



**Mdari v National Land Commission (Tribunal Case E005 of 2024)
[2024] KELAT 831 (KLR) (3 July 2024) (Judgment)**

Neutral citation: [2024] KELAT 831 (KLR)

**REPUBLIC OF KENYA
IN THE LAND ACQUISITION TRIBUNAL
TRIBUNAL CASE E005 OF 2024
NM ORINA, CHAIR & G SUPEYO, MEMBER**

JULY 3, 2024

BETWEEN

CHARLES COSMAS MDARI APPELLANT

AND

NATIONAL LAND COMMISSION RESPONDENT

JUDGMENT

Background

1. Through Gazette Notice No. 4096 of 20th June 2014, the Respondent published a notice of intention to acquire, among others, a portion of the Appellant's parcel of land known as Kwale/Mackinon Road Phase 1/6 (Mackinon 6) measuring 1.026 hectares, hereinafter the suit property. This acquisition was for purposes of the construction of the Mombasa-Nairobi Standard Gauge Railway project. Subsequently, on 8th August 2014, via Gazette Notice No. 5503, the Respondent invited projected affected persons including the Appellant to attend an inquiry on 2nd September 2014 at the Chief's Office - Mackinon Road.
2. Despite attending the inquiry conducted by the Respondent for purposes of verifying the project affected persons and determining the amount of compensation, the Appellant never received an award of compensation. It later transpired that the Respondent had published an addendum in Gazette Notice No. 6578 of 19th September 2014 which purported to identify other persons other than the Appellant as the registered owners of the suit property.
3. These events prompted the filing of Constitutional Petition No. 4 of 2017 (Charles Cosmas Mdari v. The Attorney General and others) before the Environment and Land Court (ELC) at Mombasa. The filing of this petition was preceded by several correspondences by the Appellant and his counsel seeking compensation for the suit property to no avail. Through a judgement dated 18th June 2021, the ELC found that the Appellant's rights under Articles 40 and 47 of the Constitution had been violated.



Further, the Respondent was ordered to issue an award to the Appellant within twenty (21) days and if the same was to be accepted, to be paid together with interest from 2nd September 2014 – the date of the inquiry.

4. On 8th February 2023, the Respondent issued the Appellant with an award for Kshs. 411,148.00 for a portion of the suit property measuring 0.6 hectares. This award came more than a year and half later after the ELC in Mombasa had ordered that the same be issued within twenty (21) days.
5. Aggrieved by this award, the Appellant filed an appeal before the ELC in Kwale on 8th March 2023 and the file was subsequently transferred to this tribunal for determination on 2nd April 2024 pursuant to orders issued by A. E. Dena, J on 29th January 2024.
6. The Appellant impugns the award issued by the Respondent on grounds that the acreage of the suit property acquired was contrary to the acquired size of the suit property as published in the intention to acquire in the Gazette Notice, and that the reduced acreage is not the actual size of the suit property occupied by the acquiring authority.
7. The Appellant, therefore, contends that the Respondent has violated Articles 40(3), 47(1), and 47(2) of the Constitution as well as Section 107A (7) of the Land Act.
8. It is the Appellant's case that by acquiring 1.026 hectares of the suit property but then awarding compensation for only 0.6 hectares, the Respondent has violated Article 40(3) of the Constitution by depriving the Appellant of his property without just and fair compensation.
9. Further, the Appellant contends that the impugned award violated Article 47(1) of the Constitution as read together with Section 4 of the Fair Administrative Actions Act, 2015 by not assigning any reason or criteria for the decision to only award compensation for 0.6 hectares and also failing to provide basis of the valuation by which the Respondent arrived at the award.
10. In regard to the alleged contravention of Section 107A(7) of the Land Act, it is the Appellant's case that by failing to take into account the fact that the portion of the suit property measuring 0.134 hectares left of the Appellant's property after construction of the project is fenced off by the acquiring authority – Kenya Railways Authority, the same is inaccessible to the Appellant and therefore completely unusable by the Appellant who has hence been deprived.
11. The Appellant prays for the appeal to be allowed and for the award dated 8th February 2023 to be set aside in its entirety. Further, the Appellant prays for the Court to award fair and just compensation for the suit property or such part thereof as is being utilized by the Standard Gauge Railway, and costs.
12. The has given these proceedings a wide berth. Despite being served and appearing before the Tribunal on 6th May 2024 and on 14th May 2024 where counsel for the Respondent, Mr. Mbuthia, was granted more time to file a response, the Respondent did not file any response.

Analysis and Determination

13. In our assessment, we have before us two interrelated issues for resolution. First, we have been invited to determine if the Respondent complied with the Constitution and the Land Act in issuing the award dated 8th February 2023. Related to this is the question whether the said award is a fair and just compensation for the acquisition of the suit property or part thereof.
14. Article 40(3) of the Constitution provides that:

The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-



- a. results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
- b. is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that-
 - i. requires prompt payment in full, of just compensation to the person; and
 - ii. allows any person who has an interest in, or right over, that property a right of access to a court of law.

15. The allegation in regard to the alleged violation of Article 40(3) of the *Constitution* is that the acquiring authority is in occupation of more land than the Appellant has been compensated for. It is clear from the evidence tendered that the Respondent declared an intention to acquire 1.026 hectares of the suit property through Gazette Notice No. 4096 of 20th June 2014. Further, the inquiry conducted on 2nd September 2014 which was announced through Gazette Notice No. 5503 of 8th August 2014 was in regard to the same portion of the suit property. There has been no corrigendum published by the Respondent in respect of the suit property indicating that there was a reduction of the acreage to be acquired. To that extent, the Respondent contravened the provisions of Article 40(3) of the *Constitution* as well as Part VIII of the *Land Act* which provides a detailed procedure for compulsory acquisition of land.

16. The process of compulsory acquisition of land in regard to the suit property was extensively analysed by S. Munyao, J in Constitutional Petition No. 4 of 2017 (Charles Cosmas Mdari v. The Attorney General and others where the Court found that the same had not been complied with especially in regard to failure to issue an award to the Appellant in contravention of Section 113(1) of the *Land Act*. Without any evidence that the Respondent caused a corrigendum to be published in regard to the acreage of land to be acquired in respect of the suit property, we find that the Respondent contravened the *Constitution* and the *Land Act* in failing to award compensation for 1.026 hectares and instead awarding compensation for 0.6 hectares.

17. We equally find that the Respondent violated Article 47(2) of the *Constitution* as read together with Section 4 of the *Fair Administrative Actions Act*, 2015 for failure to give reasons for its decision to award compensation only in regard to 0.6 hectares of the suit property and not 1.026 hectares.

18. This determination leads us to a sub-issue related to the first question and that is whether the Respondent ought to have acquired and paid compensation for the whole parcel of land forming the suit property. The suit property measures approximately 1.16 hectares while the acquisition was in regard to 1.026 hectares. This leaves out a portion of the suit property measuring approximately 0.134 hectares which the Appellant avers is fenced off by the acquiring authority, is inaccessible and, therefore, completely unusable by the Appellant.

19. Part of the Appellant's documents presented in evidence (Page 25-26 of the Appellant's Bundle of Documents dated 24th April 2024) is a survey report and letter dated 30th December 2015 from the District Surveyor, Kinango Sub County. The letter indicates that the Standard Gauge Railway has encroached upon the suit property by approximately 0.8785 hectares. This leaves out a portion of 0.2815 hectares of the suit property. The diagram representation of the said portion of 0.2815 hectares shows a scalene triangular shaped piece of land. We find that the size and shape of this portion of land is of no economic value to the Appellant even if the same was to be accessible. The Respondent is under a duty to ensure that project affected persons get compensation for portions of land that remain



without any economic value due to the planned use by the affected person. Canyons formed or “slice of pizza” shaped portions of land that remain as a result of excision for compulsory acquisition may not be of any value to a project affected person and ought to be acquired. We reiterate our findings in *Igainya Limited v National Land Commission & 2 others; County Government of Machakos (Interested Party)* (Tribunal Case 2 of 2024) [2024] KELAT 809 (KLR) (6 June 2024) (Judgment) where we held as follows:

The 1st Respondent is called upon to exercise scrupulousness in acquisition of land not just to ensure that there is prudent use of public resources but to also ensure that the project affected persons are not subjected to unnecessary hardships, having had no say on whether their land can be acquired. Indeed, the *Land Act* foresaw a situation where a portion of the land subject to compulsory acquisition may be rendered unusable and in that case Section 122(3) requires the 1st Respondent to instruct an acquiring entity to acquire such land. Such land may be used for other public purposes or be included in the Land Bank.¹

20. Having determined that the Respondent ought to have acquired the suit property as a whole, we now proceed to determine what just compensation is payable to the Appellant. Although the Appellant has impugned the award in its entirety, he has not presented any evidence to show that the value per acre relied upon by the Respondent is not accurate. Where a party challenges the value assigned to the land in an award then it is incumbent upon that party to lead evidence to show that the value relied upon is not the correct one. In our view, therefore, the value relied upon in calculating the award remains unchallenged and we shall adopt the same in our final determination of the compensation due to the Appellant. Having that in mind, we hereby calculate the amount of compensation due to the Appellant as follows:
 - a. Area of land acquired 1.16 Ha Approx.
 - b. The Value of the land Kshs. 726,005.00/=
 - c. The total compensation payable for the land inclusive of 15% disturbance allowance Kshs 834,905.75/=
21. The sum of our analysis is that the Appellant’s Claim succeeds and is allowed in the following terms:
 - a. The award dated 8th February 2023 is hereby set aside in its entirety;
 - b. The Respondent be and is hereby ordered to pay the Appellant the sum of Kshs. 834,905.75/= as compensation for compulsory acquisition for land known as Kwale/Mackinon Road Phase 1/6;
 - c. Interest on (b) above at court rates from 2nd September 2014 until payment in full;
 - d. Costs of this suit.

DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 3RD DAY OF JULY 2024.

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DR. NABIL M. ORINA.....CHAIRPERSON

MR. GEORGE SUPEYO.....MEMBER

Before: -

¹ Para. 32.



Mr. Kings for the Appellant

Ms. Masinde Holding Brief for Mr. Mbuthia for the Respondent

Everlyne – C/A



<https://new.kenyalaw.org/akn/ke/judgment/kelat/2024/831/eng@2024-07-03>