CAN THE STATE COMPULSORILY ACQUIRE YOUR LAND? A REVIEW OF THE ABDUL WAHEED SHEIKH CASE.

INTRODUCTION

Private land in Kenya may be acquired compulsorily by the Government where it is required for a public purpose or in the public interest.

In such circumstances, an individual may be deprived of ownership, but only on the condition that the acquisition strictly complies with constitutional safeguards: the purpose must be lawful, and the landowner must receive prompt and full compensation.

Compulsory acquisition is therefore not an arbitrary exercise of power but an administrative process, requiring that all persons with an interest in the targeted land be notified, heard, and given an opportunity to raise objections.

Under **Section 107 of the Land Act**, the **National Land Commission (NLC)** is entrusted with the mandate to carry out compulsory acquisition on behalf of both the National and County Governments

The process begins when a Cabinet Secretary or County Executive Committee Member submits a formal request to the NLC. Crucially, the Commission retains the discretion to reject any request that does not satisfy the constitutional threshold under Article 40(3) that is, acquisition must be for a public purpose or in the public interest. However, in the case of the above referenced case of Sheikh Fazal Ilahi Noordin Charitable Trust, these procedural and constitutional protections were disregarded. The Trust's land was taken without adherence to due process and without payment of compensation. For the Trustees, Abdul Waheed Sheikh and Abdul Hameed Sheikh, the road to justice was painfully long. It took seventeen years before they were finally heard in court.

OVERVIEW OF THE CASE

In the said case of Abdul Waheed Sheikh & Another (As Trustees of Sheikh Fazal Ilahi Noordin Charitable Trust) V National Land Commission & 2 Others (Tribunal Case E054 Of 2024; In **July 2008** the Commissioner of Lands published Gazette notices showing intention to acquire multiple parcels for the Nairobi, Thika Road Project, including a portion of LR No. 209193 (now Nairobi Block 3763). The suit parcel's measured area was revised by corrigendum in 2009. An award was prepared (and a compensation schedule communicated in December 2008), but the award was later revoked on the ground that the land was public, and compensation was withheld. Over subsequent years an ownership dispute with Government organs persisted.

The Trustees (claimants) produced High Court judgments and title documentation confirming their proprietary interest. They contended that they were never given the formal acquisition notices, were excluded from valuation/award processes, and received no compensation. Further, the Trustees also claimed that parts of their remaining land have been encroached upon, including the erection of a footbridge and dumping of construction spoil, none of which were the subject of any gazettement or acquisition.

The dispute culminated in this Tribunal claim seeking declarations of rights violations, payment of current-market compensation (plus disturbance), damages for trespass and deprivation, removal of the footbridge and spoil, and costs.
After determination and analysis, the Tribunal found that the acquisition process was procedurally flawed, that the claimants had enforceable interests in the property, and that their rights under Articles 40(3) and 47(1) of the Constitution had been violated. The Tribunal made orders for special damages assessed as per the current value of the land, disturbance allowance, general and aggravated damages, interest, and ordered removal of the footbridge and waste-deposited soil.

KEY ASPECTS OF COMPULSORY ACQUISITION PROCESS IN KENYA.

From the above decision, it is evident that several key legal issues and critical aspects emerge in relation to the compulsory acquisition process in Kenya as noted below :

(i)The procedure for compulsory acquisition
In the present case, the Tribunal, while determining whether the process of acquisition was procedural, highlighted albeit to some extent the key steps involved in compulsory land acquisition under the provisions of the now repealed Land Acquisition Act.

The procedure for compulsory acquisition is now aptly provided for under Part VIII of the Land Act and the Kenya Courts have made several pronouncements enforcing the procedure as provided by the law.

For instance, disputes arose during the acquisition of land for the Standard Gauge Railway and in the decision of the 5-Judge Bench in **Patrick Musimba v National Land Commission & 4 Others [2016] eKLR** the process was stated as follows:

1. The National Land Commission needs to undertake the necessary diligent inquiries including interviewing the body intending to acquire the property.
2. It must publish in the gazette a notice of the intention to acquire the land.
3. The notice is also to be delivered to the Registrar as well as every person who appears to have an interest in the land.
4. It 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.
5. It is to inspect the land and do all things as may be necessary to ascertain whether the land is suitable for the intended purposes. The foregoing process constitutes the preliminary or pre-inquiry stage of the acquisition.
6. It is then 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.
7. On completion of the inquiry, it makes a separate award of compensation for every person determined to be interested in the land and then offers compensation either monetary or land of equivalent value, is available.
8. Once the award is accepted, it must be promptly.
9. Where it is not accepted then the payment is to be made into a special compensation account held by the National Land Commission.
10. 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.

ii. Observations and practical implications.

The following are the key observations and practical implications arising from the present Tribunal's judgment: -

1. Process matters: the Tribunal reiterated that statutory procedural safeguards in compulsory acquisition (notice, inquiry, award, service) are not mere formalities: failure to involve affected owners can nullify awards and lead to substantial liabilities for the State.
2. NLC's remedial obligations: the NLC (as successor to the Commissioner of Lands) has a duty to audit and "clean up" historical acquisition processes started by predecessors and to regularize or rectify defects.

3. Constitutional primacy over limitation: when the claim engages enforcement of constitutional property rights envisaged under Article 40 and the violation is continuing (e.g., withheld compensation, ongoing trespass), statutory limitation rules will not automatically defeat the remedy.

4. Encroachment and Trespass by State projects: state infrastructure projects that encroach beyond gazetted areas may attract major damages and supervisory/remedial orders (removal, restoration), not only monetary compensation.

5. Valuation principle: compensation should reflect current market value and aim at restitution; out-of-date awards made without owner participation are vulnerable.

CONCLUSION

From the foregoing judgment, it is evident that while compulsory acquisition is a lawful means through which the state may acquire private land, strict adherence to the prescribed legal procedures is essential. State officials must ensure that the process does not infringe upon the proprietary rights guaranteed under Article 40 of the Constitution.
It is equally important for conveyancing practitioners to be thoroughly familiar with the legal and procedural requirements to safeguard the rights and interests of proprietors throughout the acquisition process.

CM Advocates LLP remains committed to supporting clients in navigating the complexities of compulsory land acquisition and resolving related land disputes with efficiency and legal precision

HOW WE CAN HELP

For any inquiries on this or any other land related matter do not hesitate to contact our **Real Estate, Banking, and Finance Law practice group** through our email, rbf@cmadvocates.com or book a virtual consultation here https://cmadvocates.com/cm-request-consultation/.

CONTRIBUTORS

Jane Mugo
Partner, Real Estate, Banking and Finance Practice
jmugo@cmadvocates.com

Wahu Wambugu
Associate Advocate, Immigration Global & Mobility Practice Unit & CM Diaspora & Expatriates Club
mwambugu@cmadvocates.com

Brian Thuranira
Advocate Trainee
bthuranira@cmadvocates.com

For more information on real estate law, banking and securities perfection, commercial law, estate planning and succession planning, tax law or immigration advisory please visit:

www.cmadvocates.com

Head Office - Nairobi, Kenya
I&M Bank House, 7th Floor, 2nd Ngong Avenue
T: +254 20 2210978 / +254 716 209673
P.O. Box 22588 – 00505, Nairobi Kenya
E: law@cmadvocates.com

Mombasa Office - Kenya
Links Plaza, 3rd Floor, Links Road, Nyali
T: +254 41 447 0758 / +254 41 447 0548
P.O. Box 90056 – 80100, Mombasa Kenya
E: mombasaoffice@cmadvocates.com

Regional Offices:

Uganda | Tanzania | Rwanda | Zambia | Ethiopia | South Sudan