



**Gitata (Suing as the administrator of the Estate of Robert Gitata Gichohi
- Deceased) v Athi Water Service Board (Environment & Land Case
192 of 2012) [2023] KEELC 21039 (KLR) (24 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21039 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 192 OF 2012
MD MWANGI, J
OCTOBER 24, 2023**

BETWEEN

**CHARLES JEREMY GICHOHI GITATA PLAINTIFF
SUING AS THE ADMINISTRATOR OF THE ESTATE OF ROBERT GITATA
GICHOHI - DECEASED**

AND

ATHI WATER SERVICE BOARD DEFENDANT

JUDGMENT

Background

1. The Plaintiff instituted this suit through the Plaint dated 11th April, 2012 which was subsequently amended on the 19th December, 2019. The Plaintiff seeks judgment against the Defendant for: -
 - a. Damages for trespass including aggregated damages
 - b. Costs of the suit
 - c. Interest on (a) and (b) above
 - d. Any other relief that the Honourable court may deem fit to grant.
2. The facts relied upon are that the plaintiff is the administrator of the Estate of Robert Gitata Gichohi (deceased) who was the registered owner of the all that parcel of land known as Kiambu/Kugeria Estate, LR No 7022/27 situated in Kiambu. The Plaintiff's case is that the Defendant had procured the services of engineering firms to carry out the work of laying water pipes to Nairobi City, in Nairobi County passing through the Plaintiff's land pursuant to a non-existent easement, alleged to be held over the land.



3. The Plaintiff denied the existence of any such easement over the suit property and despite requesting the Defendant to provide documents proving the same, nothing had been forthcoming from the Defendant.
4. The Defendant instead resorted to coercion and forcefully and unlawfully entered into the suit property and laid the water pipeline thereon without any compensation.

Defendant's statement of Defense

5. In response to the assertions raised in the Amended Plaintiff, the Defendant filed an Amended Statement of Defense amended on 4th February, 2020. The Defendant's position was that in exercise of its mandate, it commissioned a firm of Engineers sometime in the year 2011 to construct an additional pipeline to convey water from Ngethu to Gigiri Pumping Station via Kiambu and Runda.
6. The Defendant avers that the pipeline route was designed to take the same route as that taken by 3 other pipes transmitting water from Ngethu to Gigiri, the first of which was laid in 1970s by the City County of Nairobi then. The Plaintiff's property was one of the properties that was to be affected by the said works.
7. Initially, the Defendant alleged that it was to acquire a 6-Meter-wide wayleave for the pipeline which was duly surveyed, valued and the Plaintiff informed accordingly.
8. The Defendant asserts that it conducted due diligence on the suit property and the adjacent properties and established that the then City Council of Nairobi had laid 3 pipes through the Plaintiff's land in 3 phases that is, in the 1970s, in the mid-1980s and the third one in 1991. Allegedly, the then City Council of Nairobi acquired an 18 Meters wide and 38-Kilometer-long way that also passes through the Plaintiff's property as shown on the Cadastral Maps. The owners on whose properties the pipes passed were duly engaged and they executed the easement agreements. However, in 1991 the Plaintiff engaged the officials of the City Water Department in a scuffle that led to criminal charges being preferred against her though she eventually relented.
9. The Defendant contends that as result of the foregoing, the Defendant decided to lay an additional pipeline over the existing ones. The Plaintiff was all along informed of the additional pipeline but still refused to clear developments or crops on the wayleave hence the issuance of the notice.
10. It is the Defendant 's argument that the 3 pipes having been in existence for over 40 years they have acquired an easement by prescription. Further that the pipes having been laid at different periods, they could not have been there without the knowledge of the Plaintiff for such a long period. The claim for compensation by the Plaintiff is therefore unfounded as the Plaintiff was adequately compensated when the 3 pipes were being laid.
11. The Project is of public benefit and funded by public resources running into millions of shillings hence any stoppage or delay would increase the costs to the detriment of the public. As such the Defendant prays that the Plaintiff's suit be dismissed with costs.

Evidence adduced

12. Charles Jeremy Gichohi Gitata testified as PW1. He stated that he is the administrator in the Estate of Robert Gitata Gichohi (deceased). That his mother was the first Administrator but has also passed away. He adopted his Witness Statement dated 17th October, 2022 as his evidence in-chief. He averred that the suit property is about 10 acres and is situated along Kiambu Road. They use the suit property for commercial. His deceased parents lived on, and were buried in the suit property.



13. He states that in 1991, when the Defendant wanted to lay pipes through the land they had sent a contractor to allegedly lay the pipes across their land. They however resisted and a fight ensued resulting to the arrest of his mother. She was held in custody for 4 days. That was when the contractor laid the pipes under the watch of the police.
14. In 2011, the Defendant's agents attempted to access the Plaintiff's land to lay the pipes on the basis that they had an existing easement over the suit property. Although the Plaintiff agreed to hold a meeting with the Defendant, the Defendant instead sent the District Commissioner then and the Chief to inform them that they were interfering with a public interest project.
15. The Plaintiff testified that his Advocate on record had severally requested to be provided with proof of easement alleged by the Defendant over the land. None was proved. In any event even upon conducting a search, it was evident there is no registered easement over the land.
16. However, before filing the suit, the Plaintiff affirmed that the Defendant approached them with a view to compensating the family for the 6 meters way leave at a sum of Kshs 2,086,500/=. The land acquired was however about an acre, measuring 18 metres by 155 meters, valued at Kshs 20 Million then. They rejected the offer for being too low. Thereafter, they instituted the instant suit.
17. PW1 further stated that he instructed a Valuer to value the 18 metres by 15 metres portion. The current Valuation placed the value of that portion at Kshs 58 Million.
18. In cross-examination, PW1 stated that they are claiming the loss as per the valuation, damages and costs of the suit. He confirmed that pipes were laid in 1991 by the Nairobi Water and Sewerage Company and not the City Council of Nairobi as suggested by the Defendant's Advocate. It was without their consent and no compensation was paid to them. He confirmed his claim as per the Amended Plaint. He confirmed that engaging the Defendant in 2011 but they did not agree on compensation. The meetings held at the provincial administration offices were all aimed at intimidating them to allow the laying of the pipes over their land without compensation. He was not aware if the other affected land owners had filed cases against the Defendant and whether they were compensated. The City Council of Nairobi did not compensate them at any one time.
19. In re-examination, PW1 stated that the Defendants do not have an easement over the suit property. None had been availed or shown to them.
20. Mr. Edwin Macharia Mukira testified as PW2. He stated that he is a Director in charge of Valuations at Crystal Valuers Limited. He confirmed receiving instructions to value the portion of the suit property affected by the laying of the pipes by the Defendant. He confirmed preparing a Valuation Report dated 27th July, 2012.
21. He further stated that he was instructed by the late Edith Gitata to assess loss of value as a result of the wayleave passing through the land and any other consequential loss. He conducted a site visit and found that the claimed wayleave measured 18 meters wide and 155 meters long, approximately 0.6894 of an acre.
22. Further, that the wayleave traverses the land in a diagonal manner cutting the portion of land into two triangles as shown on the attached map. That he took 70% of the land taken by the wayleave as the loss of value hence the sum of Kshs 19.3 Million as the loss of value due to the existence of the wayleave. The wayleave gave rise to two parcels with very awkward shapes measuring about 2.5 million. The shape would restrict the kind of development that may be put up. He therefore came up with a figure of Kshs 50,000,000/= back in the year 2012.



23. It was his evidence that he was instructed to reassess the current loss of value in October 2022. He reassessed the loss at the value of Kshs 120 million per acre using the same parameters. The lands fronts Kiambu road, which is about 300 meters away. He revalued the loss of value due to the wayleave at Kshs 58 Million. That injurious effects and disturbance to adjoining land is Kshs 150 million. He produced the two Reports marked as PE 10 and 11 respectively.
24. In cross-examination he stated that the parameters were developed through experience. He also explained that the difference, if there was to be any in value for any kind of valuation by two valuers should not exceed 10%. He confirmed visiting the site and preparing the Valuation Reports. He however was not sure of the number of pipes laid on the land.
25. It was his testimony that the land value in 2011/2012 was around Kshs 40 million per acre. Therefore 0.7 of an acre would be 27 million. The Defendant's offer for compensation to the Plaintiff as at January 2012 was Kshs 2,086,500/=. He could not tell how they had arrived at the figure. There were no crops on the land in 2012.

Evidence adduced on behalf of the Defendant

26. Eng. Kiprono Dominic Rop, the Principal Engineer working with the Defendant testified as DW 1 and was the only witness for the Defendant. He stated that he has worked with the Defendant since 2012. He adopted his witness statement dated 23rd March, 2023 as his evidence in-chief. He further produced the documents on the Defendant's List of Documents which were marked as 'DE 1-5'.
27. It was his evidence in cross-examination that he was aware that the Plaintiffs resisted the move by the Defendant to lay pipes on the land but he was not aware why they were resisting. He confirmed that there were three existing water transmission pipelines across the Plaintiff's land.
28. DW1 testified that he had not seen the easement document in respect of the Plaintiff's land. The Cadastral Map from the Survey of Kenya however, indicates an easement over the Plaintiff's land.
29. The entire easement runs for about 38 Kilometers. He averred that the Letters adduced as DE 1 and DE 2 were addressed to other people but none to the Plaintiff. Further, that DE 4, an easement agreement dated 5th October, 1971 was also not entered into with the Plaintiff.
30. At the time of instituting this suit, the wayleave was 18 metres but had since been extended by other means. He did not adduce any document to prove that the Plaintiff was ever compensated. He confirmed that the Letter dated 25th January, 2012 was to inform the Plaintiff that the Defendant wished to lay the easement. There were no consultations done with the Plaintiff. The Letter was written by the Construction Manager without authorization by the Defendant. The Plaintiff expressed her sentiments that she had not been compensated. The Plaintiff declined the offer by the Defendant through her advocates.
31. In re-examination, DW1 stated that the Cadastral map produced as DE 3 shows existence of a wayleave. He confirmed that he had no evidence of compensation for the easement. The Defendant's position however, was as stated in the letter dated 3rd April, 2012 adduced as DE 5 and that of 10th April, 2012. He prayed that the court strikes out the Plaintiff's suit.

Court's directions

32. The court directed parties to file their written submissions. Both parties complied.



Submissions by the Plaintiff

33. In his submissions, the Plaintiff submits that the dispute between him and the Defendant arose from the Defendant's claim of having acquired an easement over the Plaintiff's land LR No 7022/27, in Thindigua in Kiambu County. The Plaintiff identified 5 issues which he submitted on namely:
- i. Whether the city council of Nairobi (Now Nairobi City County Government) acquired a Wayleave for the Nairobi Water Supply Pipelines running through LR No Kiambu/Kugeria Estates LR No 7022/27 (the suit property).
 - ii. Whether a prescriptive easement crystalized over the suit property in favour of the Defendant.
 - iii. Whether the Defendant was entitled to lay an additional pipeline on the suit property
 - iv. Whether the Plaintiff is entitled to the orders sought in the Plaint for compensation in damages.
 - v. Who shall bear the responsibility of costs of the suit.
34. The Plaintiff reiterates that this suit was necessitated by the Defendant's intimation of their intention to pass water pipes through the Plaintiff's property based on a claim that there existed a wayleave over the suit land held by the then Nairobi City Council. The Plaintiff firmly insisted that there was no such wayleave. The Defendant's response on the other hand was that there was no way pipes would have been laid over the suit property without the existence of a wayleave.
35. The Plaintiff submits that the Defendant had conceded in various correspondence that the Plaintiff had resisted the laying of pipes in 1991 resulting in a scuffle that culminated in the Plaintiff's mother's arrest. It is the Plaintiff's case that his demands to be furnished with a wayleave agreement by the Defendant bore no fruits. The Plaintiff had in his testimony exhibited a letter dated 24th June, 2011 denying the existence of any easement over his land and demanding to be supplied with a copy of the alleged easement if there was any. The Plaintiff in the said letter was categorical that any unauthorized entry into his land by the Defendant and or his agents would constitute trespass. In spite of the demand letter, the Plaintiff asserts that the Defendant did not produce any easement agreement. The Defendant nonetheless continued insisting that they had an 18 meters' easement over the Plaintiff's land.
36. The Plaintiff points out that the Defendant's witness too did not produce any easement agreement yet he alleged that they had confirmed from the Nairobi City County Government about the existence of the easement. No such confirmation evidence too was tabled before the court.
37. The Plaintiff states that the Defendant's contention that there must have been an easement over the Plaintiff's land because there was one over his neighbour's land (Barua Estates Ltd) holds not water.
38. Further, the Plaintiff submits that the Defendant's witness in answering a question from the court indicated that if there was an easement over his land, it would have shown on the register at the Lands Office as an encumbrance.
39. The Plaintiff alleged that in some negotiations undertaken in the year 2012, the Defendant had offered him Kshs 2,036,500.00 as compensation for what he referred to as a 6 meters' easement. The Plaintiff rejected the offer. The rejection of the offer was communicated by a letter dated 31st October, 2012. The Plaintiff considered the offer too low considering that the total land affected by the Defendant's activities was approximately one acre.



40. The Plaintiff concludes that the Defendant's allegation of the existence of an easement over the Plaintiff's land remains nothing but that, an allegation. The Plaintiff therefore asserts that he has discharged his legal and evidential burdens of proof on a balance of probabilities.
41. The Plaintiff submits that at the commencement of this case, he had sought to injunct the Defendant from laying the pipes through his land. The Court however ruled against him in favour of public interest, noting that he could be compensated by way of damages. That was the reason why he dropped his prayer for a permanent injunction from his plaint. He seeks compensation.
42. The Defendant went ahead to lay the pipes through the Plaintiff's land in spite of the fact of the non-existence of the easement over his land and the protests by the Plaintiff. He therefore seeks compensation.
43. The Plaintiff denies that the Defendant has acquired prescriptive rights over his land. He asserts that he had always resisted the Defendant's action and eventually filed this suit seeking damages on account of trespass.
44. The Plaintiff submits that damages are awarded in order to put the injured party in the same position as he would have been had he not sustained the wrong for which he sought compensation or reparation. The Plaintiff invites this Court to exercise its jurisdiction under section 13(c) of the *Environment and Land Court Act* and make an order for an award of damages in his favour.
45. The Plaintiff urges the Court to be guided by the valuation reports produced in evidence by his 2nd witness who is a valuer. The report discloses that the affected land is a strip of 18 metres long measuring 0.6894 of an acre. The valuer put the value of that specific stretch at Kshs 58,000,000.00.
46. The Plaintiff further urged the Court to order compensation for the huge chunk of his land which had been rendered unusable as noted by the valuer. The valuer considered that area of approximately 2.507 acres which he valued at Kshs 150,000,000.00 in the 2022 report. The Plaintiff submits for damages totaling Kshs 208,000,000.00.

Submissions by the Defendant:

47. In his submissions, the Defendant identified 2 issues for determination, namely:
 - a. Whether the Defendant is entitled to lay an additional pipeline on the suit property
 - b. Who bears the costs of the suit?
48. On the first issue, the Defendant submits that it is entitled to lay an additional pipeline on the suit property premised on the basis that there were already 3 pipelines, the first of which was laid in the early 1970s by the City Council of Nairobi.
49. The Defendant admitted that it is a requirement in Law and in deference to the right to property that a wayleave must be sought and registered before entering and laying pipes on a property.
50. The Defendant submitted that it had earlier expressed an intention to acquire an additional 6 metres' way leave for the pipeline. The valuation and the offer to the Plaintiff was for the additional 6 metres way leave for the pipeline. However, the Defendant rescinded the decision hence the withdrawal of the offer to the Plaintiff, after allegedly, conducting due diligence on the suit property and the adjoining properties establishing that there was an existing pipeline. The Defendant contended that the City Council of Nairobi had acquired an 18-metre-wide and 38 Kilometres long way leave running from Ngethu to Gigiri which included the suit property. The Defendant urges the Court to find that it is



logically impossible for the Plaintiff to be the only one not to have executed way leave agreements when the owners of adjacent properties admit to have done so.

51. The Defendant asserts that the burden of proof under Section 107(1) of the *Evidence Act* is on he who asserts, hence in this case, that burden was on the Plaintiff. The Defendant makes reference to three decided cases discussing the standard of proof.
52. In the alternative, the Defendant argues that it has acquired a prescriptive wayleave. The Defendant alleges that the Plaintiff acquiesced to the Defendant enjoying the wayleave rights over the suit property over the years notwithstanding that they had knowledge and could have prevented them but took no steps to do so. The Defendant cited the English case of *Dalton v Henry Angus & Co.* Cas 740 at 7 which discussed the ingredients of acquiescence leading to the creation of a way leave right to include; the doing of an act by a person on another's land in the absence of any right to do that act, and with the knowledge of the owner of the Land who has the Power to act and prevent the act; Election of the owner not to prevent the act.
53. Such an owner then is estopped from stopping that which has already been done.
54. The Defendant argues that in this matter, there have been pipes in the Plaintiff's land for over 40 years laid by Nairobi City Council, a fact that has not been disputed by the Plaintiff. The Defendant insists that the Plaintiff has never protested and or brought any action for compensation over the same. The Defendant therefore urges the Court to find that it enjoys prescriptive wayleave rights over the suit property.
55. On the issue of costs, the Defendant urges the Court to grant it costs upon dismissing the Plaintiff's suit.

Issues for determination:

56. Having considered the pleadings filed in this case, the evidence adduced and the submissions by the parties, I am of the view that the issues for determination in this matter are:
 - i. Whether the Plaintiff has proved trespass against the Defendant.
 - ii. Whether the Plaintiff is entitled to an order of compensation against the Defendant for the alleged acts of trespass.
 - iii. Who should bear the costs of the suit.

Analysis and Determination:

i. Whether the Plaintiff has proved trespass against the Defendant

57. I find this issue rather straight forward from the pleadings and evidence adduced. It is not denied that the Defendant laid water pipes through the Plaintiff's land. The Defendant in its amended Statement of Defence severally admits the fact but insists that it has an 18 metres' wide easement along the entire stretch of the Plaintiff's Land that forms part of the Ngethu-Gigiri Pipeline.
58. The dispute between the Plaintiff and the Defendant is clear from the pleadings and the evidence adduced before the court is whether there exists an easement agreement allowing the Defendant to have pipes through the Plaintiff's Land. Whereas the Defendant insists that there was an agreement, the Plaintiff is categorical that there is none and there has never been one. That is the reason why he seeks compensation from the Defendant for literally compulsorily acquiring a portion of his land and laying the pipes without compensating the Plaintiff.



59. The Plaintiff testified in his case reiterating the averments in his further amended plaint. He produced correspondence between himself and the Defendant over the issue in dispute. It was his testimony that the Defendant had even offered him compensation of Kshs 2,036,500.00 which he rejected for being too low considering the size and value of the affected land.
60. The Defendant in rejoinder insisted that there must have been an easement agreement over the Plaintiff's land since there were some pipes earlier laid through the Plaintiff's land. The Defendant however did not produce any such alleged agreement. Regarding the compensation amount offered to the Plaintiff in the year 2012, the Defendant alleged that the amount was for a proposed 6-meter increment to the already existing wayleave.
61. The Defendant's witness interestingly produced a copy of an easement agreement for a parcel of land adjacent to that of the Plaintiff to demonstrate his insistence that there were easement agreements along the entire pipeline. I further note that the easement agreement produced is for a 12-metre wide easement.
62. This brings forth two questions;
- i. How comes the Defendant has occupied an 18 meters wide portion over the Plaintiff's Land?
 - ii. How comes that the Defendant could not produce a similar easement agreement over the Plaintiff's land?
63. The Defendant's witness could not explain why no agreement was availed in respect of the Plaintiff's parcel of Land; neither could he explain why the alleged wayleave over the Plaintiff's land was 18 metres wide unlike the easement of the supposed adjacent land which was 12 metres wide. the
64. In this regard, I agree with the Plaintiff's submissions that the burden of proof shifted from him to the Defendant to prove the allegation of the existence of the easement agreement. It was the Defendant who was alleging that an easement existed over the Plaintiff's land. It was therefore incumbent upon the Defendant to prove the existence of the easement agreement as alleged in its statement of defence. The Defendant did not discharge this burden.
65. The Defendant's defence of having acquired the wayleave right by prescription holds no water. The law, specifically, section 98(7) of the *Land Registration Act* expressly states that no easement and no right in the nature of an easement shall be capable of being acquired by any presumption of a grant from long and uninterrupted use.
66. Having arrived at the above finding, it is then clear that the Defendant laid the pipes over the Plaintiff's Land without his authority and or consent. Way back in 1991, evidence was adduced that the Plaintiff's mother protested and attempted to resist the actions of the Defendant. She was for that reason arrested and locked up in a police station for 4 days to enable the laying of the pipes through the land without her authority and consent. The laying of the pipes was done under the watch of the police as explained by the Plaintiff in his testimony before the court.
67. An easement, according to the *Black's Law Dictionary*, 11th Edition, is:
- “ An interest in Land owned by another person, consisting in the right to use or control Land or an area above or below it, for a specific limited purpose.”
68. An easement allows that other person other than the owner of the Land use or control of the Land. The Defendant in its submissions clearly admits that it is ‘a requirement in Law and in deference to



the right to property’, that a wayleave must be sought and registered before entering and laying pipes on a private property.

69. Use, entry or control of another person’s Land without his consent not only amounts to trespass but is a violation of the right to own property protected under Article 40 of the Constitution of Kenya. Even where the deprivation of the right is for public purpose or in public interest as in this case, it must be carried out in accordance with the dictates of the Constitution and the Law that requires due process to be followed and, prompt payment in full of just compensation to the person so deprived of his property.

70. The Supreme Court of Kenya in the Case of *Attorney General v Zinj Limited* [2021] eKLR emphasized on the need for strict adherence to the Constitution in matters of compulsory acquisition of Land. Most critically, prompt payment in full of a just compensation, otherwise the process, will be,

“unlawful, unprocedural and an egregious violation of the right to property.”

71. In this case, I find that the Plaintiff has proved trespass and deprivation of his right to property by the Defendant.

ii. Whether the Plaintiff is entitled to compensation for the alleged trespass?

72. In the above cited case of *Attorney General v Zinj Limited* [2021] eKLR, the Supreme Court of Kenya pronounced itself in regard to award of damages in the following words:

“It is a trite principle of Law, that an injury or loss suffered by a person either through a tortious act, omission, breach of contract, attracts redress in a court of Law. The redress includes an award of damages to the extent possible as may be determined by the Court. The question regarding the type, extent and quantum of damages to be awarded, has long been settled through a long line of decisions from the Courts ...the quantum of damages to be awarded depends on the nature of the right that is proven to have been violated, the extent of the violation and the gravity of the injury caused.”

73. In this case, the deprivation according to the valuation report is the stretch of Land that is 18 metres wide and approximately 155 meters long – approximately 0.6894 of an acre. The valuer assigned the current value at Kshs 58,000,000.00 as at 18th October, 2022. The Defendant did not bring a valuer of its own in this case.

74. The laying of the pipes on this portion of Land has deprived the Plaintiff use of that stretch of Land permanently. It is tantamount to an acquisition. I take judicial notice that the pipes laid over the Plaintiff’s land are not the ordinary water distribution pipes; they are massive bulk water transmissions pipes equivalent of the oil pipeline- that runs from Mombasa through Nairobi to Eldoret.

75. As at 2012, the applicable Law on compulsory acquisition was the repealed *Land Acquisition Act*, Cap 295 Laws of Kenya. The *Land Acquisition Act* had a schedule which set out the principles upon which compensation for land acquired compulsorily was to be determined. The Supreme Court upheld the decision of the Environment and Land Court at Malindi in the case of *Zinji Limited v A.G. & 4 others* [2018] eKLR where the learned Judge applied the formula set out in the Land Acquisition Act to award compensation for Land acquired without following the due process upon finding that there were no similar rules under the *Land Act*, 2012, for guidance.

76. Under the schedule of the repealed *Land Acquisition Act*, in determining compensation, the following matters were to be taken into account amongst others, namely:



- i. The market value of the Land, and
 - ii. Damages sustained or likely to be sustained.
77. The regulations, additionally provided that, “to the amount of compensation determined to be payable shall be added a sum equal to 15% of the market value for disturbance. Having found that the Defendant’s actions amount to trespass, unlawful acquisition of the Plaintiff’s Land and a violation of the Plaintiff’s right to property, I find that the Plaintiff is entitled to compensation of the 0.6894 hectares of Land at the current market value of Kshs 58,000,000.00 with an additional 15% for disturbance, which equals to Kshs 8,700,000.00. The claim for Kshs 150,000,000.00 for the disturbance to the adjoining Land is not supported by any material evidence. No evidence was placed before the Court to demonstrate the injury to the other portion. I therefore disallow the same.
78. Regarding the Plaintiff’s claim for aggregated damages, I need to state that such is awardable at the discretion of the Court. Ochieng, J (as he then was) discussed exemplary/aggregated damages in the case of *Mikidadi v Khaigan and another* [2004] eKLR and stated that:
- “exemplary damages are only to be awarded in limited instances namely, (a) oppressive arbitrary or unconstitutional action by servants of government (b) conduct calculated by the Defendant to make him a profit which may well exceed the compensation payable to the Plaintiff, or (c) cases in which the payment of exemplary damages is authorized by statute.”
79. My finding is that the circumstances of this case warrant the award of aggregated/exemplary damages. The Defendant as described in the amended Statement of Defence is a State Corporation established under Statute.
80. The Defendant being a state organ, is bound, like all other State Organs by the national values and principles of governance under Article 10 of the Constitution of Kenya. I must state and underline, borrowing from the Malaysian case of *Lob Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 that the Constitution of this country is not a mere collection of pious platitudes. It is the Supreme Law of the Land embodying basic concepts among them fundamental rights and freedoms of the individual which not even the power of State may encroach.
81. The actions by the Defendant were unconstitutional and oppressive bordering on abuse of power and definitely caused the Plaintiff and his late mother mental and emotional injury in addition to depriving them of their right to property. The Defendant failed to uphold rule of law, human dignity, equity, social justice, human rights, transparency and accountability and integrity. For that reason, I award the Plaintiff aggregated damages of Kshs 10,005,000.00 (being an additional 15% of the damages awarded above).
82. On the issue of costs, having found in favour of the Plaintiff, I find no reason to deny the Plaintiff, as the successful party costs of the suit. As the Defendant rightly submitted, it is trite that costs follow the event. In the case of *Stanley K. Nkarichia v Meru Teachers College and another* (2016) eKLR, the court held that,
- “As a matter of general principle, costs follow the event and the successful party will always have costs of his success unless the court has good reasons to order otherwise.”
83. I therefore award the Plaintiff the costs of this suit.
84. I further direct that upon payment of the compensation amounts awarded above, to the Plaintiff by the Defendant, the easement over the Plaintiff’s land be formalized in accordance to the law.



Final disposition:

85. The Plaintiff's case against the Defendant succeeds in the following terms:

- i. The Plaintiff is awarded compensation in form of damages totaling to Kshs 66,700,000.00.
- ii. The Plaintiff is further awarded Kshs 10,005,000.00 as aggregated damages.
- iii. The Plaintiff shall also have the costs of the suit.
- iv. The awarded amounts shall attract interest at court rates from the date of this judgment until payment in full.
- v. Upon payment of the compensation amounts awarded above, to the Plaintiff by the Defendant, the easement over the Plaintiff's land be formalized in accordance to the law

It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 24TH DAY OF OCTOBER, 2023.

M. D. MWANGI

JUDGE

In the virtual presence of:

Mr. Okeyo for the Plaintiff

Mr. Odoyo for the Defendant

Yvette: Court Assistant

