Appellant avers, that the Respondent failed to take into account the market value of the property and as such arrived at an arbitrary, unilateral and erroneous award as compensation which was lower than the market value of the property.

5. The Appellant further contends that the Respondent failed to conduct a fresh valuation exercise and instead relied on an old and outdated valuation exercise conducted on 7th May 2018. Consequently, the Appellant contends that the award – having been based on a valuation report done in 2018 – cannot give an accurate market value of the Suit Property.

6. The Appellant also contends that the award failed to take into consideration other factors that are relevant such as costs of the improvement, loss of rental income, improvements made, increase in land value, number of people living there, damage caused on the Appellant, land value index, existing charge in favour of Bank of Baroda over the property and damage sustained or likely to be sustained by the Appellant in the process of compulsory acquisition.

7. The Appellant further avers that the part acquisition of the suit property renders the remaining area of the land economically unviable since the remainder of the building on the suit property cannot be accommodated in the remainder of the area without violating the building code and zoning policy and guidelines.

8. The Appellant therefore prays for the following:

    a. This Appeal be allowed with costs.

    b. The Award of Compensation by the National Land Commission dated 2nd November 2022 by Kabale Tache Arero, Ag. Secretary/CEO, National Land Commission, pursuant to Section 113(1) of the *Land Act* 2012 for acquisition of the Property Land Reference Number MUGUGA/GITARU/2437 for use as proposed by the Kenya National Highways Authority for the project A104 JAMES GICHURU JUNCTION-RIRONI JUNCTION (A104/B3) ROAD PROJECT be set aside.

    c. The Award be varied and the same be substituted with a just and fair compensation.

    d. The Honourable Tribunal do and hereby adopt the value of the Property and the improvements thereon as contained in the valuation report filed by the Appellant prepared by Zanconsult Valuers & Management Company Limited dated 1st August 2022 at Kenya Shillings Ninety Four Million Eight Hundred and Seventy Thousand Eight Hundred and Forty Four (KShs 94,870,844) be awarded as the market value of the Property which ought to be paid to the Appellant.

    e. Respondent to pay costs of valuation at KES 45,000/=

    f. Spent.

    g. The Respondent to pay costs of this appeal.

    h. Any other or further relief deemed fit in favour of the Appellant.

9. This appeal is opposed by the Respondent through the Replying Affidavit of Ms. Isabel Njeru, sworn on 18th July 2024. Ms. Njeru identifies herself as the Chief Valuation Officer of the Respondent. She

avers that the Respondent conducted a fresh inquiry process within the time stipulated by the ELC with the Appellant's participation.

10. Ms. Njeru further avers that upon completion of the process, the Respondent concluded that the award it initially offered to the Applicant was accurate and made the same offer thereby refuting the Applicant's claims that the valuation was arbitrary, unfair or unjust. She asserted that the Respondent was in fact ordered to undertake a fresh inquiry process and not a fresh valuation and therefore carrying out a fresh valuation was irrelevant.

11. Finally, Ms. Njeru contended that valuation for compulsory acquisition is done per the publication date of the notice of intention to acquire in the Gazette and therefore the Appellant's assertion that the Respondent should have used the current market value is a misinformed take.

12. The Respondent prays for the suit to be dismissed with costs.

Analysis and Determination

13. The main borne of contention between the Appellant and the Respondent is whether the Respondent's award of compensation for Kshs. 55,421,200/- is just and fair. Additionally, the parties have invited us to consider whether the process of compulsory acquisition of land undertaken by the Respondent in respect of the suit property complied with *the Constitution* and written law. Other attendant issues for determination to wit – appropriate reliefs, if any, and costs, shall be addressed thereafter.

14. Before delving into the main issue for resolution, parties do not seem to agree whether the orders issued in the ELC suit were complied with. On the part of the Appellant, the process did not comply with the law for failure to comply with the orders of the ELC court to conduct fresh inquiries within sixty days. The Appellant argues that the award issued outside this timeframe is illegal and irregular.

15. On its part, the Respondent argues that it complied with the order issued by the ELC by publishing a notice of inquiry via Gazette Notice Number. 4437 of 14th April 2022, within the sixty-day period. Subsequently, the Respondent argues it conducted inquiries with the participation of the Appellant and issued an award which has been impugned by the Appellant.

16. It is not in doubt that the process as ordered by the ELC was completed on 2nd November 2022, almost nine months after the said order. No explanation has been offered by the Respondent in this regard. It should be borne in mind that the process of compulsory acquisition, especially the determination of compensation payable and the payment of such compensation, should be undertaken with urgency due to the disruptive nature of compulsory acquisition. In providing timelines for the completion of that exercise, the ELC had made a finding that the Respondent had failed to adhere to *the Constitution* and written law in undertaking the process that had been challenged in the ELC suit.

17. We deprecate the failure to comply with the orders issued by the ELC but we are aware of the implications of making a finding that the outcome thereof is illegal and irregular as invited by the Appellant. In that regard, we find that although the Respondent did not conduct the fresh inquiry as ordered by the ELC within sixty days, the outcome of that process is not invalidated by this failure. Invalidating the outcome thereof would mean ordering a new inquiry to be conducted in the manner ordered by the ELC. We do not find that this is prudent in the circumstances where the Appellant is anxiously awaiting a resolution of this matter, six years since the acquisition was gazetted.

18. On the question of whether the award of compensation issued by the Respondent is just and fair, the instant appeal is two pronged. First, the Appellant contends that the award is fundamentally flawed as it violates the principles of prompt, full and just compensation under Article 40 of *the Constitution*

and Rule 3 of the Land (Assessment of Just Compensation) Rules 2017. Second, the Appellant argues that the Respondent failed and refused to invoke the provisions of Section 122 of the *Land Act* thereby leaving a portion of the unacquired portion of the suit property which is inadequate and incompatible with the Appellant's intended use.

19. On the first limb, the Appellant relies on a valuation report dated 1st August 2022 in regard to a valuation conducted on the suit property by Zanconsult Valuers and Management Company Limited (the Appellant's valuation). This report is attached to the Affidavit of Mr. Zacharia Makenzi Ndeti and marked as "ZMN-3". Mr. Ndeti, in his Affidavit sworn on 21st June 2024, states that in his professional opinion the suit property had been undervalued by the Respondent.

20. Mr. Ndeti impugns the comparables relied upon by the Respondent in its valuation report stating that the same do not reflect the market value as they are values declared for purposes of stamp duty which tend to be under declared to avoid paying more in stamp duty. Further, Mr. Ndeti faults the Respondent's valuation of the incomplete floors of the development and argues that the Respondent ought not to have applied different rates for the completed floors and the incomplete floors.

21. In the Appellant's valuation, the valuer adopts a comparable sales and replacement cost approach in valuing the suit property together with the developments thereon. It is the opinion of the valuer that the unimproved site value of the suit property (measuring approximately 0.0465 hectares) is Kshs. 14,182,500/-. The valuer also places the value of the developments upon the suit property at Kshs. 59,000,000/-

22. In a further affidavit sworn on 21st June 2024, the Appellant depones that the unimproved site value of the suit property was Kshs. 10,000,000/- in the year 2016 when the same was valued by Njihia Njoroge & Company for purposes of a mortgage facility from Bank of Baroda. This valuation dated 14th November 2016 is annexed to the said affidavit of the Appellant and marked "NMW-1".

23. On the other hand, the Respondent argues that it adhered to the law and process of valuing the suit property before an award was issued. The Respondent argues that the award is a true depiction of the value of the suit property. Adopting the same methodology as the Appellant, the Respondent arrives at a value for the unimproved site (0.0231 hectares) of Kshs. 3,424,810/- and a value of Kshs. 41,121,600/- for the developments thereon. This valuation report is dated 7th May 2018 and forms part of the Respondent's documents.

24. The Appellant and the Respondent primarily differ on the acreage of the suit property to be acquiring (to be addressed below) and the valuation of the unimproved site as well as the improvements thereon. Before we deal with the question of the acquired acreage in the second limb of this analysis, we shall first deal with what just compensation is payable in this case.

25. The requirement for payment of just compensation upon the exercise of the power of eminent domain is recognized under Article 40(3)(b) (i) of *the Constitution*. Further, Section 125(1) of the *Land Act*, 2012 requires that 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, 3. "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."[1]

26. Market value is 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 payable to a project affected person plus an additional 15% disturbance allowance in accordance with Rule 6.

27. Additionally, a project affected person who experiences 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 is entitled to damages under Rule 3(e) above.

28. 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 though 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. One must

[1] Rule 3, Land (Assessment of Just Compensation) Rules, 2017.

Emphasis added

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.'

29. In Many v. The Collector (1957 EA 125) it was held 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".

30. Despite the clarity on what just compensation entails, parties rarely find concurrence on what it amounts to. In a case where parties have submitted starkly different valuation reports, it is upon the tribunal to determine what approach and valuation is as close as possible to put the appellant in the position she was before the acquisition happened.

31. Whereas the Respondent indicates that the portion of the suit property was valued at Kshs. 3,424,810/- (approximately 0.0231 hectares) which translates to approximately Kshs. 6,894,098/- for the whole portion of the suit property, it is not lost on us that the same parcel of land was valued at Kshs. 10,000,000/- in the year 2016 when the same was offered as a security for a loan facility from Bank of Baroda. This report was availed as part of the Appellant's evidence and the same was not challenged by the Respondent. We are convinced that while the valuation reports of the Appellant and the Respondent may have been driven by client influence and adjustment heuristics, a valuation conducted prior to the compulsory acquisition for purposes of securing a facility from a bank is closest to the value of that property as at that time.

32. There is no doubt, therefore, that the unimproved site value of Kshs. 6,894,098/- for the suit property is a gross undervaluation of the land. The Respondent has not mentioned any factors that could explain a depreciation in value of the suit property. In any case, it is the expectation of a property in such an area to have appreciated by some margin in the two years between 2016 and 2018 when the same was gazetted for acquisition. The Respondent has also failed to show the comparison between the suit property and the comparables adopted in the valuation exercise. It should be borne in mind that factors such as size and location play a role in the valuation of a property. In this case, the evidence suggests that the suit property fronts a major road – a factor which contributes positively to a higher value. As stated in Limo v. Commissioner of Lands KLR (E&L) 175:

> " In addition to the matters contained in the schedule to the Land Acquisition Act which a court should consider in assessing compensation to be paid to a person whose land has been compulsorily acquired, courts have tended to take into account the nearness of the land in question to the main town and its nearness to the road access." Emphasis added.

33. This was also the position in The Collector v Abdulla Pirmohmed & Others (1958) EA where the court held that the distance of the plots from a main road was a material factor in assessing their value.[2] A reliable valuation report must indicate clearly all the factors that went into the valuation and if there were any adjustments which must be clearly explained.

34. It is clear to us that none of the valuation reports presented by the Appellant and Respondent can be relied on in regard to the unimproved site value of the suit property. The two reports have failed to make a clear link between the variables relied upon and the suit property in terms of size and location. We are only left with the valuation report dated 14th November 2016 marked "NMW-1" in the Appellant's

[2] Page 616.

further affidavit sworn on 21st June 2024. We are, therefore, of the view that an unimproved site value of Kshs. 10,000,000/- is a fair estimate of the value of the whole portion of the suit property as at the time of publication of a notice of intention to acquire the suit property, which was about a year and half after the suit was valued for purposes of securing a loan facility at Kshs. 10,000,000/-. We have no evidence of any increase in values within this short period. The same has not been pleaded or provided in evidence by any of the parties.

35. In regard to the developments on the suit property, the Respondent places the value of the developments at Kshs. 41,121,600/=. This sum has been disputed by the Appellant who has provided a counter valuation of Kshs. 59,000,000/-. This is a significant difference. The parties differ on not only how to go about the calculation itself but also the rate of the building cost. Whereas the Respondent adopted the rate of Kshs. 3300/- per square feet for the completed areas of the building and a rate of Kshs. 2000/- per square feet for the incomplete areas, the Appellant relied on the rate of Kshs. 50,000/- per square metre for the whole structure and subtracted the cost of the remaining works which is shown as Kshs. 3,500,000/- without any further evidence. The Respondent's valuation of the development is transparent and comparable with the value of the building as at 14th November 2016 when the same was valued for purposes of obtaining a loan facility from Bank of Baroda at a value of Kshs. 40,000,000/-. The Respondent did not err in adopting a lower rate for the incomplete part of the building as it is necessary to include adjustments to take into account the construction quality, and any possible depreciation. We, therefore, find no reason to depart from the Respondent's valuation of the developments.

36. The Appellant has also been awarded a sum of Kshs. 4,222,800/- towards loss of income. We also find no reason to interfere with this as it takes into account a reasonable period of two years to cushion the Appellant from loss of rental income she would have received during that period from the time the notice of intention to acquire was published until the time of expected taking of possession. This is in compliance with Rule 3(e) of the Land (Assessment of Just Compensation) Rules, 2017.

37. The Appellant, however, claims a further sum of Kshs. 6,678,969/- for "loan repayment from September 2020 to July 2022." We find this demand unsupported by law for the reasons that the compensation under Rule 3(e) enunciated above is supposed to take care of any reasonable damages to a project affected person's business in the transition period. This means that a project affected person should utilize such compensation to continue servicing other obligations arising out their business including servicing loan facilities. If such a project affected person who has been compensated for loss to their income were to be compensated separately through repayment of a loan, the same would no doubt amount to unjust enrichment and would have no basis in law. The Respondent is, however, reminded to promptly pay the compensation as will be ordered to ensure that the Appellant does not suffer any further loss.

38. The second limb of the issue discussed above is the question whether the Respondent should have invoked Section 122(3) of the *Land Act* to request the acquiring authority to acquire the remaining portion of the suit property. It is the Appellant's case that the remaining portion of the suit property is not economically viable. In this regard, the Appellant relies on the evidence of Christopher N. Omare, a physical planner, who swore an affidavit on 21st June 2024 in support of the case. According to Mr. Omare the acquisition will affect a substantive part of the suit property and the remaining portion which measures approximately 0.0210 hectares will not be economically viable or would not fit the

Appellant's intended use. In his report attached to his affidavit and marked "CNO-1", Mr. Omare observes as follows:

> " The current use is commercial cum multi dwelling residential units (flats). As such, the developer expects to develop in line with the user. Developing the remainder portion of land in adherence with ...planning guidelines is complex if not impossible. This therefore concludes that parcel Title No. Muguga/Gitaru/2437, cannot be developed as intended after the compulsory acquisition is executed."

39. Additionally, the Appellant relies on the evidence of M. D. Kamau, a licensed surveyor. It is the evidence of Mr. Kamau through his report annexed to his affidavit sworn on 21st June 2024 that:

> " From the observations made on the ground, it becomes difficult/ impossible to access the remaining portion ...from the Highway, not unless there be a provision of an Access Lane to the property from the NAIROBI-NAKURU HIGHWAY.
>
> The remaining portion {0.0210 Ha. (Approximately 0.0520 Acre)} will not be economically viable to the Registered Proprietor in terms of development considering the stringent guidelines from the County Government during the Approvals; which states that "The buildings shall not cover more than 50% of the area of the land or such lesser area as may be prescribed by the County Government Development Control Regulations."
>
> In this case, the 50% of the remaining area is 0.0105 Ha (0.0260 Acres) which cannot be feasibly developed or approved by the relevant authorities."

40. The Appellant's evidence is uncontroverted that the remaining portion of the suit property would not be economically viable upon severance. We find in favour of 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. The Appellant is entitled to compensation for the suit property as a whole and not a portion of it.

41. Having reached the above conclusions, we hereby calculate the amount of compensation due to the Appellant for the entire portion of land known as Muguga/Gitaru/2437 measuring 0.0465 Ha as follows:

    a. Area of land acquired - 0.0465 Ha Approx.

    b. The unimproved site value of the land - Kshs. 10,000,000/-

    c. Value of the developments thereon – Kshs. 41,121,600/-

    d. 15% disturbance allowance – Kshs. 7,668,240/-

    e. Loss of Rental income – Kshs. 4,222,800/-

    f. The total compensation payable for the land, developments thereon inclusive of 15% disturbance allowance, and loss of rental income - Kshs 63,012,000/=

42. 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. 55,451,170/= is hereby set aside;

    b. That the Appellant is hereby awarded the sum of Kshs. 63,012,000/= as just compensation for acquisition of land known as Muguga/Gitaru/2437 measuring 0.0465 Ha;

c. Interest on (b) shall accrue at the rate of 12% from the date of this judgement, until paid in full;

d. Parties shall bear their own costs.

43. Orders accordingly.

DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 9TH DAY OF SEPTEMBER 2024.

Dr. Nabil M. Orina Chairperson

Mr. George Supeyo

Before: -

Ms. Muthoni for the Appellant

Ms. MAsinde for the Respondent

John – C/A