



**Swaleh v Kenya Airports Authority & another (Environment & Land
Case 69 of 2018) [2023] KEELC 18309 (KLR) (20 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18309 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 69 OF 2018**

NA MATHEKA, J

JUNE 20, 2023

BETWEEN

KHALID OMAR SWALEH PLAINTIFF

AND

KENYA AIRPORTS AUTHORITY 1ST DEFENDANT

KENYA RAILWAYS CORPORATION 2ND DEFENDANT

JUDGMENT

1. The Plaintiff is and was at all material times the registered lessee of Kenya Railways on Plot Number MN/V/239 situated at Kwa Jomvu Railway Station, Changamwe in Mombasa County (the suit property). The Plaintiff avers that on or about March 20, 2018, pursuant to a Court Order issued on February 28, 2018 in ELC Miscellaneous Application Number 35 of 2016: Kenya Airports Authority vs Elezar Kamau Thiongo & Others, the Defendant proceeded with demolition of properties and eviction of people along the Mombasa Nairobi Highway from the landing lights of Moi International Airport. The Plaintiff further avers the Defendant then proceeded to demolish the boundary walls, stores and workshop shade located in the suit property belonging to the Plaintiff thug causing damage and loss to the Plaintiff
2. That the property has not been compulsorily acquired by the Defendant to warrant the said demolition and there has been no notice of demolition served upon the Plaintiff. The Plaintiff further avers that subsequently, the Defendant has threatened the Plaintiff with eviction from the suit property whereas the Plaintiff has a valid Lease Agreement with the owner of the suit property ie Kenya Railways. The Plaintiff will aver that there has been no notification of the alleged demolition by the Defendant and in any event any such demolition would be illegal as the property is well within the beacons and does not form part of the affected properties in the Order of case Number 35 of 2016. The Plaintiff will further aver that the suit property has not been compulsory acquired by the Defendant to warrant any such demolition. The Plaintiff avers that any attempt by the Defendant to demolish the suit property



and any subsequent eviction would be illegal and thus void as the property is being owned by Kenya Railways. The Plaintiff prays for judgment to be entered against the Defendant for orders that;

- a. There be a declaration that the demolition of property MN/V/239 situated at Kwa Jomvu Railway Station, Changamwe in Mombasa County by the Defendant and the purported eviction is illegal, unlawful and therefore void.
 - b. There be an order cancelling any such demolition of the suit property by the Defendant.
 - c. A permanent injunction do issue restraining the Defendant, its agents, servants and/or employees from entering into, alienating, evicting or taking possession of the land parcel known as MN/V/239 situated at Kwa Jomvu Railway Station, Changamwe in Mombasa County or destroying, demolishing or in any way interfering with the building erected thereon.
 - d. Compensation for Kshs 19,350,000/= being the value of the damaged assets.
 - e. Costs of the suit be awarded to the Plaintiff
 - f. Any other relief that this court deems fit to grant.
3. The 1st Defendant states that the suit property is within the flight path and adjacent to the Moi International Airport (Mombasa) approach lights which are navigational instrument and as such the said land is within the jurisdiction, management and control of both the Defendant and the Kenya Civil Aviation Authority for purposes of ensuring the safety of the aircrafts using the Airport and as such Kenya Railways had no power to lease the property as alleged or at all and such lease if any, which is denied, the same is null and void and does not confer upon the Plaintiff any right whatsoever to occupy the said flight path. Further, the Plaintiff's occupation of the flight path and adjacent to the approach light causes danger to the users of the Airport since the occupation interferes with the safe landing of aircrafts and it is in the public interest that the area is clear and all structures removed. That eviction was carried out to remove all illegal occupants of the flight path any obstruction and/or interference with the landing lights or approach lights and that the said eviction was done to ensure the safety of the users of the Airports including the aircrafts landing and taking off from Moi International Airport Mombasa. The Defendant states that the property in question is within the restricted area reserved for the exclusive use by the Defendant and the Kenya Civil Aviation Authority and there is no requirement for compulsorily acquiring the same as it already has the approach lights that aid the safe navigation of the aircrafts to the runway and the same is being used for a public purpose. The 1st Defendant prays that the Plaintiff's suit be dismissed with costs to the 1st Defendant and for judgment for the Counter Claim as follows
- a. A declaration that the lease between the Kenya Railways and Khalid Omar Swaleh over Plot Number. Mainland North/ Section V (239 is null and void.
 - b. A declaration that the property namely Mainland North/ Section V (239 is reserved for exclusive use by the Kenya Airports Authority and the Civil Aviation Authority for navigation instruments for Moi International Airport Mombasa and Kenya Airport Authority is entitled to possession of the vacant said property.
 - c. An Order for eviction of the 1st Defendant, Khalid Omar Swaleh from Plot No. Mainland North / Section V/ 239.
 - d. A permanent injunction restraining or the 1st and 2nd Defendants and their agents employees from transferring, leasing or in any manner dealing with the suit property or any other property



reserved for the use of the Kenya Airports Authority along or adjacent to the landing and or navigational lights.

- e. Cost of the suit and the Counter Claim.
 - f. Any other or further Order as the court may deem fit to grant.
4. The 2nd Defendant's Defence to Counterclaim is that the 2nd Defendant avers that the Plaintiff in the Counterclaim is not entitled to the reliefs sought. At best, which is not admitted, it can only obtain an order to enforce overriding interests over the 2nd Defendant's land, if any, under section 56 of the [Civil Aviation Act 2013](#). The 2nd Defendant prays that the Counterclaim be dismissed with costs in so far as it relates to the 2nd Defendant.
 5. This Court has considered the evidence and the submissions therein. The cause of action herein arose from the acts of the 1st Defendant of March 20, 2018 of demolishing of property and evicting people from the landing path of Moi International Airport. The evictions were pursuant to the orders issued on February 28, 2018 in ELC Misc App No. 35 of 2016 Kenya Airports Authority vs Elezar Kamau Thiongo & 2 others. I have perused the said file and I do note that on January 16, 2018, Omollo J allowed the application dated October 12, 2016, where Kenya Airports Authority sought eviction orders of the Respondents therein and their agents from the restricted area along the landing lights of Moi International Airport on the basis that the residents had erected illegal structures. The basis of seeking eviction orders in a miscellaneous application was the Respondents had previously filed a Constitutional Petition 42 of 2014 Elezar Kamau Thiongo and 3 others vs Kenya Airports Authority, where they had sought inter alia a declaration that they are entitled to a reasonable time to vacate from the unsurveyed land they occupied along the airport's landing lights. The court held that the Petitioners (Respondents therein) were neither the registered owners of the parcels of land they occupied nor did they hold any proprietary interest over them. The court found that they only held temporary occupation licenses at the pleasure of the County Government of Mombasa and that they occupied land that was along the flight path and lights of the airport which contravened the international aviation safety standards. The Court proceeded to dismiss the Petition with costs, since there were no eviction orders issued in the said judgement, Kenya Airports Authority filed Misc. App 35 of 2016 hence the eviction orders, the Plaintiffs make reference to herein.
 6. The Plaintiff herein is a lessee to Kenya Railways, pursuant to a lease agreement dated September 16, 2008 (PEX-1), where Kenya Railways leased LR MN/V/239 for a term of 30 years from October 1, 2008. Kenya Railways has confirmed that indeed they are the registered owners of the suit land by producing a copy of the Gazette for May 18, 1954 Notice No. 743 which stated that the suit land is among various parcels of land which were set aside for marshalling yards and railway realignment (DW2- DEX-2). Kenya Airports Authority maintained that though the railway line passes next to the airport, that did not vest the adjacent land to Kenya Railways. The Airports Authority contended that the suit land belongs to the airport for the facilitation of safe navigation for aircraft. The 1st Defendant mounted a counterclaim against the 2nd Defendant and averred that the suit land is within the restricted area reserved for their exclusive use on which a section of landing lights is erected to aid the safe navigation of aircraft. The 1st Defendant argued that the lease was null and void as it endangers the safety of the airports and prayed for the court to cancel the said lease and issue an order of eviction of the 1st Defendant from the suit land.
 7. On cross-examination, the Plaintiff admitted that though he was required to seek the approval of the County and the 2nd Defendant before constructing any building, he did not produce the approvals to Court for consideration. He also acknowledged that sometime in 2010 the 2nd Defendant inspected his building and informed him that the same was close to the flight path and he was required to get



clearance from the 1st Defendant. The Court found that indeed the Plaintiff was informed by the 2nd Defendant on August 20, 2010 that it was a term of the lease that no building would be erected without authority (DW2- DEX8). The Plaintiff was required to stop any further construction and obtain the required approvals and further to obtain clearance from the Kenya Airports Authority since the area is close to the flight path where there are restrictive rights. The 2nd Defendant through, Justine Omoke DW2, agreed with counsel for the 1st Defendant on cross-examination that the airport is sensitive security and further admitted that the Plaintiff did not seek any approval for constructing making the building illegal. DW2 also acknowledged that the suit land was on the flight path with controlled developments.

8. From the evidence adduced and testimonies of the witnesses, it is clear to court that the Plaintiff, though in a legitimate lease agreement with Kenya Railways was required to seek approvals before carrying out any construction on the suit land. First, he was required to seek approval from the 2nd Defendant as the lessor and the County Government of Mombasa. The Plaintiff conceded that he was aware of the approvals needed before embarking on any construction on the suit land. The Plaintiff failed to demonstrate to court that he sought and obtained the approval of his lessor and the County Government before undertaking the construction. In addition to the approvals, by the letter dated August 20, 2010, the Plaintiff was required to seek clearance from the 1st Defendant since the suit land was situated near the airport's flight path where the airport exercised restrictive user rights. The Plaintiff has not demonstrated to court that he sought clearance from the 1st Defendant before constructing the now demolished building on the suit land.
9. It is well known that land use around airports is restricted mainly because high buildings can interfere with air traffic and security causing risks to airport operations. The environmental impact of an airport also makes the areas around the airport not suitable for certain land uses. As a result, the 1st Defendant has wide reaching powers to protect the airport's flight path to ensure among other things the safe landing of any plane landing on its runway. In particular, Section 14 of the [Kenya Airports Authority Act](#) Cap 395 gives power to the 1st Defendant to deal with any land not just the one surrounding an airport. It states that;
 - “ 1) Any authorized employee of the Authority may, for the purposes of this Act, enter upon any land—
 - a. to survey such land or any portion thereof; or
 - b. to remove or cause to be removed any obstruction, materials, structures or buildings including slaughterhouses which are likely to attract birds that may be hazardous to aircraft operations.
 1. Any costs incurred by the Authority in pursuance of the provisions of subsection (1)(b) shall be wholly recoverable from the person responsible for such obstructions, materials, structures or buildings.
 2. Where any damage to land is occasioned by reason of the exercise of the powers conferred by subsection (1)(a), the owner or occupier of the land shall be entitled to compensation in accordance with this Act.”
10. Further Section 15 (3) of the [Act](#), prohibits the construction of any building that can in anyway interfere with any of the services or operations of the authority and further makes it a mandatory for one to obtain a license from the authority before undertaking any such developments. The Plaintiff



having been a licensee and later a lessee of the 2nd Defendant occupying the suit land since the 1990s ought to be aware that part of his due diligence included acquiring a licence or clearance from the 1st Defendant to construct. By the letter dated August 20, 2010, it is evident that the Plaintiff was instructed to stop the construction until the prerequisite approvals and clearances were obtained. He took that risk of constructing the building before first ensuring that he obtained the necessary approvals, and for that he must also bear the consequences that came with that decision.

11. I am not persuaded to declare the lease between the Plaintiff and 2nd Defendant null and void or the 2nd Defendant's title to the suit land a nullity on the ground that no evidence has been tabled before court challenging the title of the 2nd Defendant. I also decline to grant the orders of vacant possession of the suit property to the 1st Defendant or an injunctive order as against the Plaintiff and 2nd Defendant. However, it is mandatory for the Plaintiff to seek clearance from the 1st Defendant before embarking on any construction on the suit land, where the said clearance is not sought and the Plaintiff proceeds with construction, the 1st Defendant is at liberty to enter the suit land and remove the same in accordance with the *Kenya Airports Authority Act*. I therefore find no merit in the Plaintiff's suit and the same is dismissed with costs to the Defendants. In as much as the court has found that, the 1st Defendant has restrictive user rights to the suit land due to its proximity to the airport I find they have failed to prove their counterclaim on a balance of probabilities and the same is dismissed with no orders as to costs.

12. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 20TH JUNE 2023.

N.A. MATHEKA

JUDGE

