



**Biwott v Kenya Railways Corporation (Environment & Land Case E004 of 2021) [2023] KEELC 21860 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21860 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE E004 OF 2021  
EO OBAGA, J  
NOVEMBER 23, 2023**

**BETWEEN**

**JOSEPH KIPKORIR BIWOTT ..... PLAINTIFF**

**AND**

**KENYA RAILWAYS CORPORATION ..... DEFENDANT**

**JUDGMENT**

**Introduction**

1. The Plaintiff bought this suit against the Defendant in which he claimed the following reliefs:-
  - a. A declaration that the Plaintiff is the legal owner of land parcel number Eldoret Municipality Block 20 (Kapyemit)/3564.
  - b. The Defendant, its servants and/or agents be restrained by way of permanent injunction from entering, damaging and/or interfering in any way with land parcel number Eldoret Municipality Block 20 (Kapyemit)/3564.
  - c. Damages for trespass on the said land parcel number Eldoret Municipality Block 20 (Kapyemit)/3564.
  - d. An order for payment and/or compensation of Kshs. 15,000,000/= for the suit property and the improvements/developments on land parcel number Eldoret Municipality Block 20 (Kapyemit)/3564.
  - e. An order for payment of Kshs. 335,000/= per month being lost income from 30/1/2021 till payment in full.
  - f. Exemplary and punitive damages for illegal eviction and destruction of property.
  - g. Cost of this suit and interest.



2. The Plaintiff is the registered owner of LR. No. Eldoret Municipality Block 20 (Kapyemit)/3564. The Plaintiff had erected rental units and business premises on the land. On 30.1.2021, the entire building on the property was brought down by the Defendant's agents.

#### **Plaintiff's Case;**

3. The Plaintiff claimed that he was not given any notice of the intended demolition and that the demolition was carried out a day after his building was marked with a X mark. He stated that the demolition was done on the wee hours of the night of 29.1.2021 at a time when the government had restricted movement of people due to the Covid 19 pandemic.
4. The Plaintiff testified that he lost property worth 15,000,000/=. He stated that he used to get Kshs 25,000/= each from the shops and Kshs 5,000/= each from the rental houses per month. He therefore stated that he is now losing a monthly rental income of Kshs. 335,000/=

#### **Defendant's Case;**

5. The Defendant stated through its witnesses that the Plaintiff's building was brought down by a multi-agency team comprising various government agencies who were removing illegal structures on Railway reserve land and those which were erected within the visibility diamond at railway crossing across the country.
6. The witnesses further stated that when they noticed that the Plaintiff had started building on the visibility diamond area, he was asked to stop and was called to a meeting at the offices of the Kenya Railways in Eldoret. He attended the meeting in the company of his lawyer but after he left, he went and instructed his workers to continue with the construction to completion.
7. The Defendant's witness testified that it was a requirement that one was not expected to put up any structure on either side of the four diagonals of the visibility diamond at the railway crossing. The witnesses stated that the Plaintiff's building was wholly within the visibility diamond. They further stated that any property owner in an area where there was a railway crossing was not expected to put up a building. What was only allowed was growing of crops not exceeding 9 inches in height.

#### **Plaintiff's Submissions;**

8. The Plaintiff filed his submissions on 26.5.2023. He submitted that the Defendant trespassed on to his property and carried out an illegal demolition without notice. He stated that he was the registered owner of the property which was demolished. The plaintiff relied on section 7.08 of the East African Railways and Harbours Engineering Manual which provides as follows: -

“where because of local conditions, the required area of clear visibility cannot be obtained within the Railway Reserve, the co-operation of the adjacent land owner local road authority and district Administration shall be sought.”

9. The Plaintiff further relied on the provisions of Section 16(3) of the *Kenya Railways Corporation Act* Cap 397 which states as follows:-

“Where any person erects any building which obscures the view of a fixed signal or is likely to cause any obstruction or any danger to any rail or transport service provided by the Corporation, the Corporation may, unless such person has previously obtained the approval of the Managing Director to the erection of such building or has modified it to the satisfaction of the Managing Director, apply to a judge of the High Court for an order



for the demolition or modification of such building or, as the case may require, for the payment of the Corporation of the cost incurred in resiting or replacing any signaling or other equipment which is necessary to prevent such obstruction or danger and the court, at its discretion, may grant such order and may make such order as to the payment of compensation and costs as it thinks fit.”

10. The Plaintiff went on to submit that though there was an alleged meeting between the Plaintiff and the Defendant’s officers, no such minutes were produced or any survey report. The Plaintiff further submitted that he was entitled to injunctive orders as he had proved that the Defendant had trespassed to his property.
11. The Plaintiff relied on the case of [\*Rhoda S. Kiilu –Vs- Jiangxi Water and Hydropower construction Kenya Limited\*](#) (2019) eKLR where it was held as follows:-

“In the case of Willesden Investments Limited vs. Kenya Hotel properties limited<sup>1</sup> NBI H.C.C. NO. 367 of 2000 (a case cited by the plaintiff), the court stated that;

There is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstances in each case. It is my considered view that Kshs. 10,000 000/= is a reasonable award for general damages.

I have taken into account the fact that the damage occurred in a rather expansive chunk of land, though the same is situated in a rural area. I am of the view that an award of Kshs. 10,000,000/= as general damages is sufficient.”

12. The Plaintiff relied on the case of [\*Johannes Akello Omboto & another –Vs- Kenya Railways Corporation & 4 others\*](#) (2020) eKLR where the court held as follows: -

“The respondents’ actions were ostensibly under the auspices of the 1<sup>st</sup> Respondent which was aware of the pendency of ELC No. 78 of 2015 and that the status of the Petitioners’ as the registered proprietors of the suit property remained unchanged pending the hearing of the suit. The upshot of the above is that the petitioners are entitled to Compensation by the 1st respondent for breach of their rights under the provisions of Articles 40, 43 and 47 of [\*the Constitution\*](#).

The valuation report was prepared by Add Property Consultants whose<sup>2</sup> considered opinion was that the value of the land was 222,000,000/= and that the improvements was Kshs. 68,000,000/= and therefore the total was Kshs 290,000,000/=. The replacement cost was put at Kshs 22,000,000/=.

I do find that the petitioners are entitled to the damages for breach of their right to fair administrative action and breach of their economic and social rights equivalent to the cost of replacement I do find that an award of Kshs 27,131,000 as prayed for by the petitioners would be on the higher side but an award of the petitioners of general damages of Kshs 5,000, 000 (Kenya Shillings five Million only) for breach of the petitioners right by demolishing the wall and evicting his tenants without affording him a hearing is appropriate and do award the same. The Petitioners are also entitled to compensation for loss of monthly rental income of Kshs. 473,974 from the 14<sup>th</sup> of August, 2019 to the date of this judgment. Both amounts to be paid by the 1<sup>st</sup> Respondent.”



13. The Defendant filed submissions on 3.7.2023. The Defendant submitted that the Plaintiff had not proved special damages of 335,000/- as pleaded. Reliance was placed on the case of *Kenya Power & Lightning Company Limited –Vs- Philip A. M. Kimondiu* (2018) eKLR where the Court of Appeal held as follows: -

“In the case of *Storms Bruks Aktie Bolag Vs Hutchison* (1905) AC 5515 Lord MacNaughten sought to distinguish between the nature of special and general damages and explained that:-  
...‘Special damages’ on the other hand, are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character and, therefore must be claimed specifically and proved strictly.

In other words... while in the case of special damages, the respondent would be required to show proof of actual loss on matter that cannot be said to be a natural or direct consequence of the Appellant’s trespass.”

14. The Defendant further submitted that there were no Kenya Revenue Authority returns given by Plaintiff to confirm that he was earning the alleged rental income. On the issue of loss of land, the Defendant submitted that the Plaintiff still has his land. His land was not taken. He is only required to comply with the law as his land is within the visibility diamond.

15. The Defendant submitted that no damages are awarded to the Plaintiffs as his building was erected without the necessary approvals. The Defendant relied on the case of *Patrick Thoiti Kanyuira – Vs- Kenya Airports Authority* (Petition 7 of 217) (2022) KESC 30 (KLR) (17.6.2022 (Judgement) where the Supreme Court of Kenya declined to award damages because the Petitioner failed to obtain requisite approvals despite being informed that they were necessary prior to the developments on the suit property.

16. The Defendant also submitted that the Plaintiff was not entitled to exemplary and punitive damages. Reliance was placed on the case of *Leonard Gethoi Kamweti –Vs- National Bank of Kenya Limited* (2020) eKLR where the Court of Appeal stated as follows: -

“It is trite that exemplary damages, are only awarded in limited instances. The categories of cases in which exemplary damages should be awarded are set out, at paragraph 243 of Halsbury’s Laws of England, as follows:-

“Exemplary damages should be awarded only in cases within the following categories:-

1. Oppressive, arbitrary or unconstitutional action by servants of government;
2. Conduct calculated by the Defendant to make him a profit which may well exceed the compensation payable to the Plaintiff; or
3. Cases in which the payment of exemplary damages is authorized by statute.”

### **Analysis and Determination;**

17. I have carefully considered the evidence adduced by the Plaintiff and that of the Defendant. I have also considered the Defendant’s evidence. I have also considered the submissions by the parties. The issues which emerge for determination are as follows:-

- a. Whether the Plaintiff’s building was on land within the visibility diamond and if so whether the Plaintiff complied with the law regarding properties within the visibility diamond.



- b. Whether the Plaintiff was notified to remove and or stop construction within the visibility diamond.
- c. Whether the Defendant fully complied with the requirements of the law before carrying out the demolition.
- d. Whether the Plaintiff is entitled to the reliefs in the plaint.
- e. Which order should be made on costs.

**a. Whether the Plaintiff’s Building was on Land Within the Visibility Diamond and if so Whether the Plaintiff Complied with the Law Regarding Properties Within the Visibility Diamond;**

- 18. The evidence of DW1 Kenneth Mwangi Kariuki who is an engineer was that where a railway line crosses a road at the same level is called a visibility diamond. There is no construction which is supposed to be undertaken within the four corners of the visibility diamond. The visibility diamond is supposed to be 300 metres from each corner. This is provided for in the East African Railway and Harbours Engineering Manual of 1962. The only activity permitted within the visibility diamond is growing of crops not exceeding 9 inches.
- 19. The reason behind this requirement is for safety reasons. This visibility diamond enables motorists and pedestrians to have a clear view of an approaching train so that they can stop and give way to the trains to pass to avoid accidents.
- 20. Section 7.08 of the Engineering manual provides as follows: -

“Visibility (Road to Railway) -The minimum desirable areas of clear visibility, which shall apply to all level crossings, are shown in Annexure 7. The diagrams are only typical as the shape of the area will vary with the alignments of the railway and road. The essential dimension is the minimum of 300 feet in each of the four directions along the diagonal. Where speed on the railway is likely to be high or the road carries fast traffic, consideration shall be given to increasing the sighting distance over 300 feet, particularly from the road to the railway.

These areas shall be defined by markers of unserviceable rails, steel sleepers, or other permanent means, painted or lime washed white.

There shall be clear vision between the eyes of a motorist and rail level. Land adjoining the track should not be above rail level and the land adjoining the road not more than 3 feet above road level and with the intervening land not rising above a place defined by these two levels. The aim shall be a distance standard of visibility that will enable a motorist, when he is at least 300 feet from the crossing to see the leading component of a train when it also is at 300 feet from the crossing.

Vegetation and cultivation of any description on these areas shall be allowed to grow to a height of not more than 9 inches. Such clearance and cutting as is required, shall be part of the duties of the track maintenance gangs and the Permanent Way Inspector shall maintain a register showing the dates when the vegetation is cut.

- 21. The Court visited the site in the company of the Defendant’s surveyor including the Advocates for the parties. Measurements were taken from all the four diagonals. The Plaintiff’s demolished building was found to have been wholly within the visibility diamond.



22. The Plaintiff's land was not within the railway reserve but was within the visibility diamond whose activities are regulated by the provisions of the Engineering Manual. Though the East African Railways and Harbours Act was repealed by the enactment of Kenya Railways Act, the Engineering Manual was retained because of its crucial nature and applicability even without the repealed Act.
23. It is therefore clear that the demolished building was within the visibility diamond and the Plaintiff did not comply with the laws regarding properties within the visibility diamond.

**b. Whether the Plaintiff was Notified to Remove and or Stop Construction Within the Visibility Diamond;**

24. There is no contention that the Plaintiff's land is not on the railway reserve. However, the land is within the visibility diamond. When the Plaintiff commenced construction, DW2 Livingstone Kirimi Gatandi who is a security assistant at the Defendant went and asked the Plaintiff to stop the construction as the construction was within the visibility diamond which had been clearly marked using steel sleepers. The ongoing construction was marked with a x mark. The plaintiff was asked to go to the Defendant's offices at Eldoret. This was on 10.6.2016.
25. The Plaintiff went to the offices on 26.6.2016 accompanied by his lawyer Melly. He was advised to stop the construction but he stormed out of the meeting vowing that he was going to carry on the construction as that was his land. A memo summarizing what transpired on that day was produced by DW3 Bernadet Ndege. It is therefore clear that the Plaintiff was given notice not to continue constructing on the visibility diamond but he did not heed the warning or advise.

**c. Whether the Defendant Fully Complied with the Requirements of the Law Before Carrying out the Demolition;**

26. The Plaintiff in their submissions cited section 16(3) of the *Kenya Railways Corporation Act* Cap 397 and stated that the Defendant did not come for a demolition order from the High Court. A careful reading of that section shows that if buildings which obscure the view of a fixed signal, unless such person had previously obtained approval of the Managing Director to the erection of such building apply to a Judge of the High Court for an order of demolition. The Plaintiff's building was not brought down because of obstructing a fixed signal. It was brought down because it was within a visibility diamond. A fixed signal is different from a visibility diamond and the legal requirements are different.
27. The Plaintiff was given a fair hearing before his building was demolished. His co-operation as envisaged under section 7.08 of the Engineering Manual (Supra) was sought when he was called to a meeting where he was advised that he was not doing something right. The Plaintiff cannot therefore be heard to say that his rights under Article 47 of *the Constitution* were violated. The Defendant fully complied with the law before demolishing the Plaintiff's building.

**d. Whether The Plaintiff Is Entitled To The Reliefs In The Plaintiff;**

28. The Plaintiff is seeking for a declaration that he is the legal owner of land parcel number Eldoret Municipality Block 20 (Kapyemit)/3564. There is no need for this court to make such a declaration. He is only required to comply with the law. Even under Article 66(1) of *the Constitution*, the state can regulate the use of private land for public safety.
29. The Plaintiff is also seeking to injunct the Defendant from interfering in any way with his property. The Defendant has an obligation to ensure that there is clear visibility at the visibility diamond. The Defendant cannot be injuncted from ensuring that the public is safe. There is therefore no way this court can grant an injunction against the Defendant.



30. The Plaintiff is seeking for damages for trespass. It has been demonstrated that the Plaintiff put up the demolished building despite being warned that it was within the visibility diamond. The Defendant was under obligation to remove the obstruction. The Defendant cannot therefore be blamed of trespass when theirs was only removal of illegal structures. The Plaintiff cannot expect to be granted damages when he put up structures where they were not supposed to be. The building was against the law and never received any approval from the relevant authorities. In the case of Patrick Thoiti Kanyuira (Supra) the Supreme Court of Kenya declined to award damages to the Petitioner who had failed to get the requisite approvals despite being informed that they were necessary prior to undertaking any developments.
31. The Plaintiff is seeking a sum of Kshs 15,000,000/= being the cost of land and improvements. He is seeking Kshs 3,000,000 being the cost of land. There is no one who has taken his land. His land is there for him but it is only its use which is restricted. If he can grow crops which do not exceed 9 inches, he will have no issue with the Defendant. There is therefore no basis upon which he can claim Kshs 3,000,000/= for land.
32. The valuation report which put the value of improvement was dated 29.1.2021. The property was allegedly valued on 29.1.2021. The report stated that typical shops in the neighborhood are let at Kshs 8000/= while single rooms are let at Kshs 4,000/=. This implies that the report was done after the demolition. There is no way a report could state that rent for shops is Kshs 8,000/= in the neighborhood yet the Plaintiff claims that he was charging Kshs 25,000/= per month for a shop and Kshs 5,000/= for a single room. All the receipts which were produced by the Plaintiff were issued between October, 2020 and January 2021. The valuer was not called to come and produce the report. He could have been the best person to answer questions on anomalies in his report. The valuation report was produced by the Plaintiff. Even the photographs which were produced could have been for a different building and not of the demolished building.
33. A court cannot just accept a valuation report which prima facie is suspect. If indeed valuation was done on 29.1.2021 as alleged and demolition occurred on 30.1.2021 why would there be a big disparity between the amount in the valuation report and the actual rent being charged? The Plaintiff was not making returns of rental income to the Keya Revenue Authority. The receipts which were produced were purposely prepared for this case. This being the case, the Plaintiff has not adduced credible evidence to support his alleged loss.
34. There is no basis for grant of exemplary or punitive damages. What was demolished was an illegal structure which was put up with impugny even after the Plaintiff had been warned not to do so. The circumstances under which these kind of damages can be awarded were clearly set out in the Leonard Ghetoi Kamweti case (Supra).

#### **Disposition;**

35. From the above analysis, it is clear that the Plaintiff has failed to prove his case. The same is dismissed with no order as to costs because the Plaintiff has already suffered for what he would have avoided had he heeded the caution not to continue.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2023.**

**E. O. OBAGA**

**JUDGE**

In the virtual presence of;



M/s Moraa for Defendant

