

UGANDA / JUDGMENT

Malde and Co. Ex parte, Indian Land Acquisition Act (Miscellaneous Civil Suit No. 2 of 1953) [1954] EACA 1 (1 January 1954)

[1954] EACA 1

COURT

East African Court of Appeal

BEFORE

Harley J

CASE / FILE NUMBER

Miscellaneous Civil Suit No. 2 of 1953

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ORIGINAL CIVIL

Before HARLEY, Ag. J.

In re a reference by the Collector under section 18 of the Indian Land Acquisition Act, 1894, ex parte Malde and Company.

Miscellaneous Civil Suit No. 2 of 1953

Indian Land Acquisition Act, 1894, sections 18, 23, 24—Compensation—Crown leaseholders' land compulsorily acquired—Hypothetical scheme of development—Market price—Valuation of land—Costs.

In 1948, lessees purchased a Crown leasehold plot, at Eastleigh, in Nairobi City, with 99 years lease current, for £23,250. Government, on 10th July, 1951, by notice under section 6 of the Indian Land Acquisition Act, 1894, declared that the land was required for public purposes. The Collector appointed awarded compensation of £26,726-10-0. The lessees did not accept the award and required the compensation to be referred to the determination of the Court, claiming £64,722-10. In Nairobi City Valuation Roll the unimproved value of the land was shown as £40 per acre. The Collector assessed a further £40 per acre as the estimated value of the land to a purchaser on change of user. The lessees contended that the Collector had failed to take into proper account the possible future development of the land for residential purposes. The lease of the plot restricted user to agricultural purposes.

Held (8-1-54).—(1) Compensation must be determined by reference to the price which a willing vendor might reasonably expect from a willing purchaser. The disinclination of the vendor to part with the land and the urgent necessity of the purchaser to buy must alike be disregarded. Neither must be considered as acting under compulsion.

- (2) In estimating the value of land acquired by Government, the future utility of the land is a consideration which ought to be taken into account. Such future utility must, however, be estimated by prudent business calculations and not by mere speculation.
- (3) In estimating the value of the land the figure for market value should be based on four main factors:-
 - (a) Opinions of experts-provided they have taken into consideration the following three factors;
 - (b) recent prices for similar land in the vicinity: $\frac{1}{2}$
 - (c) the income from the land:
 - (d) the price paid within a reasonable time for the land itself, unless the purchaser was an unbalanced or misguided speculator.
- (4) The market price of land in general can be measured by a consideration of prices that have been obtained in the past for land of a similar quality and in a similar position and also from uses to which it is reasonably capable of being put in the future.
- (5) The purchase price is direct evidence of market value.
- (6) The valuation of immovable property is not an exact science and compensation can never amount to more than a quasi-scientific guess which the Court, should, in the case of compulsory acquisition, temper with liberality.
- (7) Land is not to be valued merely by reference to the use to which it is being put at the time when its value has to be determined but also by reference to the uses to which it is reasonably capable of being put in the future. The possibility of removal of the restriction on user so as to enable the also be taken into account but the land must not be valued as if already built upon. It is the possibilities of the land and not its realized possibilities that must be taken into consideration.
- (8) While the lessees obtained an award of less than one-quarter of the amount claimed, the claim, in the circumstances, was not altogether extravagant. The Collector was ordered to pay half the costs of the reference and the City Council to pay its own costs.

Cases referred to: Corrie v. MacDermott, (1914) A. C. 1056, 1064; Vyricherla (Raja) v. Revenue Divisional Officer, Vizagapatam. (1939) A. C. (P. C.) 302, followed; K. P. Frenchman v. Assistant Collector, (1922) A. I. R. Bom. 399, distinguished.

Hunter for Lessees.

Gledhill for Collector.

Schermbrucker for Nairobi City Council.

proceedings plot land **JUDGMENT.**—The present concern $\mathbf{a}$ $\mathbf{O}$ (L. R. No. 3882/3 Nairobi District) of 212 acres coloured pink in the plan Exhibit 4, and hereinafter referred to as the Pink Plot.

In accordance with section 6 of the Land Acquisition Act, 1894, of India, the Chief Secretary published, on 10th July, 1951, Government Notice No. 800, declaring that the Pink Plot was required for public purposes, namely African Housing. On 6th May, 1952, in Government Notice No. 472, a Collector was appointed and directed (in accordance with section 7 of the Act) to make an award for the acquisition of the Pink Plot.

The Collector apparently entered upon his inquiry and made his award in accordance with sections 11 and 12 of the Act. The award is dated 15th November, 1952. In that award the Collector assessed the amount of compensation due to the lessees of the Pink Plot, who held a Crown leasehold for 99 years from 1st May, 1904 at an annual rental of Shs. 16/37, and who would lose this lease as a result of the compulsory acquisition. In determining the amount of compensation due the Collector was bound by the provisions of sections 23 and 24 of the Act.

The lessees have not accepted the award. By section 18 of the Act they have required the amount of compensation payable to them to be referred to this Court. They object to the Collector's award on the grounds "that the compensation awarded is inadequate due to the determination of the unimproved market value of the land at £80 per acre and that in arriving at this figure the Collector failed to take into proper account the possible future development of the land for residential purposes".

All parties have agreed that the critical date for determining the market value of the Pink Plot is 10th July, 1951. In addition to the market value of this land, the court is to award a sum of 15 per cent on such market value, in consideration of the compulsory nature of the acquisition (section 23(2)).

In the present case the parties are agreed that Sh. 125,000 (£6,250)—part of Assessors' Award assessed under the heading "Improvements"—be added to the market value, and that the statutory 15 per cent be calculated on the sum of these two figures. Also a further Sh. 700 is to be allowed for "Removal Expenses for Tenants."

The Court is not to consider any increase to the value of the land acquired likely to accrue from the use to which it would be put when acquired (section 24). The amount which the Court may award must not exceed the amount claimed by the lessees, nor be less than the amount awarded by the Collector (section 25).

The amount claimed by the lessees is £50,000 plus £6,250 plus 15 per cent of £56,250 plus £35—Total £64,722-10-0. The amount awarded by the Collector was £16,960 plus £6,250 plus 15 per cent of £23,210 plus £35—Total £26,736-10-0.

The lessees' claim is arrived at by a presentation of expert figures based mainly on-

- (a) Exhibit 6—a selected list of land prices in Eastleigh, Section 3.
- (b) Exhibit 7—an estimate of profits to be made by executing a building scheme on the Pink Plot.

As regards (a), it is to be noted that the land in Eastleigh is freehold and already developed and occupied as an Asian residential area. The Pink Plot is leasehold and is undeveloped. As regards \$(b)\$—exhibit 7—the first objection to be made to the proposed development as a building site is that the lease of the Pink Plot restricts its use to agricultural purposes. The lessees claim that they could get the restriction removed. They urge that, if enough persistent pressure is brought to bear on Government, it can be persuaded to give way and to remove the restriction. The representative of the Commissioner of Lands, however, denied flatly that the restrictive user would ever be removed in favour of a scheme for Asian housing.

I listened with the greatest respect to the evidence of Mr. McCully Hunter, a witness called by the lessees as an expert of undoubted experience and authority. He presented his plan, exhibit 7, with masterly assurance and most persuasive technical skill. Yet the evidence called on behalf of the Collector and the City Council compels me to question Mr. McCully Hunter's figures. First, it has been established to my satisfaction that the maximum of saleable building plots of the size suggested would be not 1,400 but 1,140. Secondly, exhibit 7 makes no allowance for cost of sewerage, which would almost certainly be required by the time the plan came to fruition, if ever indeed the plan became the object of serious consideration. I do not go as far as to conclude that Mr. McCully Hunter could never hope to get the restrictive user removed; but he has certainly not allowed enough deduction for the speculative element in his plan. In assessing compensation, development projects may of course be taken into account, in so far as they affect market price.

It is equally open to Government to show that a price paid for land would never have been paid by a reasonable purchaser, prudently considering existing restrictions and the improbability that such restrictions would be removed. With regard to the restrictive user of the Pink Plot, I do not accept the optimism of Mr. McCully Hunter who believes that in the normal way there was an immediate likelihood of the removal of the restriction; but neither do I accept the dogmatic assertion of Mr. Furbinger that Government would never change in policy.

A lessee "is entitled to have valued his chance of ever getting the land in his hands in such a condition as could bring pecuniary value. But the valuation under the circumstances might well be nil" (*Corrie v. MacDermott*, (1914) A. C. at p. 1064). The probable user to which land may be put is an element in consideration of its value: its potential value should be considered. If the user intended is unlikely to be permitted, or only permitted, if at all, at some remote point, and if a valuation is based on mere speculation, then there is no foundation on which to base a claim or to find a market value. I do not think that the lessees' presentation of their case in exhibit 7 is *merely* speculative, but it is an example of special pleading. It is a presentation of the lessees' case from one particular angle.

Opinions of experts and valuers must be taken into account—if they value on a proper basis. This brings us to discover what is the proper basis. It may

not be over-simplifying the views of the experts in the present case to state that their valuation of the Pink Plot is based on an addition of-

\$(a)\$ its present (agricultural) value; and

(b) its potential (building) value. \$(b)\$

The Collector has allowed £40 per acre for (a) plus £40 for (b), total £80. Mr. McCully Hunter allows virtually nil for (a) but £236 for (b). Total £236. Mr. Windham-Lewis would allow £30 for (a) plus nil for (b), total £30.

Legal precedents cited in this Court lead me to believe that the figure for market value should be based on four main factors:-

- (1) Opinions of experts—provided that they have taken into consideration the following three factors.
- (2) Recent prices for similar land in the vicinity.
- (3) The income of the land.
- (4) The price paid within a reasonable time for the land itself, unless the purchaser was an unbalanced or misguided speculator.

I have considered factor No. 1, and my conclusion is that the experts have not given sufficient consideration to the other factors. There is no information with regard to factor No. 3. There is not very much evidence of factor No. 2. The most difficult part of this case, in my view, is to balance factor no. 2 against factor no. 4.

In *Vyricherla (Raja) v. The Revenue Divisional Officer, Vizagapatam* (1939) A. C. 302 at page 311, the Privy Council gives guidance on general principles which this Court must apply in the present case.

The Privy Council laid down that: \$-\$

"The general principles for determining compensation that are specified in these sections differ in no material respect from those upon which compensation was awarded in this country under the Lands Clauses Act of 1845 before the coming into operation of the Acquisition of Land (Assessment of Compensation) Act of 1919. As was said by Wadsworth J. when giving judgment in the High Court in the present case, "It is well settled that English decisions under the Lands Clauses Act of 1845 lay down principles which are equally applicable to proceedings under the Indian Act." The compensation must be determined, therefore, by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser. The disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy must alike be disregarded. Neither must be considered as acting under compulsion. This is implied in the

common saying that the value of the land is not to be estimated at its value to the purchaser. But this does not mean that the fact that some particular purchaser might desire the land more than others is to be disregarded. The wish of a particular purchaser, though not his compulsion may always be taken into consideration for what it is worth. But the question of what it may be worth, that is to say, to what extent it should affect the compensation to be awarded, is one that will be dealt with later in this judgment. It may also be observed in passing that it is often said that it is the value of the land to the vendor that has to be estimated. This, however, is not in strictness accurate. The land, for instance, may have for the vendor a sentimental value far in excess of its "market value". But the compensation must not be increased by reason of any such consideration. The vendor is to be treated as a vendor willing to sell at "the market price" to use the words of section 23 of the Indian Act. It is perhaps desirable in this

connexion to say something about this expression "the market price". There is not in general any market for land in the sense in which one speaks of a market for shares or a market for sugar or any like commodity. The value of any such article at any particular time can readily be ascertained by the prices being obtained for similar articles in the market. In the case of land, its value in general can also be measured by a consideration of the prices that have been obtained in the past for land of similar quality and in similar positions, and this is what must be meant in general by the "market value" in section 23. But sometimes it happens that the land to be valued possesses some unusual, and it may be, unique features, as regards its position or its potentialities. In such a case the arbitrator in determining its value will have no market value to guide him, and he will have to ascertain as best he may from the materials before him, what a willing vendor might reasonably expect to obtain from a willing purchaser, for the land in that particular position and with those particular potentialities. For it has been established by numerous authorities that the land is not to be valued merely by reference to the use for which it is being put at the time at which its value has to be determined (that time under the Indian Act being the date of the notification under section 4, sub-section 1), but also reference to the uses to which it is reasonably capable of being put in the future. No authority indeed is required for this proposition. It is a self-evident one. No one can suppose in the case of land which is certain, or even likely, to be used in the immediate or reasonably near future for building purposes, but which at the valuation date is waste land or is being used for agricultural purposes, that the owner, however willing a vendor, will be content to sell the land for its value as waste or agricultural land as the case may be. It is plain that, in ascertaining its value, the possibility of its being used for building purposes would have to be taken into account. It is equally plain, however, that the land must not be valued as though it had already been built upon, a proposition that is embodied in section 24, sub-section (5), of the Act and is sometimes expressed by saying that it is the possibilities of the land and not its realized possibilities that must be taken into consideration.

But how is the increase accruing to the value of the land by reason of its potentialities or possibilities to be measured? In the case instanced above of land possessing the possibility of being used for building purposes, the arbitrator (which expression in this judgment includes any person who has to determine the value) would probably have before him evidence of the prices

paid in the neighbourhood, for land immediately required for such purposes. He would then have to deduct from the value so ascertained such a sum as he would think proper by reason of the degree of possibility that the land might never be so required or might not be so required for a considerable time."

In the present case evidence of recent prices for land similar to the Pink Plot and in its vicinity is scanty. The most comparable plots were sold for £33 per acre in 1945, a price said to be equivalent to £40 in 1951. It is true that prices shown in exhibit 6-prices of plots in Eastleigh, Section 3-indicate that land very close to the Pink Plot is of very high value. Although this circumstance should not be disregarded absolutely, yet comparison of the Pink Plot with Section 3 involves too much hypothetical consideration. Factor no. 4, however, must be given full weight. The Pink Plot was purchased at a price of £109 per acre in 1948, and land prices in 1951 rose. All three parties were agreed at the outset of this case that the 1948 figure of £109 per acre could be accepted by the Court as admitted and not requiring proof. The actual price paid for the 212 acres was \$£23,250\$.

That the purchase price is direct evidence of market value is laid down in the case of K. P. Frenchman v. Assistant Collector, (1922) A. I. R. Bom. 399. Frenchman's case may be distinguished from the present case on two main grounds: -

- (1) There was no evidence in *Frenchman's case* of recent prices for similar land in the vicinity.
- (2) At page 401 of Frenchman's case it was held that "The claimant paid about 10,000 rupees an acre. This on the evidence was a very fair rate."

In the present case I feel impelled to hold that the lessees paid too much for the Pink Plot in 1948, and the reason, presumably, was that they took the same optimistic view of their chances of getting the restrictive user removed which they have expressed through their expert in Court. Moreover, the fact that plots of similar land sold for £33 must undoubtedly influence the valuation, although not so as to extinguish consideration of purchase price and rising land values. I do not think that it would be correct or even possible, to work out a direct mathematical average between the factors. As was said in Frenchman's case (at page \$401\$: —

"The valuation of immovable property is not an exact science, and the very best efforts of an expert or a court to fix a market value for a property like this can never amount to much more than a quasi-scientific guess, which the court should in the case of compulsory acquisition temper with liberality."

Taking into consideration the general principles and factors and the particular circumstances of the present case, I would assess the market value of the Pink Plot in July 1951 at \$\\pounds\$ 20,000. Therefore, the sum payable to the claimants will be: \$-\$

| Market value of land | \$\\cdot\$ | | £20.000 |

|-----|-----|-----|-----|

Market value improvements	. .	\$\sim\$ \$\sim\$	\$6.250.\$
15 per cent compulsory acquisition	\$\overline{a}\$	\$\cdot\$	\$3.937 - 10 - 0\$
Removal expenses \$\sim\$	. .	\$\cdot\$	35
		£30.222 \$-10-0\$	

There is authority for holding that where the Court in awarding excess compensation, fails to award even one quarter of the excess claimed, the claim may well be deemed to be so extravagant as to deprive the claimant of costs. In this present case the claimant has succeeded to a much lesser extent, but I do not, in the circumstances, regard his claim as altogether extravagant. I order that the respondent (the Collector) shall pay half the costs of this claimant-appellant. The City Council will pay its own costs.

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