



Kadir v National Housing Corporation & another (Environment and Land Case Civil Suit 98 of 2018) [2023] KEELC 21582 (KLR) (17 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21582 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND CASE CIVIL SUIT 98 OF 2018
MAO ODENY, J
NOVEMBER 17, 2023**

BETWEEN

SWALEH ABDIL KADIR PLAINTIFF

AND

NATIONAL HOUSING CORPORATION 1ST DEFENDANT

THE HON ATTORNEY GENERAL 2ND DEFENDANT

JUDGMENT

1. By a Plaint dated 30th April 2018, the Plaintiff herein sued the Defendants seeking the following orders;
 - a. A declaration that the Plaintiff is the genuine and rightful owner of portion No. 5546 Malindi.
 - b. Special damages in the sum of Kshs. 12,000,000/-.
 - c. Loss of future earnings in the form of rental income from the suit land as the same rate of Kshs. 31,000.00 a month from the 1st day of March, 2018 until the date of the judgment herein.
 - d. Interest on b and c above at such rate and for such period as this Honorable court may deem fit to grant.
 - e. In the alternative to a, b, c and d above, compensatory damages on the basis of full repayment value of the suit property herein as developed by the Plaintiff prior to the demolition thereof on the 12th day of February 2018, together with unencumbered open market value of the land upon which that same as constructed being portion no. 5546 Malindi measuring nought decimal four eight nought (0.0480) Ha or thereabouts and situated at Malindi Township in the Kilifi County (suit land) as at the time of judgment herein in the aggregated sum of Kshs. 30,000,000.00 or such other value as may be determined upon quantification by a licences quantity surveyor to be agreed upon by the parties within 14 days of the judgment herein or appointed by this honourable court upon failure of such agreement.



- f. General damages for distress, pain and suffering.
- g. Aggravated and exemplary damages.
- h. Costs of this suit together with interest thereon at such rate and for such period of time as this honorable court may deem fit to grant.
- i. Any such other or further relief as this honourable court may deem appropriate.

Plaintiff's Case

- 2. PW1 adopted his Witness Statement dated 30th April 2018 and produced the documents in the list of documents as Pex No 1 to 18 save for the valuation report.
- 3. PW1 stated that he was at all material times the registered lessee of all that piece of land Portion No. 5546 delineated on Survey Plan No. 158373, C.R. No. 23699 situate in Malindi Township within Kilifi County. He further stated that he purchased the suit land from the 1st Defendant on 20th December 1993, paid a consideration of Kshs. 145,000/- and a transfer in his favour duly registered on 31st December 1993.
- 4. PW1 testified that subsequently, and upon the requisite building approvals from the then Municipal Council, he constructed a double storey building which he managed to rent out to five tenants earning a total of Kshs. 28,675/- monthly rental income in January 2018.
- 5. It was PW1's evidence that he enjoyed quiet possession until the morning of 12th February 2018 when the 1st Defendant without notice wrongfully entered the suit property, evacuated the tenants and demolished the building. As a result of what he referred to as wrongful demolition, the Plaintiff alleged that the building has since become inhabitable causing him substantial loss and anguish.
- 6. The Plaintiff withdrew the suit against the 2nd Defendant vide a Notice to Withdraw dated 4th July 2019.
- 7. On cross-examination by Mr. Awino, PW1 testified that he developed the suit land between 2002 and 2003 and spent about Kshs. 12-13million but he did not have the receipts to show in court. He stated that half of the building was demolished and was not agreeable to the 1st Defendant rebuilding the half unless they put up a fresh one.
- 8. PW2 Edwin Otieno Oduor, a professional Valuer conducted a valuation on the suit land and prepared and produced the valuation report dated 5th April 2018. On cross-examination by Mr. Baraza, counsel for the 1st Defendant, PW2 told the court that the demolition affected the foundation of the building and the walls.

Defendant's Case

- 9. DW1 Joshua Odege Sanduk a licenced Surveyor adopted his Witness Statement dated 1st July 2019 and stated that he had been an employee of the 1st Defendant for 13 years. He testified that the damage on the building occurred as collateral damage during execution of a court order and indicated that the 1st Defendant was willing to restore the building to its original state and that they be allowed to do so.
- 10. DW1 confirmed on cross-examination by Mr. Binyenya, that the suit land belonged to the Plaintiff and that the 1st Defendant made a mistake demolishing the building.



Plaintiff's Submission

11. Mr. Binyenya counsel for the Plaintiff filed submissions and largely reiterated the facts established in the parties' pleadings and evidence adduced in court. He submitted that the Plaintiff was entitled to damages for loss and injury suffered.
12. It was counsel's submissions that the general rule regarding the measure of damages was that the injured party ought to be awarded a sum so as to put him in a position similar or nearly close to the position he would have been had he not sustained the loss.
13. Counsel relied on the cases of *Total Kenya Limited formerly Caltex Oil Kenya Limited v Janevams Limited* [2015] eKLR; and *Peter M. Kariuki v Attorney General* [2014] eKLR.

Analysis And Determination

14. It was undisputed that the Plaintiff was the rightful owner of the suit land and building thereon. The 1st Defendant admitted that they indeed wrongfully demolished the Plaintiff's building. It follows therefore that the sole issue for determination in this case is whether the Plaintiff is entitled to damages and costs of this suit as prayed.
15. Under Section 13(7) of the *Environment and Land Court Act* No.19 of 2011, the Court has jurisdiction as follows:-

In exercise of its jurisdiction under this Act, the Court shall have power to make any order or grant, any relief as the Court deems fit and just including:-

- a) Interim or permanent preservation orders including injunction.
 - b) Prerogative orders
 - c) Award of damages
 - d) Compensation
 - e) Specific performance
 - f) Restitution
 - g) Declarations or
 - h) Costs.
16. The Plaintiff sought special damages in the sum of Kshs. 12,000,000/- indicating that being the sum expended in constructing the building back in the year 2002. Special damages must be specifically pleaded and proved.
 17. In the case of *Swalleh C. Kariuki & another v Viloet Owiso Okuyu* [2021] eKLR the court held that :
“Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in *Hahn V. Singh*, Civil Appeal No. 42 Of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:

“Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act



complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

18. The Plaintiff’s documentary evidence in support of the special damages is a bill of quantities for a proposed residential house on Plot No. 5546. On perusal of that document, it shows that the document was prepared in February 2018 yet the construction was done back in 2002. Again, the total estimation was calculated at Kshs. 12,884,745/-. It is not explained why the Plaintiff would then claim only a sum of Kshs. 12,000,000/- out of that amount.
19. The Plaintiff conceded in his testimony that he did not have any receipts in support of the construction expenses. I thus find that the prayer for special damages in the sum of Kshs. 12,000,000/- has not been proved.
20. The Plaintiff also prayed for loss of future earnings in the form of rental income at the rate of Kshs. 31,000/-. In the case of *Douglas Kalafa Ombeva v David Ngama* [2013] eKLR, the Court of Appeal held that loss of earnings is a special damage claim, and as already established, it is paramount that special damages are pleaded and proved. The Plaintiff pleaded that the rental statement for January 2018 from his five tenants amounted to Kshs. 31,000/-. The Plaintiff explained that his estate agents Malindi Real Agency Limited would deduct 8 percent from the rent collected.
21. The Plaintiff exhibited a copy of an account statement dated 10th February 2018 from the said Agents establishes that the Plaintiff’s rental income for the month of January 2018 was indeed Kshs. 31,000/-. In the circumstances, I find that the Plaintiff is entitled to prayer to the rental income as prayed.
22. In the alternative, the Plaintiff sought compensatory damages based on full repayment value of the building prior to the demolition together with unencumbered open market value of the suit land in the sum of Kshs. 30 million. The expert evidence produced by the Plaintiff was not controverted by the 1st Defendant. I will therefore rely on the valuation report exhibited by PW2.
23. PW2 observed that the building was situated in a fast developing neighborhood identified as Ngala Phase 4 within Malindi Town. He also established that the part demolition affected the building’s foundation and therefore was not habitable. That the building could not be renovated due to the major damage caused. He estimated the market value of the building at Kshs. 30,000,000/-.
24. The evidence on record established that the demolition did not affect the suit land. In the absence of any other valuation report to rebut the one on record, I am inclined to award compensatory damages as pleaded. In any event, the 1st Defendant conceded to their willingness to compensate the Plaintiff for the loss caused.
25. I therefore find that the Plaintiff has partially proved his case and make the following specific orders;
 - a. A declaration that the Plaintiff is the genuine and rightful owner of portion No. 5546 Malindi.
 - b. Loss of future earnings in the form of rental income from the suit land as the same rate of Kshs. 31,000.00 a month from the 1st day of March, 2018 until the date of the judgment herein.
 - c. An order is hereby issued for compensatory damages as full payment of the value of the suit property as per the Valuation report in the sum of Kshs 30,000,000/
 - d. Costs of this suit to the plaintiff.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 17TH DAY OF NOVEMBER 2023.

M.A. ODENY



JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

