



**Nthenge (Chairman) & 6 others v Kenya Airports Authority (Environment & Land Case 213 of 2009) [2023] KEELC 18195 (KLR) (9 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18195 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 213 OF 2009**

**AA OMOLLO, J**

**JUNE 9, 2023**

**BETWEEN**

**BONIFACE NTHENGE (CHAIRMAN) ..... 1<sup>ST</sup> PLAINTIFF**  
**JOHN KATUTA (SECRETARY) ..... 2<sup>ND</sup> PLAINTIFF**  
**MARY NZIOKI (TREASURER) (SUING AS OFFICIALS KYANGOMBE SELF  
HELP ORGANIZATION) ..... 3<sup>RD</sup> PLAINTIFF**  
**DAVID MUGOFWA ..... 4<sup>TH</sup> PLAINTIFF**  
**DANIEL KIERU ..... 5<sup>TH</sup> PLAINTIFF**  
**GEORGE MUHIA NGANGA ..... 6<sup>TH</sup> PLAINTIFF**  
**LAWRENCE MUCHEMI GITHIARI ..... 7<sup>TH</sup> PLAINTIFF**

**AND**

**KENYA AIRPORTS AUTHORITY ..... DEFENDANT**

**JUDGMENT**

1. In an amended plaint dated 4<sup>th</sup> March 2015 amending the plaint that was dated 8<sup>th</sup> May 2008, the Plaintiffs brought this claim as a representative suit against the Kenya Airports Authority. They pleaded that over a period of 12 years from 1992, the Plaintiffs and members of the Kyang'ombe Self Help Group occupied and developed parcels allocated and or purchased comprised in LR No. 209/17236 with the consent and approval of the Defendant, the Nairobi City Council and the Provincial Administration.
2. The Plaintiffs stated that they had sought and connected their respective premises essential services like water and electricity after receiving approvals from the relevant authorities. That on 21<sup>st</sup> October 2011, the Defendant in disobedience of a Court order on or about the 21<sup>st</sup> day of October 2011 the Defendant in disobedience of a Court order wrongfully and without any colour of right by itself, it's



- agents, servants and representatives entered the Plaintiffs premises situated on LR No 209/17236 and purported to exercise its right to ownership of the property and proceeded to demolish the Plaintiffs structures and completely destroyed them rendering the Plaintiffs and their families homeless and thereafter condoned the area and caused the Plaintiffs to be evicted.
3. The Plaintiffs pleaded further that the aforesaid acts of destruction maliciously were out of spite towards the Plaintiffs with intention of humiliating and injuring their dignity and pride. The Plaintiffs denied any encroachment on the Defendant's land LR No 21919. They pleaded that the Defendants destroyed their churches, schools, commercial properties, residential properties and social amenities.
  4. As a consequence of their losses, the Plaintiffs pray for judgment to be entered against the Defendant as follows:
    - a. A declaration that the Defendant's action of demolition and eviction of the Plaintiffs' from their respective premises comprised in title No. 209/17236 were illegal and unjustified.
    - b. Special damages to be ascertained / proved by each plaintiff herein and represented.
    - c. General damages.
    - d. Aggravated damages.
    - e. Resettlement.
    - f. Costs of this suit.
  5. The Defendant contested the suit vide amended statement of defence dated 23<sup>rd</sup> October 2015. The Defendant averred that it is the owner of LR No 21919 where Jomo Kenyatta International Airport and other buildings ancillary to the airport are erected. The Defendants denied that the Plaintiffs have resided on the suit premises from the 1992 and denied consenting to any developments by the Plaintiffs on the suit premises.
  6. The Defendants contended that the parcel of land claimed by the plaintiff forms part of their land LR 21919. The Defendant added that;
    - a. That the Defendant herein was issued with its grant Number I.R 70118 in the year 1996 while the Plaintiffs were issued with their grant in the year 1997.
    - b. That the parcel of land the subject of this suit was issued to the Plaintiffs in the year 1997 whereas the Kyangombe Self Help Organisation was registered in the year 2006.
    - c. That the parcel of land the subject of this suit was issued to a non-existing entity and thus the Grant is of no effect in Law.
    - d. In further response to the allegations contained in paragraphs 4, 4A, 5 and 6 of the plaint it is the Defendant's contention that the Defendant in issuing the said notice was acting within its statutory mandate as provided for under Sections 12, 14, 15 and 16 of the *Kenya Airports Authority Act*.
  7. Further, the Defendant denied that it made the decision to demolish and structures belonging to the plaintiff; denied that there were any orders of Court that were in place during the demolitions; and also denied any involvement in any demolition. The Defendant asserted that they had issued notices to the Plaintiffs requiring them to remove the illegal structures erected on their land.
  8. The Defendant state that the land subject of this suit falls under the flight corridor runway 06 of Jomo Kenyatta International Airport which gives it control over the manner and usage by dint of Sections



12, 14 – 16 of *Kenya Airports Authority Act* Cap 395 and annex 17 to the Convention establishing the international Civil Aviation Organisation (ICAO). They continued to plead that vide gazette notice No. 60 of 8<sup>th</sup> May 1998, was a “declared area” by the then Minister for Transport and Communications which means all constructions in the said area were strictly prohibited except with approval from the Director of Civil Aviation in consultation with the Director of the Defendant. Thus the Defendant prayed that the suit be dismissed with costs.

9. The hearing commenced on 8<sup>th</sup> February 2018 and the plaintiff called 3 witnesses while the Defendant called 2 witnesses. John Katuta Mutua named as the 2<sup>nd</sup> plaintiff gave testimony as PW1. He adopted his witness statement dated 4<sup>th</sup> March 2015 as part of his evidence. PW1 stated that he was born in 1974 at the suit premises since his parents worked for original white settler owner of Kyang’ombe ranch. That the white settler left the country in 1982 and left his property to his three employees comprised of the PW1’s father, Wambura Mavese – deceased and Charles Kihunya.
10. That the 3 were later joined on the land by their relatives and the ranch population increased. PW1 avers that the children of the three workers of the white settlers started building on the suit land. That in the 1990s the government started assisting them by providing security which culminated in the building of a police post at Kenya Ports Authority village bordering Kyang’ombe. They later formed and registered Kyang’ombe Self Help Group.
11. PW1 continued that he developed the land which belonged to his father by constructing a two-bedroomed house for himself, put up business complex where he distributed coca cola and Kenya breweries products and also put up 10 single roomed houses for rental putting his estimated monthly income at Kshs.150,000. He stated further that on 21/10/2011 at around 11.30pm a bulldozer came and destroyed their houses leaving no room to salvage anything. It is his contention that the demolition was undertaken by the Defendant in violation of a Court order.
12. In his written statement, PW1 asserted that the demolitions exposed them to deadly dangers since the electric cables and wires were left naked, their children were subjected to harsh weather conditions with no food, water and sanitation. That they were also denied rights to access their premises. According to him the Defendant only fenced a small portion of the land belonging to Kyang’ombe. He urged that he be compensated and be resettled.
13. In cross-examination, PW1 said the ranch was owned by white settlers and he does not know who is the registered owner of the land. He stated that they had the right to occupy the land but they are not claiming title to the land. He asserted that their structures had been approved by the city council except they lost all the approval documents during the demolitions. PW1 confirmed that the Defendant demarcated the land they wanted to demolish yet went on to demolish their structures which fell outside the demarcated areas.
14. PW1 admitted that they did not seek approvals of the Defendant for the development of their structures. That this suit was filed before the demolition took place and they obtained restraining orders. PW1 was not aware order had been discharged (dismissed). It is his assertion that the Defendant demolished the whole village when only a few people had encroached.
15. In re-examination, PW1 stated that the Defendant put up the wall after their structures were demolished. That the larger part of the village was not fenced. He averred that their constructions were authorized by the government. The village had an assistant chief and a nearby police post.
16. PW2 was Benedict Muli Mbaluka who told the Court that he is a resident of Machakos town and a teacher by profession. He adopted his written witness statement dated 4<sup>th</sup> March 2015 as his evidence in chief. PW2 said that he joined Kyang’ombe Self Help in the year 2000 and bought 3 plots. That he put



up commercial rooms, three shops, bar and rental rooms which generated an income of Kshs.102,000 per month. PW2 added that he had also bought 16 plots where he has constructed a private school which had 11 classrooms and offices and staff houses.

17. According to PW2, he followed due process in registration of the school. The school was fenced with concrete posts and key apple fence. PW2 stated that on 22/10/2011, they woke up to find all the structures had been demolished. The learning of 250 pupils in his school was also terminated and he had to look for a school to settle the class 8 candidates. PW2 asserted that the school generated Kshs.4.5 million a year and after expenses his profit was Kshs.1.5million. He averred that the school investment was his future which he lost after the demolition.
18. PW2 estimated his total loss at Kshs.43,000,000. He asked the Court for an order of compensations. He produced the documents at pages 4 – 23 of the Plaintiffs bundle as Pex 1 in support of his case. The documents include bill of quantities, building plans and a demand for stand premium. That he had books of accounts but they were lost during the demolitions. The witness stated that they were never asked not to put up any structures for being on a flight path. He also prayed for compensation and resettlement.
19. During cross-examination, PW2 said he purchased his plot from Mwangaza Self Help Group and Juhudi which are a part of Kyang'ombe Self-Help Group. He admitted having no title to this plots other than the certificates of ownership he produced. Because the demolition took place at night, he did not see any officer from the Defendant during the activity. The witness was not sure if his plot fell within plot No. 209/17236.
20. That the certificate of ownership he attached refers to LR No 34847. He conceded not obtaining approval from the Defendant for his developments or occupation. He was also not aware of the Defendants notice dated 1/2/2008 addressed to Kyang'ombe. PW2 further stated that as at 28/10/2009, he had made a request to the Commissioner of Lands to be allocated land measuring 1 acre for a school; and paid Kshs.106,661 for allotment letter but had not been issued with any title.
21. The witness stated that his building plans were prepared by an architect but the drawings lack endorsement for approval. He did not have receipts to support the bill of quantities nor tax returns from Kenya Revenue Authority. In re-examination, PW2 said Mwangaza & Juhudi were all within the umbrella of Kyang'ombe corroborated with ownership certificates at pages 25 – 28 of their bundle. The witness was referred to the Defendant's letter dated 5/10/2008 which granted Kyang'ombe Self Help Group permission to sub-divide LR 209/17236 subject to the conditions stated which land is distinct to the Defendants' parcel 21919.
22. On 16<sup>th</sup> February 2022, Boniface Musyoka Nthenge testified as PW3 by adopted his witness statement dated 4/3/2015. PW3 also produced the documents contained in the further list dated 27/9/2016 as Pex 3, the bundle filed on 22/10/2019 as Pex 4 and the bundle filed on 29/1/2020 as Pex 5.
23. PW3 stated that he is the Chairman of Kyang'ombe Self-Help Group and has been authorized by the group members to bring this suit on their behalf. PW3 averred that the owned plot No. 396 which was developed and connected with power. His ownership certificate is found at page 2 of Pex 1. He informed the Court that he purchased his plot in the year 2007 and referred to the letter dated 5/10/2008 where the Defendant acceded to sub-division of the suit property.
24. PW3 said that after the demolition in 2011, a parliamentary committee was formed to look into the matter and make recommendations. The report is exhibited at pages 167 – 290 of Pex 1. PW3 commented that despite the recommendations given at paragraph 13.12 of the report, they have not



- been paid anything. PW3 stated that at the time of demolition, the area was developed with 70% - 80% occupation.
25. PW3 contended that the CEO of Airports Authority Mr. Muhoho had on various occasions visited the area and encouraged them to develop as long as they did not trespass the neighbouring airport land. He asserted that after the demolition, the Defendant fenced only a very small portion of the land the Plaintiffs had previously occupied. That up-to-date the said portion remains unoccupied, unfenced and a few of the Plaintiffs still live there.
  26. PW3 stated that no notice was given to Kenya Power of themselves to allow them disconnect the power supply. The demolition thus exposed citizens to imminent and irreparable loss; inhumane and undignified conditions; and loss of domestic animals. He prayed that they be resettled and compensated.
  27. Under cross-examination, PW3 admitted his ownership certificate was issued by Mwangaza – Kyang’ombe Self Help Group while in the plaint, the organization is referred to as Kyang’ombe Self Help Group which according to him there is no difference. PW3 bought the plot in 2007 but the ownership certificate was issued in 2002. He stated that he put up a house on it in 2008 and rented out the house charging a monthly rent of Kshs.7,000. He did not produce any receipt to confirm amount of rent received stating the same was destroyed during the demolition.
  28. He added that he had two ships on the same premises fetching Kshs.45,000 for the whole building. The witness avers that he owned other plots but their ownership certificate were misplaced. He told Court that he has produced electricity bills to support his case. He was referred to the letter dated 9/2/2007 by the Chairman seeking approval for development. In reference to the letter dated 1/2/2008, PW3 averred that they must have provided the necessary documents.
  29. The witness confirmed that he knew what a flight path is and but at his plot No. 396 he could not see planes land or take off since it was far. He stated that there were go-downs between their parcel and the airport land. He was unaware that buildings near the Defendants’ land are regulated. He confirmed that there was no transfer of LR 209/17236 to Kyang’ombe. He denied receiving the Defendant’s letter dated 6/10/2008 addressed to Kyang’ombe which related to encroachment.
  30. PW3 denied they had encroached on the Defendant’s land. He was shown the reminder notice to vacate found at page 16 of the Defendants’ bundle of documents. During demolition, PW3 stated that on day 1, he saw 30 bulldozers and G.S.U personnel but he could not tell who was participating. He admitted that the parliamentary committee did not specify who was to compensate them.
  31. In re-examination PW3 averred that Kyang’ombe Self Help Group was registered first while Mwangaza was registered alter. That paragraph 12.62 of the Parliamentary Committee report indicated that it was the Defendant who carried out the demolitions. PW3 added that this suit was filed after the notices of 6/2/2008 and the Court gave an order of status quo on 1/10/2009. He asserted that this order was later extended. It is their case that the demolition was done with the Court order in place. This marked the close of the Plaintiffs’ case.
  32. Mr. Rashid Ali Abdulahi gave evidence as DW1 introducing himself as a land surveyor at the Defendant Authority. He stated that his testimony is derived from what he gleaned as the records of the Defendant which have been produced before the Court. He averred that the Defendant was issued with grant No. 70118 LR 21919 in 1996. He stated that the records at the Lands Offices show LR 209/17236 has never been owned by the Plaintiffs.
  33. DW1 took issue with Kyang’ombe Self Help Group being issued with a title in 1997 yet the group was registered on 27<sup>th</sup> January 2006. It is DW1’s evidence that the investigations he carried out revealed



- that the land claimed by the plaintiff is wholly owned by the Defendant. He added that the Plaintiffs' structures were constructed along the flight corridor.
34. DW1 continued that he was aware that on 9<sup>th</sup> February 2007 the Kyang'ombe Self Help Organization applied for a consent to develop structures on the suit property and the Defendant through its General Manager (P&ES) wrote back informing them that the no objection to development requested by them could only be granted to the Plaintiffs once they provided the Defendant with documents of ownership, the Deed Plan and only after the said documents were checked and the location of land ascertained (copies of the said letters are found on page 12 & 13 and 5 of the Defendant's bundle of documents). However, the plaintiff did not submit the titles for the particular parcels.
  35. He stated further that instead of waiting for the ascertainment of the issues raised by the Defendant, the Plaintiffs proceeded to erect structures along the flight corridor creating a security threat to the operations of the Defendant's airport known as Jomo Kenyatta International Airport. This led to the Defendant issuing the Plaintiffs with a notice dated 6<sup>th</sup> October 2008 (A copy of the said notice is found on page 11 of the Defendant's bundle of documents. By virtue of the land the subject of this suit being along the flight corridor the Defendant has jurisdiction over the said land under the provisions of Sections 12, 14, 15 and 16 of the [Kenya Airports Authority Act](#). The said provisions of law empower the Defendant and its servants and agents to enter upon any land near to or neighbouring an airport so as to ensure that the safety and security of the airport is at all times maintained to the highest standards possible.
  36. The witness produced the documents contained in their bundle dated 11/1/2016 as Dex 1 and the supplementary bundle dated 28/9/2016 and further bundle dated 8/2/2018 as Dex 2 & 3 respectively. DW1 stated that LR 209/17236 registered in name of Great Properties Ltd does not fall with their land and it had nothing to do with the Plaintiffs as per the deed plan, it is situated behind Panari Hotel on Mombasa Road.
  37. DW1 contended that the Kyang'ombe residents were partly inside the Defendants' land and partly outside. That the area occupied also fell on the flight path where developments are prohibited.
  38. Upon cross-examination, DW1 stated that the demolition was carried out by the government and he referred to the parliamentary select Committee. DW1 affirmed appearing before the Committee on behalf of the Defendant but denied knowledge of the recommendation for restitution. He conceded that the report captured that the demolitions were undertaken following a complaint made by the Defendant, that the structures were a threat to security of Jomo Kenyatta International Airport.
  39. DW1 could not remember whether a survey report was filed as per the Court order of 1/10/2009. He confirmed that the Court order of 12/5/2010 directed that the status quo be maintained. He also confirmed that the Defendant did not obtain any eviction order after 12/5/2010. DW1 confirmed that the Defendant fenced their property after the demolitions. DW1 argued that the Defendant's letter dated 5/10/2008 was suspect as the General Manager security does not give development conditions.
  40. The witness stated further that the extent of the flight path was specified in L.N. No. 60 of 1998. He maintained that the Plaintiffs' structures were on a flight path but denied that the buildings existing behind their fence were also on a flight path. IN re-examination, DW1 said the committee's restitution was to be done by the government and it was exgratia.
  41. Dr. Rodgers Manana testified on 19/12/2022 as DW2. He stated that he is a PhD holder in International Law and works with the Defendant as head of investigations and compliance. He adopted his witness statement dated 29/9/2016. He repeated evidence of DW1 that the Plaintiffs occupied land on a flight path but also encroached on the Defendant's land.



42. DW2 referred to L.N. No. 59 issued pursuant to Kenya *Civil Aviation Act* which restricted developments on flight paths (page 8 of the Defendant's list). DW2 also referred to the Plaintiffs' letter dated 9/2/2007 requesting for no objection to the sub-division. According to him, the Defendant responded vide letter dated 1/2/2008 (page 12) requesting for ownership documents which as far as he is aware the documents were never provided.
43. DW2 continued in his testimony that when aircrafts come to land, they are at low flying levels so it exposes people staying nearby and on a flight path. That the security becomes an issue because the occupants can easily bring down a plane even with an AK 47. Thirdly, that materials such as iron sheets does reflect and affects pilots when landing. Therefore, it is advisable to control development.
44. It is the Defendant's case that they did a letter to Kyang'ombe Self Help Group advising that they were contravening the law (cap 395). They were requested to stop further development and notices put in the Daily Nation. DW2 added that they did not receive any request for approval form the Plaintiffs. That these activities made the Defendant to escalate their complaints with the relevant government agencies. DW2 denied that the Defendant was responsible for the demolitions.
45. On cross-examination, DW2 answered that he knew where Kyang'ombe is. He stated that it is now the Standard Gauge Railways terminal near them and a quarry leased by National Land Commission to a Chines Company to mine murrum. That DW2 had worked with the Defendant for 5 years as at the time of the demolition. DW2 denied that it is only the buildings of Kyang'ombe that were demolished. That when the Defendant lodged a complaint, it quoted its title and the marked flight paths.
46. DW2 averred that they served notice to the public but the notice did not indicate they will evict people. He agreed that they did not have a letter from the government as a notification to remove the offending structures. In re-examination the witness mentioned that the letter dated 22/7/2009 to the Permanent Secretary Lands and 16/10/2002 wee the complaints to the relevant agency. This marked the close of the defence case.
47. The advocates for parties on record exchanged their respective written submissions. The Plaintiffs opened their submissions by restating the facts pleaded and the evidence adduced. The Plaintiffs summarized the facts by stating that from the testimonies of their witnesses, it was clear the land they had settled on bordered the Defendant's land LR No 21919. That they had lived on the land openly since 1992.
48. The plaintiff referred to report of the Parliamentary Select Committee from page 51 at paragraph 12.62. The paragraph stated thus;

“During the visit, the committee discovered that it's only a small part of Kyang'ombe village was on the flight path however demolitions were ordered for the whole village. The demolitions went beyond boundary of KAA land and the flight path.”

And paragraph 13.12 on restitution thus:

“The committee established that most evictees were third parties who acquired the properties in question believing the titles to be genuine and undertaken due diligence. Considering that the government allowed the some of the people to settle on land that was not theirs such as Kyang'ombe, Mitumba and Maasai Villages. And further that the demolitions destroyed were undertaken without prior notice, making it impossible for the victim to salvage personal belongings. The committee therefore recommends that the Government makes restitution, ex gratia payments or other humanitarian assistance to persons who acquired



these properties in good faith, for value and without notice that the title was not genuine.”

49. The plaintiff submitted on the right of human dignity as guaranteed under article 28 and the socio-economic rights under 43 of the *Constitution*. They referred to articles 53 and 57 on the rights of the children. They argued that the Defendant breached articles 28, 29 and 51 of the *Constitution* having been ambushed in the middle of the night with the demolitions with no opportunity given to the Plaintiffs to prepare to vacate.
50. The Plaintiffs place liability on the Defendant because it is them who instigated the process by seeking assistance from the respective government agencies. That the Defendant had issued notices and were aware of the order of status quo that had been issued. The Plaintiffs on article 23(3) of the *Constitution* which provides thus:

“In any proceedings brought under Article 22, a court may grant appropriate relief, including

–

- a. A declaration of rights;
- b. An injunction;
- c. A conservatory order;
- d. A declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
- e. An order for compensation; and
- f. An order for judicial review.”

51. They aver that they are entitled to general damages in view of their ordeal on the night of November 21<sup>st</sup> 2011. They support this argument by citing the case of *William Musembi & Others v Moi Education Centre Company Ltd & Others* at Paragraph 79 thus;

“These acts by the State may be regarded and considered by some, as acts of regression, which end up depriving the people of the rights that they should be enjoying. They are a contradiction to the progressive realization principle and constitute a violation of those rights. These acts, unless they are limitations to the realization of those rights which are justifiable and reasonable in accordance with Article 24(1) of the *Constitution*, are counter-intuitive to the realization of social economic rights under Article 43 of the *Constitution*. The state has to take a more drastic and purposive approach to its mandate and obligations in ensuring that the rights to the people of Kenya are not violated, or in the very least, that these rights are not deprived or denied. We say no more.”

52. The Plaintiffs also urged this Court to award the aggravated damages by virtue of the Defendant’s action in disobedience of a Court order. They further prayed for an order of resettlement as recommended by the Parliamentary Select Committee Report at pages 61 – 69. The plaintiff urged the Court to award them costs of the suit.
53. The Defendant on its part submitted that it is the registered owner of LR 21919 I.R. No. 70118 while the Plaintiffs are claiming ownership of LR 209/17236. The Defendant went further to give an



analysis of the evidence adduced by both parties. Then the Defendant raised the following issues for determination:

- i. Do the Plaintiffs own parcel No. 209/17236?
  - ii. Do the Plaintiffs have rights over the suit property?
  - iii. Were the Plaintiffs properly evicted?
  - iv. Have the Plaintiffs proved the damages sought?
54. The Defendant quoted the provisions of Section 107 – 109 of the *Evidence Act* thus;
- “ 107. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
- “ 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 the proof of that fact shall lie on any particular person.”
55. It is their submissions that the Plaintiffs did not give proof of their ownership of LR 209/17236. According to the Defendant the land occupied by the Plaintiffs and referred to as Kyang’ombe village formed part of their land LR 21919 where the Jomo Kenyatta International Airport (JKIA) is also erected. The Defendant restated that the gazette notice No. 60 of 8/5/1998 made the suit property a “declared area” which then made any developments therein to be controlled.
56. The Defendant contended that the Plaintiffs did not own any land. In supporting their submissions, they cited the case of *Veronica Njeri Waweru & 4 others v City Council of Nairobi & 2 others* (2012) eKLR where the Court observed thus;
- “The petitioners have readily conceded that they have been occupying public property, a road reserve, for the last ten years. They have licenses to operate businesses, but have no proprietary interest in the land. Clearly, therefore, their claim that their rights under Article 40 have been violated has no basis. They do not own the land, and they therefore cannot be deprived of that which they have no rights over. I therefore find and hold that there has been no violation of the petitioner’s right to property under Article 40.”
57. It is the Defendant’s submission that the eviction of the Plaintiffs was a government decision. It contended that the Plaintiffs were given a notice to vacate of close to 3 years (notice dated 6/10/2008 and reminder on 15/9/2011). The Defendant added that PW1 & PW2 confirmed not seeing any officers from the Defendant during the eviction process.
58. The Defendant placed reliance on the case of *Kenya Airports Authority v Wambua Mila (Ungani Settlers)* where Okong’o J found that the plaintiff could not be compensated for the loss of suit property that they occupied illegally and from which they were evicted. Further, it is submitted by the Defendant that having served notice the Plaintiffs had sufficient time to move out of the premises hence they are not entitled to damages. They relied on the following decisions inter alia; *Veronica Njeri Waweru & 4 others v City Council of Nairobi and 2 Others* (2012) eKLR, *Mikidadi v Khaigan and Another* (2004) eKLR



59. I have read and considered the oral and documentary evidence adduced together with the submissions rendered. In my determination, I will be guided by the prayers set out in the amended plaint. The plaintiff pleaded that the Defendant and its representatives entered their (Plaintiffs) land situated on LR No 209/17236 and purported to exercise rights of ownership over the property. PW1 in his evidence stated that the land 209/17236 was owned by a white settler who had employed his father alongside others as herders. He stated that when the white settler left in 1982, he shared his cattle amongst his employees. That the three former employees continued to stay on this land with their families before being joined later with other relatives and friends.
60. The Plaintiffs are claiming ownership of the land No. 209/17236 by virtue of their open occupation from the year 1992 to the date of eviction although adverse possession was not one of the prayers made to the Court. The Defendant on its part contended that LR No 209/17236 is not owned by the plaintiff stating that the Plaintiffs have encroached on their land number 21919 and the flight path. The burden rested on the plaintiff to prove that they owned and occupied the land LR 209/17236 their land was distinct from the land owned by the Defendant.
61. A copy of the title for LR No 209/17236 was produced in the Defendant's bundle (page 31). It shows the title was opened on 1/4/1982 in the name of Great Properties Limited. It was transferred to Nizarali Haji on 29/10/2012 (entry No. 2) and at entry No. 3 is a transfer to Narmeen Rahentulla Nanji on 22/12/2014. There is no entry in favour of Kyang'ombe Self Help or Mwangaza Kyang'ombe Self Help Group or any of the Plaintiffs in whose behalf the suit has been brought. Further the certificates of ownership produced (found at pages 24 – 59 and 91 – 101 of the Plaintiffs' bundle of documents) made no reference to LR No 209/17236.
62. For instance, the certificate of ownership issued to Onesmus Musyoki Ngumbi and Benedict Muli Mbaluka (PW2) on 28/10/2001 refers to land Ref. No. 34847. The rest of certificates of ownership gave only plot numbers without stating the land reference number they were anchored upon. The land reference number was necessary to corroborate the Plaintiffs claim that they were the owners of LR No 17236 as pleaded and or in the alternative that they were not encroaching the Defendant's land. They did not make such evidence available to this Court.
63. Was the eviction illegal and in contempt of the Court order on maintenance of status quo? The Plaintiffs pleaded that their eviction on the night of 21/10/2011 was an ambush as they were not given any notice to remove their things. They have submitted that the eviction was done in violation of their constitutional rights. On their part, the Defendant stated that the Plaintiffs had been served with sufficient notice and that the order to evict was a cabinet decision not the Defendant's decision.
64. It is not in dispute that as at the time the demolition of the Plaintiffs property took place in November 2011, this case was still pending in Court. Besides the notices served upon the Plaintiffs, the Defendant has not produced any order of eviction that was obtained either by itself or the government agencies that are said to have carried out the demolitions.
65. This Court takes the view that whether or not there was an order of the Court for the maintenance of the status quo, the existence of this case in itself ought to have stopped the evictions from being carried out under the doctrine of lis pendens. Black's Law Dictionary 9<sup>th</sup> edition, defines lis pendens as the jurisdictional, power or control acquired by a court over property while a legal action is pending.



The doctrine of lis pendens was re-stated by the Court of Appeal in the case of *Naftali Ruthi Kinyua v Patrick Thuita Gachuria & Another* (2015) thus;

Lis pendens is a common law principle that was enacted into statute by section 52 Indian Transfer of Property Act (ITPA)-now repealed. While addressing the purpose of the principle of lis pendens, Turner L. J, in *Bellamy v Sabine* [1857] 1 De J 566 held as follows:-

“It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendent lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings.”

66. The question here is whether the Plaintiffs has established that it is the Defendant who instigated the whole process when it filed a complaint with the Ministry of Lands and also served notice on the Plaintiffs. The Defendant does not deny filing a complaint vide the letters inter alia, dated 8<sup>th</sup> November 2005 and 30<sup>th</sup> December 2005 to the Permanent Secretary, Ministry of Lands. The witnesses called by the Plaintiffs particularly PW1 could not tell with certainty whether the Defendant was involved in their eviction which took place in November 2011. In the Parliamentary Select Committee Report produced by the plaintiff at paragraph 12.56 stated thus:

“Demolitions were carried on Saturday, November 13, 2011 without the knowledge of the residents. The demolitions were carried out based on the concerns raised by KAA that its land LR No 21919 and flight path was occupied.”

67. Consequently, there is no evidence led to put the Defendant as the party who conducted the demolition contrary to the doctrine of lis pendens. The fact of lodging a complaint does not apportion to any liability on the Defendant since the letter did not instruct any government agency to remove the Plaintiffs from the suit land. There is no correspondence produced by the Plaintiffs showing that the Defendant gave anyone instructions to carry out the impugned eviction or to demolish the Plaintiffs’ structures. As submitted by the Defendant, the Plaintiffs failed to join the Attorney General to these proceedings who would then have taken responsibility for the actions of the government agencies.
68. In the circumstances of this case, it is difficult to make a declaration that the actions of the Defendant were illegal where there is no proof, first that the Plaintiffs owned the land title 209/17236, and second that the Defendant demolished the structures. The consequence is that prayer (a) of the amended plaint fails and is dismissed.
69. Are the Plaintiffs entitled to special, general and exemplary damages as prayed? It is trite law that special damages must be specifically pleaded and specifically proved, see the holding in the case of *Richard Okuku Oloo v Sony Sugar Co. Ltd* (2013) eKLR thus;

“We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of. In the Jivanji case, a decision of this court differently constituted, it was held that the degree of certainty and particularity depends on the nature of the acts complained



of. The following passage which partly quotes *Coast Bus Service Limited v Murunga & others* Nairobi CA No. 192 of 1992 (ur) appears in the Jivanji case:

“It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of *Kampala City Council v Nakaye* [1972] EA 446, *Ouma v Nairobi City Council* [1976] KLR 297 and the latest decision of this Court on this point which appears to be *Eldama Ravine Distributors Limited and another v Chebon* civil appeal number 22 of 1991 (ur). In the latest case, Cockar JA who dealt with the issue of special damages said in his judgement:

“It has time and again been held by the courts in Kenya that a claim for each particular type of special damage must be pleaded”

70. The Plaintiffs have stated that their properties were demolished, however, in the amended plaint, no value was attached to the properties listed under paragraph 6(a) as damages. In their evidence in support of the claim for special damages, the witnesses gave certain amounts constituting what they received as monthly income. For instance, PW1 stated he used to receive Kshs.150,000 monthly from his developments which were demolished; PW2 put his annual income for the school at Kshs.1.5 million and other monthly rental income from the other properties; PW3 also gave his monthly income at Kshs.45000 per month.
71. None of these witnesses produced any receipts for rent payment, or income tax returns or audited accounts to support their amounts claimed. They all stated that the documents were destroyed during the demolition. This Court however noted that both PW2 and PW3 were not living in the premises that were demolished. One wonders why they would keep receipts in premises they had rented out. Furthermore, PW2 had the option of getting copies of their audited accounts particularly for the school from their auditor or calling the auditor as a witness but failed to do so. In as much as this Court would sympathize with the circumstances of the Plaintiffs, the proof on special damage had to be met which proof in this case has not been discharged.
72. The Plaintiffs also prayed for exemplary damages against the Defendant for having disobeyed the Court order. As already found herein above, there is no satisfactory evidence adduced to confirm that it was the Defendant carried out the demolitions. Therefore, there is no basis why the Court would make such an award.
73. The Plaintiffs also prayed for general damages. There is no doubt that demolitions were carried in Kyang’ombe village. In my opinion, the Plaintiffs having failed to prove their ownership of LR No 209/17236 and having been made aware of the Defendant’s interest on the land they occupied through the notices served on them, they cannot be entitled general damages as against this Defendant for unlawful eviction or for loss of property. The Defendant had served notice specifically to Kyang’ombe Self Help Group from which the Plaintiffs derive their interest in the land and a put a notice to the public in general in daily newspaper with wide circulation in Kenya. The notices are produced at pages 11 and 29 of the Defendant’s bundle.
74. The Plaintiffs seemed to have been aware of the Defendant role in controlling developments in the impugned area. No wonder they wrote the letter of no objection dated 9<sup>th</sup> February 2007 to the Defendant seeking their comments on their (Plaintiffs) intended developments. The Defendants responded albeit late on 1/2/2008 asking to be supplied with ownership documents and deed plan before they could give their comments. The plaintiff witnesses did not ascertain whether they provided the requested documents to the Defendant.



75. The Plaintiffs did not state on what basis they began carrying out constructions before getting the go-ahead from the Defendant. The inference drawn from the evidence adduced is that they put up the demolished structures without obtaining approval from the Defendant. In their letter of no objection, the Plaintiffs were candid by stating that the land in question neighboured the Defendant's land. Although PW1 stated that they lived on the land from 1992, there was no evidence before the Court that the demolished structures were put up in the 1990s. Some of the ownership certificates produced show the purchases were made from October 2001 – 2007.
76. For instance, the sale agreement for Victoria Ngali Kibinda (pages 159 – 166) show purchase of plot made in 2005 and 2009. Thus this person could not develop the land earlier than October 2005. Priscilla Nthiki started buying from 2002. The same applies to Benedict Muli in 2001. The Plaintiffs filed this claim after they became aware of the notices served by the Defendant claiming they had encroached on Airport land (paragraph 4 of the original plaint). In the case before the Court, they have not discharged the burden that their structures were not on the Defendant's land.
77. The Plaintiffs urged this Court that an order be made for their resettlement. They did not however provide evidence of how it is the responsibility of the Defendant to do so. The recommendation of Parliamentary Select Report relied on by the Plaintiffs did not direct the resettlement to be undertaken by the Defendant. As I said earlier, the omission to join the Attorney General was fatal to the Plaintiffs claim. Articles 28 and 43 of the Constitution they referred to puts the obligation on the State to comply. It would go against the rules of natural justice to make an order against the State/Government who was not given an opportunity to defend itself. In the end, the prayer for resettlement also fails for want of joinder.
78. For the reasons stated hereinabove, it is my considered opinion and I so hold that the Plaintiffs suit is without merit. It is dismissed with an order that each party bears their respective costs.

**JUDGMENT, DATED, SIGNED & DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF JUNE, 2023.**

**A. OMOLLO**

**JUDGE**

