



**Kabira v Attorney General (Environment & Land Case 1433 of 2014)  
[2023] KEELC 21686 (KLR) (22 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21686 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 1433 OF 2014**

**JA MOGENI, J**

**NOVEMBER 22, 2023**

**BETWEEN**

**GRACE WAMBUI KABIRA ..... PLAINTIFF**

**AND**

**HONORABLE ATTORNEY GENERAL ..... DEFENDANT**

**JUDGMENT**

1. The property under controversy in the instant suit is LR No. 209/7259/217 IR No. 458874/75 allegedly allocated to the plaintiff by Nairobi City Council City Planning Department vide their letter Ref No. CV 876/S/26/10/1. (Hereinafter referred to as the suit property). The same was allegedly alienated by the defunct Nairobi City Council City Planning Department on 22/10/1981 in favour of the plaintiff, Grace Wambui Kabira (PW1 herein).
2. PW1 is represented by learned counsel, M/s Githinji, Kimamo and Company Advocates.
3. The defendant is the Honorable Attorney General represented by J. Motari Matunda, Senior Litigation Counsel for the Attorney General.

**The Plaintiff's case**

4. By a plaint dated 10/11/2014, PW 1 has sued the defendant for :-
  - a. Compensation for illegal demolition of Plaintiff's commercial building valued at Ksh. 30,000,000/-
  - b. Compensation for illegal acquisition of LR No. 209/7559/217 IR No. 458874/75 valued at Ksh. 15,000,000
  - c. Mesne profits at the rate of Ksh. 259,500/= per month from November 2011 until settlement in full.



- d. Compensation provision for economic inflation at the point of settlement
  - e. General Damages
  - f. Costs of this suit
  - g. Any other remedy that this Honorable Court may deem just to grant.
5. It was the allegation of PW1 that in November 2011 the Government through the Permanent Secretaries of Defence, Internal Security and also through the Kenya Airforce and by its agents and agents and without notice demolished the plaintiff's commercial premises situated on the suit property and took over the suit property without compensating the plaintiff.
  6. The plaintiff produced a lease between City Council of Nairobi and herself over the suit property (PExhibit 1) and a sale agreement dated 4/04/2008 (PE exhibit 2) and the beacon certificate. Pursuant to the said sale agreement and lease, PW1 applied and got approval for construction and has produced the approved architectural drawings for the demolished building (PExhibit 7) and photographs of the demised building (PExhibit 8). That PW1 then established a residence cum commercial premises thereon and demised a portion of the premises in favour of various tenants who paid her rent thereof.
  7. It was further alleged by PW1 that she has tried to get compensation for the loss occasioned by the government but has not been successful since the government has failed, neglected and/or rejected to respond to her requests. She alleges that she has incurred, irreparable damage due to the actions of the defendant.
  8. Upon cross-examination she stated that her husband bought the suit property and wrote it in her name. That she assisted the husband with construction and that all along during construction of the suit property she resided in the rural area. She testified that she did not know how far Moi Air Base was from the place where the building was constructed.
  9. PW2 – John Njoroge Ikonya testified that he was a registered and practicing valuer and that he prepared the valuation report that at pages 24 to 31 of the plaintiff's trial bundle which is submitted under the letterhead of Paragon Valuers where he was a director. It was his testimony that he was instructed by Githinji Kimamo on behalf of the plaintiff Grace Wambui Kabira to assess the value of the building that had been erected on the suit property LR 209/7259/217.
  10. He testified that the report was prepared on 29/11/2012 and the inspection was done on 26/11/2012. In the report he stated that the suit property was alienated from the part of the 25 acres that were allocated to City Council of Nairobi as a grant by the President of Kenya on 1/11/1967 for 99 years.
  11. That the suit property was a sub-plot of LR No. 209/7259/217 IR No. 458874/75 and it was allocated to the plaintiff by Nairobi City Council City Planning Department vide their letter Ref No. CV 876/S/26/10/1 measuring 23.02 M X 28.88M which translates to 0.0665 of a hectare or 0.1643 of an acre.
  12. That the suit property was allocated to Grace Wambui Kabira vide a letter dated 22/10/1981 and a beacon certificate issued which is at page 47 of the bundle. He testified that the plaintiff was issued with a title on 29/05/2008 which is a lease for 99 years from 1/11/1967. That building plans were drawn and submitted to the city council and the building was constructed between 2001 to 2002 and the tenants got into the houses in 2011.
  13. He stated that from the plans he came up with the value of the building. That the land value of the suit property was Ksh. 15,000,000 and the buildings were valued at Ksh. 30,000,000. He stated that he placed the loss of income at Ksh. 3,114,000 then the statutory 15% addition and it come to a total of



- Ksh 7,217,000 and the overall value calculated to Ksh. 55,331,100.000 which according to the witness was rounded off to Ksh. 55,000,000. He testified that the Land Act caters for disturbance, displacement and psychological torture, and the government allows 15%.
14. He further stated that the client, PW1 provided monthly statements from an agent whose average collection and it showed that it was Kshs 259,500, He also testified that he considered the going rent in the area where the suit property was situate and with 24 houses the average rent was Ksh 10,000 – Ksh 15,000.
  15. During cross-examination, he testified that the documents he had showed that the plaintiff was the owner of the suit property. According to PW2 the land is not within Moi Air Base. It was his testimony that there was heightened security and the plaintiff was advised not to rent out houses to suspicious persons. He stated that his report is based on photographs not actual building.
  16. He testified that he was not given any bills of quantities (BQ) to ascertain the type of building constructed. Further that as a result of the demolitions there were several cases filed although he did not handle these cases.
  17. He further stated that his instructions were to determine value of development and that he did not include in his report a comparative value of the developments. That from his experience the three components of demolition are a consideration forced market value, forced sale value and comparative value.
  18. In re-examination he testified that the houses on the suit property were constructed in 2001 -2002 and there was heightened security which he has referred to at page 3 of the report and provided his view of what he perceived to have caused the heightened security. It was his testimony that according to the Land Acquisition Act, the government should have compensated the plaintiff.
  19. PW2 testified that since circumstances had changed the government from the time the government allocated the plaintiff the land, it had a right to get back the land. However, the government was supposed to issue notice and indicate the area it needed to acquire. The practice he testified is that a land tribunal would have been formed and those who lost their land would have been compensated but this was not done. It was his testimony that the tenants had not vacated by the time of the demolitions. He stated that he used a lot of comparables and that is how he got the Ksh. 15 million figure.
  20. At this point, Counsel for the plaintiff made an application to have the director of planning from Nairobi County to be allowed to come and produce the building plans. The Counsel for the defendant was in agreement but applied to have the court take the evidence of the defendant but mark the plaintiff's document for production. The application was allowed.
  21. PW3 – Vincencia Juma – Land Registrar attached at the office of the Land Registrar Court Section, testified that that according to their records they had a copy of certificate of title for IR No. 210364 a copy of a lease over LR No 36/11/1050 and a copy of lease for LR 209/7259/217 for IR 116678. She also testified that she had records for LR No. 209/7259/217 for IR No. 45864/1 but that they could not find records for IR No. 45864/1. She testified that in their system they have no record of IR No. 45864/1.
  22. She also testified that in their records they had a forwarding letter from the County Council of Nairobi dated 16/05/2008 signed by the town clerk which was forwarding leases for registration. Further that they had a deed plan for IR 116678.
  23. Upon cross-examination it was the expert witness's testimony that they have two titles documents and that during registration they issued the plaintiff with a new IR which is number 116678/1



and previously the plaintiff's lease agreement had IR number 45864/75. She stated that both titles were authentic. She stated that the plaintiff's title was the 1<sup>st</sup> in time and the lease was registered on 29/05/2008. The second title was registered on 20/06/2019 and she stated that the two titles related to distinct titles of land.

24. That the lease for the defendant was registered on 20/06/2019 and the title was registered on 20/06/2019. She also testified that they had a deed plan which is dated 3/01/2019 with deed plan number 429861. She indicated that she had a deed plan for the plaintiff which is number 214438.
25. In further cross-examination she testified that grant number IR 210364 is registered in the name of the Cabinet Secretary to the National Treasury as Trustee of the Ministry of Defence. She testified that she was unable to elaborate where the plaintiff's land falls by looking at the Certificate of Title and the Deed Plan of the Military Land. She testified that she had not seen the letter of allotment for the plaintiff at the Ministry of Lands since the allotment letters are kept by the Lands Administration Department.
26. At this point the plaintiff's counsel sought to have expert witnesses summoned as follows; the architect who was in charge of the demised building to produce the plans, the representative of the department of development control from Nairobi City Council to produce the entire file relating to IR 116678/1; the Director of Survey to produce the map of the suit property and the representative of the army to produce the approval letter from the Army to the plaintiff.
27. PW-4 Rodgers Gachewa testified that he was the Principal Land Surveyor and he stated that he was giving evidence on how LR 209/7995 and how it relates to LR 209/7259/217. It was his testimony that the military land was surveyed in 2002 whereas the suit property for the plaintiff was surveyed in 1995. The portion in contention was resurveyed based on the map approved in 1972.
28. He testified that according to the map in their custody of 2002, when the military land was resurveyed there was no encroachment and that LR 209/7259 was city council land and therefore LR 209/7259/217 was subdivided from LR 209/7259. That during the said sub-division, the parcel LR 209/7259/217 encroached onto military land LR 209/7995. That the entire plot of LR 209/7259/217 measures 23.02 metres by 28.88 metres and that it is a perfect rectangle.
29. He stated that the plaintiff's land encroached along the dimensions of 23.02 metres and it protruded by 2.73 metres by one side and the other side by 1.17 metres and another slanting dimension of 3.13 metres. So encroachment is 72 square metres which is 0.0072 Hectares (Ha). That the plaintiff's land was 665 square metres which is 0.0065 Hectares.
30. According to him, recovery of land where there is encroachment should be done for the land encroached and not entire parcel of land. Further that from their records, the encroached part was a small strip based on the records at the survey offices.
31. Upon cross-examination, he stated that the plaintiff's land had encroached onto the military land by the portion he had indicated but the neighbouring plots had not encroached. That the folio 124/27 is 1972 survey which show that the encroachment beacon H5 and AR 4. If there was acquisition, the acquiring authority would serve them with the end product which would include, acquisition plan, any other supporting records, e.g. approval plans and end product of an acquisition is the map.
32. From his testimony, he stated that the map folio 329/5 has an authentication date as 22/03/2005. The map folio gave the LR number of military land as LR No. 30/II/1050. The beacons H4, H5 and AR 4 are still intact and therefore the two beacons T17 and T16 which are said to be plaintiff's land are an encroachment. He still held the position that the boundary of the two pieces of land are clear and it shows that the plaintiff has partially encroached on the military land.



33. In re-examination by counsel for the plaintiff he testified that the encroachment was partial and that the correct and appropriate way to correct the encroachment is really not the work of the surveyor.
34. PW5- Mr Wallex Nyale Mwango – Testified that he is an architect practicing on his own but he was consulting with Runyenye Architects from 1996 to 2002. It was his testimony that he was conversant with the suit property and he was involved in drawing of the plans which were approved by the director of planning. He testified that when they applied for approval they were given receipts and were also directed to seek approval from Moi Air-Base- Kenya Airforce.
35. He stated that based on the approval they received there were notes attached directing that the plans were to be drawn in conformity with existing structures and approval was to be obtained from the Kenya Air Force. The Ministry of Housing also gave guidance on the requirements to be met for any residential houses to be built which applied to the plaintiff's construction.
36. The Expert Witness testified that they sought consent of the Air Force through a letter and the Air Force team visited the site and after sending a reminder they eventually approved the construction on the suit property. He stated that they had the letter of approval signed by the Lieutenant Colonel Commander of the Air Force SR Otieno. That the army visited the site before construction was initiated and they raised no objection to positioning of the building.
37. The building was constructed and 1.5 metres was left out on both sides from the military and from the road side which included the distance from the beacons. He testified that if the encroachment was to be corrected it would not require that one demolishes the whole building only the encroached section.
38. That since the suit property was a perfect rectangle, on the side measuring 23.02 metres the building would only encroach by 1.2 metres which borders the military and on the other end of 28.88 metres there was an encroachment of 1.7 metres. The side where the encroachment was by 1.2 metres this would not require demolition of the whole building but only the 1.2 metres.
39. The witness then produced the original document in evidence marked for return after judgment.
40. Upon further cross-examination by Mr Motari, he stated that the building according to his drawing s was within the perfect rectangle. He stated that one could demolish 1.7 metres of the building without demolishing the whole the whole building after consultation with the experts who would advise on how to secure the building with proper props and with use of appropriate methods of demolition.
41. He testified that they build an extra floor on top bring the total to two (2) floors together with the ground floor. The height of the final building is 6.9 metres, the height of the floor was 2.7 metres. When the building was completed it was 6.9 meters.
42. He further stated that the military responded to the letter they had written to them and advised that they had to resketch since the plaintiff's sketch had exceeded the allowable level by 7.75 feet. There was an encroachment of 1.2 meters into the military space. Further the document that was submitted to City Council was for 467 square meters for the plinth areas which was calculated based on the new works. The plan and the final construction turned out to be more than what was built.
43. In re-examination he testified that the entire building was submitted for approval. That the allowable level for the building was 10 metres by the arm and upon completion the building was 8.5 meters including the water tanks. At this point the plaintiff closed their case.



## The defendant's case

44. The defendant's statement of defence dated 13/07/2015 is a denial of the plaintiff's claim. The defendant stated that if any demolition occurred which is denied, the same was carried out because the plaintiff's property was an obstacle on the flight path.
45. The defendant avers that the plaintiff's building did not receive approval from the Ministry of Defence and was in disregard of the ICAO regulations and therefore were a nullity even if the approval was given by Nairobi City Council. Further that if that were the case then liability and blame shall fall on the Nairobi City Council and the defendant would raise a co-defendant cross claim for indemnity from any blame that it will be held liable of.
46. The defendant contended that if at all the Nairobi City Council had given any approval, the same was not absolute and the plaintiff was supposed to have sought further approval from the Ministry of Defence before embarking on construction.
47. The defendant further stated that the claim of judgment the calculations enumerated in the said claim and the figures are not supported with credible evidence that there is no basis laid for the claim therefore the claim is incapable of being granted as the plaintiff has not tendered evidence in support of the same. Therefore, the defendant is seeking dismissal of the suit with costs.
48. DW1- Duncan Owino Juma a military officer with Kenya Air Force of the rank of Lieutenant Colonel, adopted his witness statement dated 10/10/2021 and the bundle of documents dated 18/03/2021 which he wanted the court to mark as his exhibits. He testified that following the heightened security around 2011 which was also targeting airports due to terrorism and being endowed with the responsibility to defend Kenyan airspace, they had to have the facilities protected to enable them perform their duties.
49. Further that in line with National Aviation Security which is guided by ICAO regulations on safety and security which are clear on the developments around the airport in particular Moi Air Base. Within the aerodrome the regulations is that buildings prescribe the heights of buildings approved. Further that the air base has to be protected and due to the security risk for any approval for a structure or building to be put up the Ministry of Defence must be informed and involved for approval.
50. It was his testimony that the defendant was not involved and that the land being claimed by the plaintiff is not within Moi Air Base which has an allotment of 480.5 hectares. That in terms of demolitions there were other demolitions.
51. In cross-examination he averred that Moi Air base was issued with an allotment letter to its property on 16/01/2002 whereas the plaintiff was allotted through the City Council a 99-year lease since 1967 and when the Moi Air Base got its allotment letter the lease for 99 years had not lapsed. It was however the contention of DW1 that Moi Air Base existed before 2002 since colonial times. He averred that he needed to counter-check on the issue of allotment letter vis-avis Moi Air Base existence.
52. He averred that in 2002 Moi Base started documenting its land and that he was not sure that the 2002 allotment of the Moi Air Base land included the plaintiff's land. He also testified that as the army they have a duty to make sure that the bases is secure and this includes ensuring that the neighbours of the bases also know about their work and support them.
53. Further that those who build around the air base are required to know the procedure and that the enforcement team ensures this. He however testified that he was not aware whether the KAF team



- visited the plaintiff's premises which is within 1 km radius and that the 3 storey building is qualified as a high rise.
54. He stated in his testimony that although there was a request for approval by the plaintiff for the building extension and this request was recommended for approval, it is the commander who has the authority to say No. He averred that according to them the building was an illegal structure and it was demolished.
  55. It was his testimony that demolition of illegal buildings is usually undertaken by a multi-agency team which comprises of mainly security bodies. He however stated that he had not produced any document to buttress the claim that there was a resolution that the demolition had to be carried out.
  56. On the issue title, it was his testimony that the title had not been issued. He stated that he was not sure that the title and allotment included the plaintiff's land.
  57. In re-examination he testified that that the memorandum produced at pages 19 of the defendant's bundle was a recommendation for approval which however was not approved by the Commander. With this the defendant moved to close their case. The plaintiff's counsel moved to have the maker of the letter of allotment to be summoned to produce the letter. The court issued summons for the Director of Land Administration of Nairobi to attend court at the next hearing and to produce original documents relating to the suit property. The Director of Land Administration of Nairobi did not however attend court
  58. DW2- Lt Colonel Kanja Stephen Mathu testified and stated that he works at the Kenya Air Force as staff officer Grade 1 works. He adopted his witness statement dated 19/09/2023. He testified that of interest was the original letter where at paragraph 4 the military set limits on the building. He stated that the building lay in the approach path of the air craft and it was dangerous and security risk to the aircraft.
  59. He stated that under condition 4 they imposed a height limit as the *Civil Aviation Act* and Kenya Airforce Aircraft Act.
  60. Upon cross-examination by Mr. Kimamo Counsel for the plaintiff he stated that there was no notice issued for demolition by the army but that it was issued by Nairobi City Council and that the building had been in existence for eleven (11) years but that he could not produce any proof showing the plaintiff was served with a notice by the Nairobi City Council.
  61. He testified that the military fenced the suit property and that the owner needs military approval to access the remainder of her property. He stated that he does not know the exact height of the building but according to the photos it was above the approved height.
  62. When he was re-examined he testified that the mandate for enforcement of the building code is Nairobi City Council. He stated that he never saw the demised building but he found the letter of 4/042000. With this the defendant closed their case
  63. On 27/09/2023 the parties were directed to file their submissions and a judgment dated reserved.
  64. Having considered the pleadings by both parties, the evidence adduced by both parties and the witnesses including the experts and the submissions, the issues for determination may be crystalized into the following: -
    - a. Whether the demolition of the plaintiff's house by the defendant was lawful?
    - b. Whether the plaintiff is entitled to the reliefs sought in the plaint?



- c. Which order should be made on costs
65. In determining the first issue, this court will consider whether the defendant followed the law before it demolished the Plaintiff's house. As DW2 testified hereinabove, there was no demolition notice issued by themselves nor by the Nairobi City Council that he is aware of. Meaning the demolition took place without the plaintiff being notified. Further there was no enforcement notice issued by the defendant. The law governing issuance of Enforcement notices was contained in the Physical Planning Act of 1996 (Now repealed).
66. Section 30 of the repealed Act provided as follows:
- “No person shall carry out development within the area of a local authority without a development permission granted by the local authority under section”.
67. Section 38 of the repealed Act which dealt with the issue of Enforcement Notices provided as follows:-
- “When it comes to the notice of a local authority that the development of land has been or is being carried out after the commencement of this Act without the required development permission having been obtained, or that any of the conditions of a development permission granted under this Act has not been complied with, the local authority may serve an enforcement notice on the owner, occupier or developer of the land”.
68. The commonly admitted facts on record are that the Plaintiff's land and that of airbase border each other. Evidence was led by the Plaintiff, the Land Registrar and the District Land Surveyor that the military land was surveyed in 2002 whereas the suit property for the plaintiff was surveyed in 1995. The portion in contention was resurveyed based on the map approved in 1972.
69. The Land Registrar testified that there are two title documents and that during registration they issued the plaintiff with a new IR which is number 116678/1 and previously the plaintiff's lease agreement had IR number 45864/75. That both titles were authentic. The plaintiff's title was the 1<sup>st</sup> in time and the lease was registered on 29/05/2008. The second title which is the title for Moi Air Base was registered on 20/06/2019 and she stated that the two titles related to distinct titles to land. This evidence by the Land Registrar has not been controverted
70. Sub-plot number LR No. 209/7259/217 IR No. 458874/75 was allocated to the plaintiff by Nairobi City Council City Planning Department vide their letter Ref No. CV 876/S/26/10/1 measuring 23.02 M X 28.88M which translates to 0.0665 of a hectare. The same was allegedly alienated by the defunct Nairobi City Council City Planning Department on 22/10/1981 in favour of the plaintiff, Grace Wambui Kabira.
71. The plaintiff also obtained approval from the City Planning department on 5/07/2001 for construction of domestic building containing 8 flats to be erected on LR No. 209/7259/217 by the Town Planning Committee during their meeting held on 18/05/2001. Copy of this approval and the original building plans were produced as exhibits including the original correspondence between the architect PW5 with the army through the Army Commandant Kenya Air Force.
72. The original letter produced dated 17/03/1999 to the Army Commandant was to inform the army about the intention of the Plaintiff to construct a 10-metre-high residential block on the suit property. He let the commandant know that the said plot borders the Eastleigh airstrip to the west and he attached a sketch plan. He then wrote a reminder dated 20/01/2000 and the army through the letter dated 4/04/2000 which was also produced as an original letter plus a copy responded.



73. The response from the army stated in part “3. The subject plot falls within the approach funnel and transition slope of the MAB runway and within this area, objects protruding higher than 30ft above ground level are prohibited. 4. Based on the sketches you submitted, the structure will have a maximum height of 11.5 m (37.72ft) above ground level which exceeds the allowable limit by 7.72ft. 5. You may therefore proceed with your design but you must strictly observe a height limit of 30ft (9.15 m) above ground level to avoid future expenses in line with city council by-laws”
74. PW5 when he was cross-examined by Counsel Motari for the defendant confirmed that the height of the final floor on the building was 6.9 metres. Each floor had a height of 2.7 metres. The army directed that the building should not exceed 9.15 meters above the ground level.
75. The testimony of DW-2 and his witness statement is that that through the letter dated 04/04/2000 Senior Officer (Lt Col (Rtd) S.R Owino (20588) signed the said letter authorizing the construction of the plot No. 1 Biafra and not LR No. 209/7259/217. The defendant produced several gazette notices dating back to 1937 which refer to Land Acquisition but there is no correlation of the suit property and the said parcels being acquired for purposes of aerodrome. Further the Gazette Notice Number 701 states “...as detailed as in the following schedule are not now required for the purposes of an aerodrome, and that the government withdraws from the acquisition of the said lands”
76. The defendant’s Exhibit 7 is a letter dated October 2001 to the Town Clerk asks Clerk to put on hold any further developments on the any land neighbouring he Moi Air Base Eastleigh until the issue of land ownership and clearance for construction of buildings is resolved. From my scrutiny of the documents provided by the plaintiff, the City Council gave the Beacon Certificate to the plaintiff on 22/10/1981. This means the issue for ownership of land for the plaintiff was a settled issue in 1981.
77. At the same time the defendant produced as exhibits correspondence to and from owners of buildings neighbouring the Moi Air Base and from Nairobi City Council stating that they had exceeded the allowable allowance height for construction near the Moi Air Base and their buildings would be demolished. In fact the documents at pages 21 to 23 of the Defendant’s bundle show the web of communication and the notice for demolition issued.
78. The gap however is that none of these correspondence refer to the plaintiff’s parcel of land nor was the plaintiff issued with a notice of demolition from the Nairobi City Council as were other neighbours as per the documents and correspondence at pages 18 to 29. None of the letters refer to the plaintiff’s parcel nor the suit property.
79. The defendant’s exhibits included newspapers cuttings which speak to issues of increased insecurity and this buttresses the testimony of DW1 and DW2 that the concern for the Moi Air Base was about security and for this reason they moved in and demolished the plaintiff’s suit property and compulsorily acquired it without notice and without compensation.
80. The plaintiff produced newspaper cuttings dated 24/11/2011 at pages 21 of the plaintiff’s bundle where the storyline has quoted extensively my brother Justice Warsame’s (As he then was) ruling when he stopped the demolitions in Eastleigh which is the location of the property in the instant suit. He extensively spoke to the issue of security and stated that insecurity should not be the reason to deny citizens their right to land as provided under Article 40 of *the Constitution*. Under Article 40 of *the Constitution*, the state is not allowed to deprive any person land or an interest in land unless that deprivation is for a public purpose or for public interest. Even so there are prescribed processes for how land is compulsorily acquired.
81. In her list of documents, the plaintiff produced a valuation report by Paragon Property Valuers Limited which was not contested and a sample of monthly income by D-Map Agents showing the monthly



rental payments. They payable rent from the report by Paragon Valuers dated 29/11/2012 shows a monthly payable income of Ksh. 259,500. For the value of the demolished and repossessed land LR 209/7259/217 the report stated that the capital value is Ksh. 30,000,000 and Land Value is Ksh. 15,000,000. The loss of income since November 2011 the date when the report was submitted has been place at Ksh. 3,114,000 and 15% statutory addition has been made of Ksh. 7,21, 100.

82. The defendant did not contest this valuation report nor file an alternative valuation report and therefore it is unchallenged as it is. My reading of this valuation report I am reminded that this being an expert witness report which was produced by PW2. I have to pay attention the following:

- a. That the valuation report must describe the scope/extent of the work undertaken and the extent to which the property was inspected;
- b. That the report must state any assumptions and limiting conditions upon which the valuation is based; and
- c. That the valuation report must fully and completely explain the valuation bases/approaches applied and the reasons for their applications and conclusions.

83. My examination of the report attests to it having fulfilled the above set standards and provided information that will be useful to the court in drafting of the final determination.

84. Section 26 of the [Land Registration Act](#), 2012 states that a certificate of title issued by the Registrar of Lands to a land owner shall be taken by the Courts as prima facie evidence that the person so registered is the absolute and indefeasible owner and the said title is only subject to challenge as provided by the law. This evidence was corroborated by the Land Registrar who confirmed to the Court that the land belongs to the Plaintiff.

85. Article 40 of [the Constitution](#) states as follows;

“Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

- a. of any description; and
- b. in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

- (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
- (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

- a. results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
- b. is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—



- i. requires prompt payment in full, of just compensation to the person; and(ii)allows any person who has an interest in, or right over, that property a right of access to a court of law.
  - (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
  - (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.
  - (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.
- 86. Section 24(a) of the [Land Registration Act](#) states that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto, (this section is similar to section 27 of repealed Registration of [Land Act](#), Cap 300).
- 87. In the case of *Loretto vs Teleprompter Manhattan CATV Corp* (1982) the court stated as follows:
 

“When the character of a governmental action is a permanent physical occupation of property, there is a taking to the extent of the occupation regardless of whether the action achieves an important public benefit or has only a minimal economic impact on the owner”.
- 88. The Plaintiff has argued that the acts of the defendant amounted to illegally occupying her land and destroying her property which is a violation of her rights. That the Defendant’s actions are unjustified, illegal and unlawful. It is clear from the evidence that the acts of the Defendant in destroying her property and forcefully acquiring the plaintiff’s land are acts that are frowned upon by our Constitution. They are acts that are contrary to [the Constitution](#) and the direct effect is the deprivation of the right to ownership and limitation of enjoyment of the right to property without any basis in law.
- 89. Evidence was led by the plaintiff that she never received any notice for demolition neither from the army nor the Nairobi City Council. The defendant on his part led evidence and stated that the work of enforcement of standards is the purview of the Nairobi City Council and demolition is done by a mult-stakeholder committee.
- 90. The defendant was non-committal as to whether a notice for demolition was issued to the plaintiff at all. There is no evidence laid before the court about demolition of the plaintiff’s property. Further the evidence of PW5 confirmed that if there was to be any demolition then it was to take 1.2 metres of the plaintiff’s building and not the whole of it. Worse still not to take the parcel of land away from the plaintiff and fence it off as Moi Airforce Land. PW3 on her part as the Registrar of Lands confirmed that the Moi Airforce Land and the plaintiff’s land are two existing parcels with distinct titles.
- 91. Going by the above it is evident that the suit land belonging to the plaintiff had encroached on the airbase by the metres stated by the surveyor, however, forceful removal of the plaintiff from the suit land and destruction of her property had no legal basis at all. The encroachment could have been resolved by removing the offending part.
- 92. The Plaintiff produced pictures to support the alleged destruction of her property on the suit land. That notwithstanding the DW1 and DW2 stated that the property of the plaintiff was not damaged but



did not rebut the evidence given by the plaintiff and her witnesses. From the evidence above the Court reaches the conclusion that indeed there was unauthorized entry, invasion, eviction and destruction of the plaintiffs property and compulsory acquisition of her land by the defendant.

93. As to whether the plaintiff suffered loss and damage, the plaintiff pleaded, led evidence and produced an itemized rental income list at page 49 of the plaintiffs bundle as well as stamp duty receipt that she used to pay for the suit property and a valuation report which she is relying on to prove value of suit property and the special damages in the sum of Kshs. 55,000,000.00/-. I however note that the monthly statement by D- Map Enterprises at page 49 refers to the property as LR E42B and the property owner as Mr Isaac Kabira. This therefore is rental income of different property and not the suit property.
94. The Defendant submitted that this claim is not payable because the figures according to the defendant were just picked from the air and there is no basis for the same. The plaintiff gave uncontroverted evidence that she had developed her property and built residential houses (storey building with rental houses). She produced pictorials to show the building and DW 1 and DW2 clearly led evidence and admitted that the plaintiff was removed from her land and her building was demolished. All these lends credence to the plaintiff's case that her properties were destroyed and that she suffered loss.
95. It is trite principle of law that special damages must not only be pleaded but also specifically proved. See Charles Sande Vs. Kenya Cooperative Creameries (1992) LLR 314. I have examined the monthly statement produced at page 49 and as already referred above it does not refer to the same suit property.
96. The plaintiff produced the approved plans that enabled her construct her rental houses but since there is no proof of the special income and mesne profits I will not award the same for failure to prove this kind of income through production of rental payment receipts, lease agreements or any document to attest to the income. The definition of the term "Mesne Profit" under section 2 of the *Civil Procedure Act* (Cap 21 Laws of Kenya; see also the Rioki Estate Company (1970) Ltd –vs- Kinuthia Njoroge (1977) KLR 146 are referred to as a form of special damages which must be specifically pleaded and proved. In the instant case, the plaintiff did plead a specific amount as mesne profits but failed on the test of proving the same with documentary evidence. Thus I decline to award the same as held by Justice M.A. Odero in Nakuru Industries Ltd –vs- S.S. Mehta and Sons (2016) eKLR which I endorse accordingly.
97. I will therefore not accept the assessment of Kshs. 259,500 per month for 12 months as prayed since there is no documentary evidence to support this claim.
98. I will now look at the plea for General damages having found that the demolition and acquisition were illegal, unjustified and unwarranted, I award general damages to the plaintiff having regard to the circumstances and the forceful entry and acquisition and the unmitigated inaction and conduct of the defendant. I award general damages in the sum of Kshs 3 million.
99. By dint of the proviso to section 27 (1) of the *Civil Procedure Act* Cap 21 Laws of Kenya, costs of this suit shall be borne by the defendant.

### **Disposal Orders**

- a. Compensation for illegal demolition of Plaintiff's commercial building valued at Ksh. 30,000,000/-
- b. Compensation for illegal acquisition of LR No. 209/7559/217 IR No. 458874/75 valued at Ksh. 15,000,000
- c. General Damages in the sum of Ksh. 3 million
- d. Interests on (c) above from the date of this judgment at court rate until payment in full.



e. Costs of this suit .

It is so ordered.

**DATED, SIGNED AND DELIVERED THROUGH MICROSOFT TEAMS ON 22<sup>ND</sup> DAY OF  
NOVEMBER 2023.**

.....

**MOGENI J**

**JUDGE**

In the virtual presence of

Mr. Kimamo for the Plaintiff

