



Otieno v Nairobi City County; Aveco Limited (Interested Party) (Environment and Land Case Civil Suit E265 of 2020) [2023] KEELC 16839 (KLR) (18 April 2023) (Judgment)

Neutral citation: [2023] KEELC 16839 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E265 OF 2020
MD MWANGI, J
APRIL 18, 2023**

BETWEEN

GEORGE ODUOR OTIENO PLAINTIFF

AND

NAIROBI CITY COUNTY DEFENDANT

AND

AVECO LIMITED INTERESTED PARTY

JUDGMENT

Background

1. The Plaintiff commenced this suit by way of a Complaint dated December 7, 2020. The Plaintiff prays for Judgment against the Defendant for:
 - a. A declaration that the demolition of the Plaintiff's Paradiso Restaurant erected on Plot No 7 on L R No 9042/105 was absolutely illegal;
 - b. General damages for the illegal demolition;
 - c. Construction costs of the Restaurant being a total of Kenya Shillings Thirteen Million Six Hundred and Eighty-Eight Thousand Three Hundred and Thirty-One (KShs 13,688,331/=);
 - d. Total value of the destroyed equipment, machinery, furniture and fittings in the Restaurant at Kenya Shillings Four Million Five Hundred and Sixty Thousand Five Hundred (KShs 4,560,500/=);
 - e. Loss of annual income at Kenya Shillings Six Million Nine Hundred and Seventy-Eight Thousand Two Hundred and Thirteen (KShs 6,978,213/=) per year;



- f. Costs of this suit;
- g. Interest on (b), (c), (d), (e) and (f) above at court rates.

Plaintiff's case

2. The gist of the Plaintiff's case is that he was at the material time, the Lessee of Plot No 7 on all that parcel of land known as L R No 9042/105 (hereinafter referred to as 'the suit property') vide a sub-lease issued by the Interested Party on the 1st January, 2015. The Interested Party is the owner of the suit property.
3. The Plaintiff avers that upon acquiring the leasehold over the suit property, he subsequently constructed and established a restaurant on the said plot which he was operating uninterrupted in the name of 'Paradiso Bar and Restaurant'.
4. On or about November 5, 2015, the Defendant's officers visited the Plaintiff's premises with an enforcement notice threatening to demolish the Restaurant. The Enforcement Notice had not been served on the Plaintiff prior to the said date.
5. The action by the officers of the Defendant prompted the Interested Party, the Landlord to the Plaintiff, to institute Judicial Review Proceedings in Nairobi High Court Judicial Review Application No 399 of 2015 against the Defendant. An order was issued on 28th January, 2016 prohibiting the Defendant and its servants from *inter alia* demolishing the Restaurant.
6. The Plaintiff avers that, in total violation and blatant disregard of the said order, the Defendant went ahead to demolish the Plaintiff's Restaurant on November 3, 2018 occasioning the Plaintiff great financial loss and economic suffering. He has enumerated the particulars of illegality by the Defendant in his plaint, including, entering into his property without lawful authority and demolishing the restaurant without any lawful justification.
7. The Plaintiff further alleges that as a result of the said illegal demolitions, the Plaintiff incurred loss and damage of monumental proportions tabulated as:-
 - a. Demolition of the Restaurant whose re-construction is valued at Kshs 13,688,331/-,
 - b. Destruction of equipment, machinery, furniture and fittings in the Restaurant valued at Kshs 4,560,500/=, and
 - c. Loss of income for the years 2019 and 2020 estimated at Kshs 6,978,213/=. The Plaintiff therefore prays for Judgement against the Defendant as above.

Defendant's case

8. The Defendant filed a Statement of Defence dated March 11, 2021. The Defendant denied all the allegations leveled against it by the Plaintiff. It averred that it never leased L R No 9042/105 to the Interested Party and therefore the Interested Party could not therefore lawfully transfer a right that he did not have to the Plaintiff.
9. The Defendant contends that its officers never visited the Plot threatening to demolish the Restaurant as alleged by the Plaintiff. If at all, the Defendant avers that the Plaintiff had not obtained the requisite approvals, and his premises were therefore liable for demolition.
10. The Defendant further stated that an enforcement notice as to the illegality of the Restaurant was duly served upon the Plaintiff in accordance with the Physical Planning Act but the Plaintiff failed to



comply causing the Defendant to result to demolition as it did. The Plaintiff did not appeal against the enforcement notice as required under the Physical Planning Act. The Defendant therefore asserts that it proceeded with the demolition. The Defendant avers that it is not to blame for the loss and damages suffered by the Plaintiff if any, as the Plaintiff cannot derive benefits from an illegality.

Interested Party's Defence

11. The Interested Party interestingly filed what it referred to as its 'Defence' dated June 8, 2021. The Interested Party stated that it was the legal owner of all that property known as LR No 9042/105 in Embakasi, off the Eastern Bypass within Nairobi County. It acquired ownership of the suit property pursuant to a sale by public auction undertaken by the Defendant on 2nd April, 2009. Its legal ownership of the suit property was affirmed by the judgement of the Environment and Land Court in ELCC 100 of 2013 (*Aveco Ltd vs County Government of Nairobi & 3 others*).
12. The Interested Party avers that it issued a Sub-lease dated 30th November, 2014 to the Plaintiff herein from where he proceeded to establish and run his restaurant business lawfully and without any interruption until the unlawful demolition by the Defendant. The subject property has also been sub-leased to other persons presently occupying various portions thereof.
13. This matter was slated for hearing on December 8, 2022. On the said date, Counsel for the Defendant did not attend. However, the Defendant was present when the hearing date was given. The Defendant did not avail any witness. The matter therefore proceeded in the absence of the Defendant and its Advocate.

Evidence adduced by the plaintiff

14. At the hearing, the Plaintiff, George Odour Otieno (PW 1), testified in support of his case. He adopted his Witness Statements dated December 7, 2020 and October 25, 2021 as his evidence in-chief. He also produced the documents on the Plaintiff's List of Documents dated December 7, 2020 as Plaintiff Exhibits 1 to 7. He reiterated the averments in his plaint and urged the Court to find in his favour.
15. It was his further testimony that he has not been able to re-establish the restaurant after it was demolished by the Defendant since he was unable to raise the money to rebuild the premises. There is therefore nothing happening on the premises at the moment.

Court's Direction

16. The court directed that written submissions be filed within 7 days. The Plaintiff filed his submissions dated January 10, 2023. The court has had the opportunity to read the submissions.

Plaintiff's Submission

17. In his submissions, the Plaintiff identified two issues for determination as follows;
 - a. Whether the demolition of the Plaintiff's property was illegal.
 - b. Whether the Plaintiff is entitled to compensation as sought.
18. On the first issue, the Plaintiff submitted that the demolition of his property by the Defendant was an act of impropriety and arbitrariness. The demolition was without any colour of right known in law. He submitted that the Defendant's agent descended upon his property on November 3, 2018 and proceeded to demolish the entire building housing the restaurant, without any right. The Plaintiff had hitherto been operating the restaurant for years without any interference whatsoever.



19. In spite of the fact that the demolition was barred by the Orders issued by the High Court on January 28, 2016, the Defendant defiantly went ahead undeterred. The said Orders had not been impugned nor vacated by the Court, therefore rendering the action by the Defendant out-rightly illegal. It was in total disregard of the rule of law. In any event, not even a demolition notice had ever been issued to the Plaintiff.
20. The Plaintiff submits that the said demolition was therefore a violation of the Plaintiff's fundamental right to property as provided for under Article 40 of the Constitution. He prays for a declaration that the demolition of his property was illegal.
21. On the second issue as to whether the Plaintiff was entitled to compensation, he submitted that he is entitled to compensation as sought having established that the demolition of his restaurant was illegal.
22. The Plaintiff submitted that he suffered extensive and monumental loss as a result of the demolition of his restaurant. The compensation sought is to restore the *status quo ante*. He avers that he suffered pain, anxiety and mental anguish as a result of losing his primary source of income. He further submitted that a sum of Kshs 30,000,000/= would be sufficient compensation. He cited the case of Mike Maina Kamau vs Attorney General (2017) eKLR where the court awarded a total sum of Kshs 50,000,000/= in general damages for pain and suffering as a result of a demolition.
23. As regards compensation for costs incurred to construct the Restaurant, the Plaintiff testified that the total amount needed to reconstruct the Restaurant was Kshs 13,688,331/=. He produced a bill of quantities as Exhibit 2.
24. As for destroyed equipment and fittings that were in the Restaurant at the time of demolition, he submitted for a sum of Kshs 4,560,500/=. He relied on the audited accounts adduced as Exhibit 4.
25. Regarding the lost income, the Plaintiff's evidence was that his annual income stood at Kshs 6,978,213/= based on the audited accounts which were produced in evidence. He prayed that the court grants him the said sum for every year from 2018 when the demolition occurred to date.

Issues for determination

26. I have carefully considered the pleadings herein, the evidence adduced in court, and the submissions by the Plaintiff. It is the Court's opinion that the issues for determination are as identified by the Plaintiff in his submissions as follows;
 - a. Whether the Plaintiff is entitled to the declaration sought.
 - b. Whether the Plaintiff is entitled to compensation as sought.

Analysis and Determination

A. Whether the Plaintiff is entitled to the declaration sought

27. I must begin by stating that, the fact that the Plaintiff's case proceeded in the absence of the Defendant does not in any way lessen the duty or burden imposed on him of proving the issues of fact pleaded in his case. (see Karugi & Another vs Kabiya & 3 Others (1987) KLR 347, and the Court of Appeal decision in Charterhouse Bank Limited (Under Statutory Management) vs Frank N Kamau (2016) eKLR).



28. Sections 107 and 109 of the Evidence Act, Cap 80 Laws of Kenya provide that: -

“107. Whoever desires any court to give judgment as to any legal right or liability dependent on facts which he asserts must prove that those facts exist.

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that proof of the fact shall lie on any particular person.”

29. The Plaintiff has accused the Defendant of illegally demolishing his Restaurant without the due process. The Plaintiff's case was premised upon the photographic evidence produced showing the demolished premises and the court order issued in Nairobi High Court Judicial Review Application No 399 of 2015. In the above cited case that was filed by the Interested Party herein, the court issued an order of prohibition preventing the Respondent (the Defendant herein) from entering, evicting, demolishing or otherwise interfering with the Applicant's, its members, and or residents' quiet possession, occupation and control of the subject property being L R No 9042/105 Embakasi Estate Off Eastern Bypass without following the due process. The Defendant did not adduce any evidence to contradict the Plaintiff's evidence.
30. My interpretation of the order by the High Court, requiring the Defendant to follow the due process is that the Defendant was obligated to abide by the law of the land before undertaking any of the actions stipulated in the order namely entering, evicting, demolishing or otherwise interfering with the Applicant's, its members, and or residents' quiet possession, occupation and control of the subject property being L.R No. 9042/105 Embakasi Estate Off Eastern Bypass. It ought, at the minimum to have issued a notice to the Plaintiff and given him a hearing before proceeding with such a drastic action of demolishing his restaurant. That cannot be too much to ask in a democratic country like ours.
31. The Plaintiff testified that the Defendant invaded his property, and proceeded to demolish it without notice and or appropriate notification. The Defendant did not afford the Plaintiff an opportunity to present his side of the 'story' and duly consider the same before condemning him.
32. The action by the Defendant was therefore not only arbitrary but also against the rule of law, one of the national values enshrined under the Constitution. The Defendant being a state organ is bound by the national values and principles of governance under article 10 of the Constitution.
33. When Kenyans gave the Constitution, 2010 to themselves, they emphatically and categorically proclaimed their aspirations for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. The Defendant and its officers are obligated to, at all times respect, uphold and defend the Constitution.
34. In the circumstances of this case, I am satisfied that the Plaintiff has proved that the Defendant entered the suit property without prior notice and demolished the Restaurant without any justifiable cause and in spite of the Order issued by the High Court on January 28th January, 2016. The Defendant had no justification whatsoever in proceeding with the demolition of the Plaintiff's restaurant.
35. I therefore find and declare that the Defendant's action of demolishing the Plaintiff's Restaurant was indeed illegal, unlawful and in violation of a Court Order.

B. Whether the Plaintiff is entitled to compensation as sought

36. The Plaintiff in this case, as already outlined earlier seeks compensation as hereunder: -
- a. General damages for the illegal demolition;



- b. Construction costs of the Restaurant being a total of Kenya Shillings Thirteen Million Six Hundred and Eighty-Eight Thousand Three Hundred and Thirty-One (Kshs. 13,688,331/=);
- c. Total value of the destroyed equipment, machinery, furniture and fittings in the Restaurant at Kenya Shillings Four Million Five Hundred and Sixty Thousand Five Hundred (Kshs. 4,560,500/=);
- d. Loss of annual income at Kenya Shillings Six Million Nine Hundred and Seventy-Eight Thousand Two Hundred and Thirteen (Kshs. 6,978,213/=) per year.
37. Under Section 13(7) of the [Environment and Land Court Act](#) No 19 of 2011, this Court has the power to grant any relief as it deems fit and just including injunction orders, prerogative orders, award of damages, compensation, specific performance, restitution, declaration or costs. From the clear reading of the section, the list of reliefs is not exhaustive.
38. The Plaintiff submitted that he suffered extensive and monumental loss as a result of the demolition of his restaurant. That he suffered pain, anxiety and mental anguish as a result of losing his primary source of income. He prays for a sum of Kshs 30,000,000/= as general damages. He relied on the case of [Mike Maina Kamau vs Attorney General](#) (2017) eKLR where the court awarded a total sum of Kshs 50,000,000/= in general damages for pain and suffering as a result of a demolition.
39. In the case of *Livingstone V Rawyards Coal Co* (1880) 5 App Cases 25, (United Kingdom House of Lords) Lord Blackburn stated as follows in regard to damages; -
- “that sum of money which will put the injured party in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation.”
40. In the case of [Willesden Investments Limited vs Kenya Hotel properties limited](#) NBI H C.C NO 367 of 2000 the court stated that;
- “There is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstances in each case.”
41. Taking into account all the circumstances of this case, the need to deter unlawful actions and violation of citizen’s fundamental rights by the Defendant, I am of the opinion that an award of general damages in the sum of Kshs 10,000,000.00 would be adequate and reasonable compensation to the Plaintiff for the pain and suffering occasioned by the Defendant’s blatant act of unlawfully demolishing the Plaintiff’s property.
42. As regards compensation for construction costs of the Restaurant, the Plaintiff testified that the total amount needed to reconstruct the Restaurant is Kshs 13,688,331/= and produced the bill of quantities as Exhibit 2.
43. The law on specific damages, I must state is well spelt out. Special damages must not be only be specifically pleaded but must be strictly proved. In the case of [Hahn vs Singh](#) (1985) KLR 716, the Court of Appeal held that: -
- “special damages must not only be specifically claimed (pleaded) but must also be strictly provedfor they are not the direct natural or probable consequence of the act complained



of and many not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

44. In the case of *Total (Kenya) Limited formally Caltex Oil (Kenya) Ltd vs Janevans Ltd* (2015) eKLR the court insisted that a party must present actual receipts of payments made to substantiate loss or economic injury. It is not enough for a party to provide proforma invoices sent to the party by a third party. This court agreed with the above cited decisions in the case of *Arthur K Apungu vs Justnice Limited* (ELCC 103 of 2009).
45. In the instant case, the Plaintiff produced a bill of quantities dated July 2019. That in my view is not sufficient proof of a claim for special damages. He ought to have produced receipts or some other evidence proving actual payment. Alternatively the Plaintiff should have called a loss assessor who could have guided the court on that claim from an expert’s point of view. My finding therefore is that the claim for ‘construction costs of the restaurant’ has not been proved as required by the law.
46. As for destroyed equipment and fittings that were in the Restaurant at the time of demolition, the Plaintiff submitted for a sum of Kshs. 4,560,500/=. His evidence was the audited accounts produced as Exhibit 4.
47. The Plaintiff did not call the auditor/accountant who had prepared the audited accounts to testify in court and justify the figure of of Kshs. 4,560,500/= or explain to court how the figure was arrived at. That claim has therefore not been proved and must fail.
48. Regarding the lost income, the Plaintiff’s evidence was that his annual income stood at Kshs. 6,978,213/=. He relied on the audited accounts of the business. In his submissions, the Plaintiff prayed that the same be compensated from the year 2018 to date. In his plaint however at paragraph 11c, he prayed for compensation for two years only (loss of income for the years 2019 and 2020.)
49. Although the Plaintiff was the wronged party, he too had a legal duty to mitigate his losses. In the case of *British Westinghouse Electric and manufacturing company vs Underground Electric/Railways Company of London Ltd* (1912) AC 677 Viscount Haldane L.C, explained the duty to mitigate loss as follows;

“The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach, but this principle is qualified by a second, which imposes on the Plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars him claiming any part of damage which is due to his neglect to take such steps.”
50. The Court of Appeal in the case of *African Highland Produce Ltd vs John Kisorio* (2001) eKLR, held that the guiding principles of law in mitigation are as follows; -
 - i. It is the duty of the Plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act he sues and he cannot claim as damages any sum which is due to his own neglect.
 - ii. The duty arises immediately a Plaintiff realized that an interest of his has been injured by a breach of contract or a tort.
 - iii. The question of what is reasonable for a Plaintiff to do in mitigation of his damages is not a question of law, but one of fact in the circumstances of each particular case, the burden of proof being upon the defendant.



51. In the case of *Caltex Oil (Kenya) Ltd vs Evanson Njiiri Wanjibia* (2017) eKLR, the court held that “in calculating damages in such circumstances, the court must take a reasonable approach. Unjust enrichment is always frowned upon by the court. There is also the expectation by the law that the aggrieved party must mitigate its loss and not fold its hands and expect to reap a windfall by way of an award of damages by the court.”
52. This Court’s responsibility then is to determine what is reasonable in the circumstances of this case putting into consideration the Plaintiff’s responsibility to mitigate its losses.
53. Considering all the circumstances in this case, it would be unconscionable for the Plaintiff to be awarded the lost income from the year 2018 to date. This court is of the considered view that an award of lost income for a period of one year only would be fair, reasonable and adequate compensation to the Plaintiff. With reasonable diligence, the Plaintiff should have been able to re-establish his business within one year. I award him lost income for one year only at Kshs. 6,978,213/=.
54. In view of the foregoing, judgement is made in favour of the Plaintiff in the following terms;

Orders

- i. An order is hereby issued declaring that the demolition of the Plaintiff’s Paradiso Restaurant erected on Plot No 7 on L R No 9042/105 by the Defendant illegal;
- ii. General damages in the sum of Kshs 10,000,000.00;
- iii. Loss of annual income at the sum of Kshs 6,978,213/=only;
- iv. Costs of this suit;
- v. Interest on (ii) and (iii) above at court rates from the date of this Judgement.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF APRIL 2023.

M D MWANGI

JUDGE

In the virtual presence of:

No appearance by parties.

Court Assistant – Yvette.

M D MWANGI

JUDGE__

