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)

Neutral citation: [2023] KELAT 1373 (KLR)

REPUBLIC OF KENYA

IN THE LAND ACQUISITION TRIBUNAL

TRIBUNAL CASE E002 OF 2023

NM ORINA, CHAIR & G SUPEYO, MEMBER

DECEMBER 13, 2023

BETWEEN

THE REGISTERED TRUSTEES OF RUIRU SPORTS CLUB ..... COMPLAINANT

AND

KENYA NATIONAL HIGHWAYS AUTHORITY ..... 1ST RESPONDENT

NATIONAL LAND COMMISSION ..... 2ND RESPONDENT

JUDGMENT

Background

1. On 11th July 2008, the then Commissioner of Lands through gazette notice no. 6034 and 6035 notified the public of the intention to compulsorily acquire a portion of property known as L.R. No. 122/7 measuring 6.0542ha for purposes of construction of the Nairobi – Thika road. The gazette notice identified the owner of the property as one, Samuel Kimondo Theuri.

2. Pursuant to this notice of intention to acquire, the Commissioner of Lands proceeded to conduct an inquiry to ascertain interests in the land and the value for purposes of compensation. Having received representations from Mr. Theuri and other interested parties who had built structures on the property, the Commissioner of Lands issued an award for the sum of Kshs. 71,486,990.00. The said sum of money was deposited by the 1st Respondent (the acquiring authority) to the Commissioner of Lands account for purposes of effecting the compensation. The Complainant was not involved in this process.

3. While this was ongoing, a suit was pending in Court pitting the Complainant against Samuel Kimondo Theuri over the ownership of the subject property.[1] The awarded sum of Kshs. 71,486,990.00 was therefore held by the Commissioner of Lands, pending determination of the dispute.

[1] Nairobi HCCC No. 2127 of 2007 – *Ruiru Sports Club vs. Samuel Kimondo Theuri and others.*

4. Subsequently, the 2nd Respondent also invoked its powers to review title to L.R. No. 122/7 following complaints by the Complainant herein. The 2nd Respondent through a determination dated 22nd August 2016 revoked title to L.R. No. 122/7 registered in the name of Samuel Kimondo Theuri and cancelled any subsequent sub-divisions thereto. The 2nd Respondent also upheld the Complainant's title to L.R. No. 122/4.

5. Consequently, the 2nd Respondent vide Gazette Notice No. 9742 of 25th November 2016 gazetted the Complainant's property known as L.R. No. 122/4 as the correct property subject of compulsory acquisition and identified the Complainant as the rightful owner.

6. The 2nd Respondent, thereafter, conducted a fresh inquiry inviting the Complainant for purposes of compensation. This inquiry culminated in an award of Kshs. 516,117,522.00 dated 23rd July 2018 which was communicated to the Complainant and the 1st Respondent. The said award was subsequently accepted by the Complainant.

7. The 1st Respondent confirms that pursuant to that award, it has deposited a total of Kshs. 317,694,656.00 in the accounts of the 2nd Respondent towards the settlement of the award taking into account that an initial sum of Kshs. 71,486,990.00 had been deposited with the Commissioner of Lands, the predecessor of the 2nd Respondent in matters of compulsory acquisition.

8. The Complainant has not been paid any money so far.

The Complainant's Case

9. The Complainant has invoked this Tribunal's jurisdiction under Section 133C (8) of the *Land Act* No. 6 of 2012 (the *Land Act*). The substratum of the Complainant's case is that the Respondents have violated *the Constitution* of Kenya, 2010, the *Land Act*, and the *Fair Administrative Action Act*, 2015 by failing to pay compensation for its property which was compulsorily acquired. The Complainant alleges that the Respondents have failed to pay promptly just and full compensation as required under Article 40(3) of *the Constitution* and Section 115 of the *Land Act*.[2]

10. The Complainant further avers that the Respondents have failed to give written reasons of their continued and unreasonable delay in paying compensation, thus violating Article 47 of *the Constitution*. It is also submitted that the Respondents have violated Articles 2(1), 31, 10(2), and 20 of *the Constitution* in their actions or inactions.

11. The Complainant prays for the following orders:

    a. A declaration that the Complainant's rights to acquire and own property guaranteed under Article 40 of *the Constitution* of Kenya and Section 111(1) and 115(1) of the *Land Act* 2012 have been contravened by the Government of Kenya, the 1st Respondent and the 2nd Respondent;

    b. A declaration that the Complainant's rights to fair administrative action guaranteed under Article 47 of *the Constitution* of Kenya has been contravened by the 2nd Respondent;

    c. An order compelling the 2nd Respondent to pay the Complainant promptly the full compensation awarded to the petitioner for the acquired portion L.R. No. 122/4 being Kshs. 516,117,522.00;

    d. Interest on the compensation sum;

2 Complaint dated 12th October 2023, para 40.

e. Costs of the suit;

f. Such further or other orders or directions as the Tribunal may deem fit to grant so as to meet the interests of justice.[3]

The 1st Respondent's Response

12. The 1st Respondent, through its response dated 8th November 2023 and an Affidavit of even date sworn by Daniel K. Mbuteti – its senior surveyor, confirms the background of this matter and states that following the fresh gazette of the acquisition in the name of the Complainant, a valuation was undertaken and an award for Kshs. 516,117,522.00 made in favour of the Complainant.[4]

13. Having been informed by the 2nd Respondent's Chairperson of the said award, the 1st Respondent proceeded to remit a total of Kshs. 317,694,656.00 to the 2nd Respondent towards the settlement of the said award. The amounts were remitted in four batches itemized as follows: Kshs. 33,000,000.00 on 27th February 2020, Kshs. 50,000,000.00 on 19th March 2020, Kshs. 209,694,656.00 on 16th July 2020, and Kshs. 25,000,000.00 on 2nd September 2020.[5]

14. The 1st Respondent further avers that together with the initial sum of Kshs. 71,486,990.00 remitted to the accounts of the then Commissioner of Lands, the 1st Respondent has remitted a total of Kshs. 389,181,646.00 towards compensation of the subject land, leaving a balance of Kshs. 126,935,876.00.

15. The 1st Respondent therefore states that it has not at any moment refused to pay the Complainant their due compensation as demonstrated from the payments made to the 2nd Respondent so far. The 1st Respondent seeks to be absolved from any blame and urges the Tribunal to compel the 2nd Respondent to make due payments to the Complainant.

The 2nd Respondent's Response

16. The 2nd Respondent, on its part, disowns the award issued to the Complainant herein and states that the award of Kshs. 516,117,522.00 was not supported by a valuation report as is the practice in compulsory acquisition of land. The 2nd Respondent contends that the award which was issued upon an inquiry that was conducted pursuant to publication of Gazette Notice No. 8309 of 25th August 2017 should not be upheld because "the inquiry was not a sound decision as the corrigendum and deletion was sufficient to change the details of the Project Affected Person."

17. It is the 2nd Respondent's case that once the details of the land ownership had been corrected via Gazette Notice No. 9742 of 25th November 2016 by deletion of L.R. No. 122/7 in favour of Samuel Kimondo Theuri and replaced with L.R. No. 122/4 in favour of Ruiru Sports Club, the 2nd Respondent ought not to have conducted a new inquiry.

18. The 2nd Respondent states that this decision was reached through the 93rd Plenary meeting of the 2nd Respondent where it was observed that:

a. The publication of a notice of inquiry nine (9) months after the notice of corrigendum and deletion was unnecessary and appears to have been an afterthought.

3 *Ibid,* page 8-9.

4 Affidavit of Daniel K. Mbuteti sworn on 8th November 2023, para11-12.

5 Ibid, at para. 14.

b. That the revaluation undertaken did not factor all the affected parties and is prone to challenge on the grounds of being discriminatory contrary to the tenets of fair administrative action.

c. The revaluation did not also consider the effective date of an acquisition of the land which is the date of intention to acquire.

d. The comparables adopted in the revaluation are not suitable in terms of land use, size of land and location of the subject.

e. The revaluation did not consider quantum factor and its impact on likely value of land."[6]

19. That, consequently, the 2nd Respondent decided, through a resolution that compensation for the subject land was to be paid by the Ministry of Lands and Physical Planning through the sums that had been deposited, being Kshs. 71,486,990.00. The 2nd Respondent further decided at this meeting that the money disbursed by the 1st Respondent totaling Kshs. 349,779,975.00 subsequent to the revaluation of L.R. No. 122/4 would be used to settle other outstanding cases in the Thika Superhighway project in consultation with the 1st Respondent.

20. The 2nd Respondent, further, claims that the revaluation of L.R. No. 122/4 had connotations of fraud and that the 2nd Respondent had acted in good faith to safeguard public interest pursuant to Article 201 of *the Constitution* in not approving the processing of the award in favour of the Complainant.

21. In sum, the 2nd Respondent distances itself from any allegation that it has contravened the Complainant's rights under *the Constitution* and asks the Tribunal to also take note that the existence of disputes contributed to stalling the process.

Complainant's Rejoinder

22. In a brief rejoinder, the Complainant filed a further affidavit on 21st November 2023, sworn on the same day by Gabriel Muindi Muthwale. In the said affidavit, the Complainant reiterated its position that the initial process of compulsory acquisition that involved one Samuel Kimondo Theuri and others in regard to L.R. No. 122/7 could not be relied upon as the basis for compensating the Complainant as that process had been found to have been based on fraudulent excision of the Complainant's land.

23. It was the Complainant's contention, in rejoinder, that the 2nd Respondent followed the correct procedure in conducting a fresh inquiry once the correct party had been gazetted as the owner of L.R. No. 122/4. Upon conclusion of this exercise, the Complainant contends that the 2nd Respondent's mandate was completed by issuance of an award in favour of the Complainant for Kshs. 516,117,522.00 and the 2nd Respondent could not purport to sit on appeal of its own decision.

24. Furthermore, the Complainant asserts that the 2nd Respondent never gave audience to the Complainant before the said 93rd Plenary meeting of the 2nd Respondent was conducted where the 2nd Respondent decided not to approve the payment of the award. The Complainant also asserts that this decision was never communicated to them.

Analysis And Determination

25. When this matter came up for pre-trial conferencing on 22nd November 2023, the parties mutually agreed that the same can be disposed off on the basis of the documents filed and written submissions. The Complainant filed its submissions within five (5) days as directed by the Tribunal on 29th

6 Affidavit of Joycelyn Makena sworn on 16th November 2023, para 17.

November 2023. The 2nd Respondent's submissions were filed on 7th December 2023, outside the timelines directed by the Tribunal, which occasioned a delay in our deliberations. As a result, we invoked Section 133C (4) to extend the time under Section 133C (3), by one day.

26. We have considered the pleadings filed together with the accompanying documents, and the submissions and we have reached the following determination.

27. In their submissions, the Complainant and the 2nd Respondent have identified issues for resolution by the Tribunal. On its part, the Complainant has asked us to make a determination on: (i) whether the Respondents' action of withholding the compensation money is lawful and fair, (ii) who would bear the costs, and, (iii) whether the Complainant is entitled to orders sought.[7] The 2nd Respondent, on the other hand, has asked us to determine: (i) whether the delay in paying the compensation was occasioned by the Respondents, (ii) how much compensation is payable to the Complainant, and, (iii) whether the Complainant is entitled to the orders sought.[8]

28. The matters in contention between the Complainant and the 2nd Respondent revolve around the question whether the 2nd Respondent had the powers to revisit its own decision and to revoke the same. In that regard, we believe that resolution of this key question will bring matters into perspective even as the Tribunal provides answers to the other questions posed by the parties.

29. Pursuant to Section 133C (8) of the *Land Act*, which the Complainant has invoked, this Tribunal has jurisdiction, "in matters relating to compulsory acquisition of land..." to hear and determine complaints arising under Articles 23(2) and 47(3) of *the Constitution*. Article 23(2) of *the Constitution* gives effect to the legislation that establishes this Tribunal and the jurisdiction therein to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Similarly, Article 47(3) of *the Constitution* gives the Legislature powers to enact legislation, as it has done in this case under Section 133C (8), to provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal to give effect to the rights under Article 47(1). We are therefore satisfied that we have the requisite jurisdiction to determine the matter before us.

30. Article 47(1) of *the Constitution* provides that, "every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair." This Tribunal, thus, needs to be satisfied that the 2nd Respondent's decision to revoke its own decision complied with the constitutional dictates outlined under Article 47(1) and especially the requirement of lawfulness and fairness.

31. In this regard, the Tribunal will first assess whether the 2nd Respondent could exercise this power at all (the legality test) and if we find in the affirmative, then we will proceed to assess the fairness of the said decision. In applying this approach, we are guided by the Supreme Court pronouncement in the case of Martin Wanderi & 106 others v Engineers' Registration Board & 10 others [2018]eKLR where the Court stated:

> In examining Article 47(1) of *the Constitution*, the starting point is a presumption that the person exercising the administrative power has the legal authority to exercise that authority. Once satisfied as to the lawfulness of the power exercised, is when the court will delve into inquiring whether in the carrying out of that administrative action, there was violation of Article 47(1). This is the test of legality. So that the question of the unlawfulness or otherwise to act is at the onset of the inquiry. Where the act done was ultra vires the mandate

7 The Complainant's Written Submissions dated 29th November 2023, para. 23.

8 The 2nd Respondent's Written Submissions dated 5th December 2023.

of the administrative entity, the act is void ab initio and the inquiry stops there as there is an outright violation of *the Constitution*. The question of legality or the lawfulness of an act lies at the core Article 47(1).

32. It is, therefore, imperative that we are satisfied that the 2nd Respondent could review its own decision before we move on to the next step of assessing whether in exercise of that power, the 2nd Respondent breached the provisions of Article 47(1) of *the Constitution*.

33. The Complainant argues that the 2nd Respondent became functus officio after issuing an award in favour of the Complainant and therefore could not purport to recall its own decision. In the Complainant's opinion, the only available path to review the said decision was a review by the Courts as provided for under the *Land Act*. The Complainant further argues that there is need for finality of decisions to guard against continuous review or alteration.

34. Although the 2nd Respondent has not addressed the question whether it had powers to review its own decision, it asserts that it could recall or cancel an award which in its opinion is "not supported by reasons." The 2nd Respondent separately seems to suggest that the decision contained in the award to the Complainant was not a "final" decision as it was still subject to its plenary for ratification.

35. The instant case presents a unique situation which has not attracted much judicial attention before the courts. Nevertheless, we have been called upon to determine a situation where a body exercising administrative powers has varied or revoked its own decision. To our mind, even if this situation seems unique, it is not completely uncontemplated in administrative law. A public body exercising administrative powers may in certain cases, suo motu, or upon application by an affected party reconsider its own decision.

36. First, before we deal with the question of under what circumstances an administrative body may review its own decision, it has been suggested by the 2nd Respondent (in the alternative?) that there was no decision at all. We find this to be a disingenuous argument for the following reasons.

37. Whereas the 2nd Respondent submits that the "final" decision as to the award of compensation was made at the proceedings of the 93rd plenary meeting of the 2nd Respondent,[9] we are unpersuaded by this position. It is not in dispute that the 2nd Respondent issued an award to the Complainant on 23rd July 2018 for Kshs. 516,117,522/=,[10] and the same was accepted by the Complainant. The issuance of an award denotes the end of the process and contrary to what the 2nd Respondent submits, the said award was not again subject to a "final decision" by the 2nd Respondent's plenary.

38. The *Land Act* refers to the decision of the "commission" not of a committee or officer of the commission. The Chairperson of the 2nd Respondent or any officer, acting on his or her behalf, therefore, issues an award on behalf of the Commission. The assumption here is that such a decision was properly vetted by the Commission and endorsed as a decision of the Commission before it is issued to affected parties.

39. The finality of a decision, and in this case an award, is guided by the provisions of the *Land Act*. Section 114 of the *Land Act* provides that, "(1) On making an award, the Commission shall serve on each person whom the Commission has determined to be interested in the land, a notice of the award and offer of compensation." Indeed, evidence submitted by the 1st Respondent shows that the Chairperson of the 2nd Respondent also formally communicated this award to the 1st Respondent for

9 2nd Respondent's Submissions dated 6th December 2023 at Page 7.

10 Exhibit marked "GMM 8" in the Affidavit of Gabriel Muindi Muthwale sworn on 12th October 2023.

purposes of disbursing the necessary funds for compensation. In a letter dated 8th November 2018, the Chairperson forwarded a schedule of payment to the 1st Respondent and requested a deposit of Kshs. 538,303,272.00 for compensating the Project Affected Persons identified therein.[11] This evidence was not controverted by the 2nd Respondent. Finn J in the Australian case of Semunigus v. The Minister for Immigration and Multicultural Affairs addressed the question of finality of a decision as follows:

> The making of a decision involves both reaching a conclusion on a matter as a result of a mental process having been engaged in and translating that conclusion into a decision by an overt act of such character as, in the circumstances, gives finality to the conclusion – as precludes the conclusion being revisited by the decision maker at his or her option before the decision is to be regarded as final.
>
> What constitutes such an act can obviously vary with the setting in which the decision is made: it may be no more than a written notation of a conclusion on a departmental file; it may be a publication of the conclusion in a particular forum, or communication of it to another; it may be performing a consequential or collateral act that presupposes the decision having been made, etc. (emphasis added)

40. Furthermore, it is not plausible, as submitted by the 2nd Respondent, that a plenary of the 2nd Respondent sat on 18th November 2021,[12] the date of the 93rd plenary meeting, to make a final decision on an award that was issued on 23rd July 2018, more than three (3) years earlier.

41. Back to the question whether a public body can review its own decisions, the first port of call whenever a public body is presented with a situation for reconsideration of its own decision has to be the relevant legislation. Does the law support such an endeavor? A plain reading of the *Land Act* does not provide an answer to whether the 2nd Respondent can review its own decision. Decision making of the kind that is exercised by the 2nd Respondent before compensation is paid is supported by legislation and reference must be made to the same legislation to determine whether the 2nd Respondent has powers to review its decisions. We are not persuaded that the concept of functus officio would apply blanketly to administrative decisions as suggested by the Complainant.

42. It is important to assess the procedure under Part VIII of the *Land Act* at this stage. The process of compulsory acquisition of interests in land commences with the issuance of a preliminary notice by the 2nd Respondent under Section 107 of the intention to acquire land. This notice kick-starts the process which includes assessment of the value of the land to be compulsorily acquired, issuance of an award, payment of compensation and the taking of possession of land so acquired. The comprehensive procedure established under the *Land Act* is summarized as follows in the case of Patrick Musimba vs. National Land Commission & 4 others [2016] eKLR:

> 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

[11] Exhibit marked "DM-4" in the Affidavit of Daniel K. Mbuteti sworn on 8th November 2023.

[12] Exhibit marked "JM 3" in the Affidavit of Joycelyn Makena sworn on 16th November 2023.

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*.

43. In this process, and relevant to the instant case, Section 113 of the *Land Act* is instructive. Section 113 (2) 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..." (emphasis added). The plain interpretation of this provision is that the award once issued by the 2nd Respondent is final and can only be subjected to review as per the provisions of Article 40 (2) (sic) of *the Constitution* and Section 122 and 128 of the *Land Act*.

44. Would statutory interpretation still permit review absent express provisions? We are of the view that the clear statutory language pointing to avenues through which a decision of the 2nd Respondent can be reviewed militates against a finding that the 2nd Respondent has implied statutory powers to review its own decision. French J, in the Australian case of Sloane vs. Minister for Immigration, Local Government and Ethnic Affairs found as follows:

> The existence of the regulation making power and the detailed provisions of s115 in relation to the review of decisions tend to suggest a legislative purpose of codifying and confining bases upon which decisions made under the Act or the Regulations are able to be reviewed. (emphasis added)

45. The plain reading of the relevant statute, being the *Land Act*, leads to the inevitable conclusion that a decision made by the 2nd Respondent in issuing an award for compensation remains good in law unless and until declared otherwise by a court of competent jurisdiction. We now turn to consider whether there are other circumstances outside the legislative framework that would entitle the 2nd Respondent to review its own decisions. We appreciate that there is considerable tension between the need for finality and flexibility to correct perceived errors or fraud as alleged by the 2nd Respondent.

46. The 2nd Respondent alludes to "good faith to safeguard public interest" as the motivation behind its decision to revoke the award issued in favour of the Complainant. Indeed, good governance requires public bodies to issue sound and fair decisions. We are of the view that even in the absence of a clear statutory provision that allows the 2nd Respondent to review its own decisions, there may be limited circumstances where an award issued by the 2nd Respondent may be reviewed. We hold that the only window open to such a review would be to correct an error on the face of the record or where the said decision was obtained fraudulently. We believe that the exercise of limited review in these two situations would give effect to good governance and avoid a situation where the impugned decision has to be unnecessarily subjected to review by a court of law. Furthermore, a decision obtained fraudulently would amount to no decision at all and the same can be revoked by the body making it. Indeed, as stated in Lazarus Estates v. Beasley:

> No Court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a Court, no Order of a Minister, can be allowed to stand if it has been obtained by fraud, fraud unravels everything. The Court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions.[15]

47. Even in these limited circumstances where a review may be warranted, such a process must abide by article 47(1) of *the Constitution* and the provisions of the *Fair Administrative Action Act*. All the parties concerned must be given sufficient notice and be given an opportunity to make representations before a decision is made.

[15] [*1956*] 1 QB 702 at 712.

48. In the instant case, the 2nd Respondent has not provided evidence to show that the award made to the Complainant contained errors that needed to be reviewed or that it was fraudulently obtained, as alleged. Instead, the 2nd Respondent has purported to sit on appeal of its own decision and reversed the same without according the Complainant a chance to be heard. It is not in contention that the 2nd Respondent neither notified the Complainant before making this decision nor gave an opportunity to the Complainant, who was directly affected by the decision, to make representations. As if that is not enough, the 2nd Respondent did not even bother to notify the Complainant of its decision despite the many inquiries and follow-ups by the Complainant on the status of the compensation. The Complainant has come to learn of this decision through the pleadings filed by the 2nd Respondent!

49. We hereby find and hold that the 2nd Respondent violated the Complainant's right to fair administrative action as enshrined in Article 47(1) of *the Constitution* and Sections 4 (3) (a), (b), (d) and (g) of the *Fair Administrative Action Act*. We nevertheless proceed to conduct a merit review of the 2nd Respondent's impugned decision to review its own decision below.

50. The 2nd Respondent argues that its review of its own decision was due to the "unclear circumstances" under which the Complainant was given an award upon the revaluation of the subject property. The 2nd Respondent argues that the inquiry conducted by itself that culminated in the award was "not a sound decision as the Corrigendum and deletion was sufficient to change the details of the Project Affected Person."[16] We find and hold that this was a wrong approach that is unsupported by the law for the following reasons.

51. Having determined that the property in question did not belong to Samwel Kimondo Theuri, the 2nd Respondent indeed acted correctly by conducting a fresh inquiry following the corrigendum. This ensured that the legitimate owner of the property was involved and had an opportunity to present memoranda before an award was made. An inquiry, for purposes of compensation is a quasi-judicial process where the Project Affected Persons (PAPs) are given a chance to make representations before an award for compensation is made. In this process, the PAPs present memoranda and can submit their own valuations in regard to the property in question.

52. The essence of an inquiry under Section 112 of the *Land Act* being conducted in a quasi-judicial manner is for purposes of due process to all the persons with an interest in the property being given a chance to be heard before a determination is made. As noted by the High Court in Patrick Musimba, there was a deliberate effort by the legislature in giving effect to Article 40 of *the Constitution* by enacting a comprehensive procedure, a departure from the arbitrariness of the past. The High Court noted in this regard, "parliament took very seriously its constitutional duty to legislate on the State's powers of deprivation or expropriation. Perhaps conscious of the emotive nature of land issues, the Legislature appeared scrupulous and contemplative."[17]

53. The 2nd Respondent did not, therefore, have any basis to recall its inquiry conducted on 20th September 2017 and to purport to rely on the inquiry done on 26th September 2008 which did not involve the Complainant, and which was no longer valid, in any case, by having been conducted with the persons who had illegally hived off the Complainant's property and not the Complainant. To rely on such an inquiry as a basis for compensation would be an absurdity. It should also be noted that the loss suffered which entitles one to be compensated whenever a compulsory acquisition occurs is a personal loss and this loss must be completely made up to the person affected. It is, therefore, inconceivable how the 2nd

16 Affidavit of Joycelyn Makena sworn on 16th November 2023, para 16.

17 *Patrick Musimba*, para 96.

Respondent came to the conclusion that what had been determined as a loss to Mr. Theuri (who did not even have a legitimate interest in the property) should be the loss suffered by the Complainant.

54. In any case, as far as the Complainant is concerned, and justifiably so, its property known as L.R. no 122/4 had not been compulsorily acquired until the 2nd Respondent did so via Gazette Notice No. 9742 of 25th November 2016 which captured the correct property reference number being L.R. No. 122/4 and the correct ownership. The process of acquisition was therefore commenced afresh. The 2nd Respondent was thus right then in conducting the exercise of inquiry afresh and not to have relied on the inquiry conducted in 2007 as the 2nd Respondent now advises through its plenary decision. It should be noted that the value of the Complainant's property for purposes of compensation is the value of their property at the date of publication in the gazette of the notice of intention to acquire the land.[18] The notice of corrigendum and deletion contained in Gazette Notice number 9742 of 25th November 2016 is for these purposes the notice of intention to acquire. In essence, the 2nd Respondent was wrong in purporting to rely on an earlier valuation conducted in the year 2008, Eight (8) years earlier as reflecting the correct value of the Complainant's land. The correct value of the portion of property known as L.R. No. 122/4 that was compulsorily acquired was its value as at 25th November 2016 and not 26th September 2008.

55. Again, even if we were to indulge the 2nd Respondent further, the issue raised by the 2nd Respondent alleging a lack of a valuation report is not supported. On the one hand, the 2nd Respondent alleges that the Complainant was issued with an award without a valuation report,[19] but on the other hand, the 2nd Respondent seeks to impeach the valuation report on alleged fraud.[20] The 2nd Respondent has not presented material before this Tribunal to support the allegation of fraud. It is trite that an allegation of fraud, which is a serious allegation, must be proved to a higher standard. In the case of Kinyanjui Kamau vs George Kamau [2015] eKLR the Court of Appeal held as follows:

> It is trite law that any allegations of fraud must be pleaded and strictly proved. see Ndolo vs Ndolo (2008)1KLR (G & F) 742 wherein the court stated that ".. we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove the allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely; proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases.." In case where fraud is alleged it is not enough to simply infer fraud from the facts.

56. In the instant case, the 2nd Respondent did not particularize any fraud and did not present any evidence to that effect. We are not convinced that the escalation of the valuation from the initial valuation undertaken by the then Commissioner of Lands in the year 2008 for a sum of Ksh. 71,486,990.00 to a sum of Kshs. 516,117,522.00 in a valuation based on the value as at the year 2016 connotes fraud. Without any further evidence that this subsequent valuation was fraudulent, the 2nd Respondent's claim remains unproven. It is noteworthy that the 2nd Respondent did not carry out another valuation to support this claim.

57. It is also instructive to note that the 2nd Respondent has not at any time invited the duly mandated investigative agencies to conduct investigations on the alleged impropriety within its structures

18 See, Section 107A(13) of the *Land Act*

19 Affidavit of Joycelyn Makena sworn on 16th November 2023, para 15.

20 para 19, Affidavit of Jocelyn Makena.

nor conducted another valuation on the property in order to impeach the existing valuation. The purported findings of a committee of the 2nd Respondent to the effect that the valuation was improperly carried out are merely speculative and unsupported by any evidence, and thus should not have been relied upon by the 2nd Respondent in revoking its award.

58. The Complainant has gone further to provide to this Tribunal a valuation of their own valuers of a similar amount that was submitted to the inquiry as part of their claim for compensation. This valuation attached to the Affidavit of Gabriel Muindi Muthwale and marked as exhibit "GMM 9" is for Kshs 517,500,000/=, a comparable sum to the 2nd Respondent's valuation. Furthermore, there is evidence that the 2nd Respondent did not have an issue with this valuation and in fact advised the 1st Respondent to disburse funds for the purposes of compensation on the basis of the award arising out of this valuation. The 1st Respondent confirms that they were duly notified of the award and have indeed proceeded to disburse a total of Kshs 317,694,656.00 to the 2nd Respondent for onward transmission to the Complainant.

59. The instant case presents a unique situation where the 2nd Respondent purports to set aside a whole process done and finalized by itself, more than three years later. It is a situation where the 2nd Respondent reconstitutes itself and becomes an accuser, respondent and judge at different times. Even though the Tribunal takes judicial notice of the fact that the 2nd Respondent was differently constituted at the time of issuance of an award to the Complainant, good governance dictates that institutional decisions stand and can only be set aside through the right avenues. The 2nd Respondent should endeavor to inspire public confidence in its actions. The detailed procedure in Part VIII of the *Land Act* is intended to insulate the process of compulsory acquisition from whimsical decisions that were commonplace prior to the enactment of *the Constitution* of Kenya 2010. We must also remind the 2nd Respondent that decisions made in violation of *the constitution* are null and void, even when the same are clothed in good faith.

Conclusion

60. The upshot of our analysis above is that the actions of the 2nd Respondent in purporting to recall its own decision contained in an award to the Complainant for compensation for its property acquired compulsorily violate the provisions of Article 47(1) of *the Constitution* of Kenya and Sections 4 (1), (3) (a), (b), (d) and (g) of the *Fair Administrative Action Act*. The same are null and void to that extent.

61. We also find and hold that the 2nd Respondent has not shown justifiable cause why it has not paid compensation to the Complainant while part of the compensation sums have been transferred to its accounts. The said funds have been held by the 2nd Respondent for more than three years now. To that extent, we find and hold that the 2nd Respondent has violated the Complainant's rights under Article 40 (3) for failure to pay compensation promptly as required under the law.

62. The Complainant is, therefore, entitled to the payment of compensation for the acquired portion of L.R. No. 122/4 in full as contained in the 2nd Respondent's award dated 23rd July 2018.

63. We also find that the Complainant is entitled to interest at commercial rates pursuant to Section 117 (1) of the *Land Act* for the sum of money disbursed by the 1st Respondent and held by the 2nd Respondent.

64. We note that the 1st Respondent has not disbursed the full amount of the compensation sums to the 2nd Respondent although a substantial amount has already been disbursed. The 1st Respondent seems to be caught in-between the legal tussle pitting the Complainant and the 2nd Respondent who has deliberately failed to remit the sums already disbursed by the 1st Respondent. We are unable to find that

the 1st Respondent has, therefore, violated the Complainant's rights in any way. The 1st Respondent is absolved to that extent.

Orders

65. The Complainant is, therefore entitled to the orders prayed for, which we grant in the following terms:

a. A declaration is hereby issued that the 2nd Respondent has violated the Complainant's rights under Article 40 (3) of *the Constitution* of Kenya 2010, and Sections 111 (1) and 115(1) of the *Land Act* for failing to compensate the Complainant promptly following the compulsory acquisition of a portion of its property known as L.R. No. 122/4;

b. A declaration is hereby issued that the 2nd Respondent has violated the Complainant's rights to fair administrative action under Article 47(1) of *the Constitution* of Kenya 2010 and Sections 4 (3) (a), (b), (d) and (g) of the*Fair Administrative Action Act*;

c. A declaration is hereby issued that the Complainant is entitled to payment of compensation in regard to a portion of its property known as L.R. No. 122/4 in terms of the award issued on 23rd July 2018 for the sum of Kshs. 516,117,522.00;

d. An order is hereby issued directing the 2ndRespondent to, within twenty-one (21) days hereof, remit to the Complainant the sum of Kshs. 317,694,656.00 held in its accounts to the Complainant;

e. An order is hereby issued directing the 2nd Respondent to pay the Complainant the interest earned on (d) above at commercial rates from the time the money was disbursed to its accounts until payment in full;

f. An order is hereby issued directing the 2nd Respondent to communicate this judgement to the Principal Secretary, State Department for Lands and Physical Planning in the Ministry of Lands, Housing and Urban Development, for purposes of disbursement of the sum of Kshs. 71,486,990.00 previously held by the Commissioner of lands for compensation of the subject land to the Complainant;

g. An order is hereby issued directing the 1st Respondent to pay, within twenty-one (21) days, the balance of the compensation amount being Kshs. 126,935,876.00 to the Complainant;

h. Costs of this suit to be borne by the 2nd Respondent.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF DECEMBER 2023.

Dr. Nabil M. Orina Mr. George Supeyo

Chairperson Member

In the presence of:

Mr. Monda - for the Complainant

Ms. Ochako - for the 1st Respondent

No appearance - for the 2nd Respondent

Abdi Aziz - Court Assistant