



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

ENVIRONMENT AND LAND SUIT NO 63 OF 2004

ISAIAH M'MUGAMBI M'MUKETHA.....PLAINTIFF

VERSUS

HON. THE ATTORNEY GENERAL.....1ST DEFENDANT

CHIEF LAND REGISTRAR.....2ND DEFENDANT

THE COUNTY GOVERNMENT OF MERU.....3RD DEFENDANT

J U D G M E N T

1. The Plaintiff's case is set out in the following paragraphs which are pleaded in his Pleint.

2. At all material times the Plaintiff was the registered owner of leasehold titles known as MERU MUNICIPALITY BLOCK 1/30 and BLOCK 1/231 measuring 0.0.62 hectares each. The lessor was County Council of Meru and the term of each of the two (2) respective leaseholds was ninety nine (99) years commencing 1st May 1995.

3. During the currency of the two (2) leases and without the same having been revoked the 3rd Defendant and while purporting to be protecting the Government interest ordered the Plaintiff to stop developing the plots vide a letter dated 26th February, 2003. The Plaintiff was aggrieved by that order and proceeded to file Meru High Court Miscellaneous Civil Application No. 33 of 2003 seeking for an Order of prohibition and leave was duly granted on 5th March, 2003 and the said leave was to operate as stay of the order by the Town Clerk until the hearing and determination of the application for orders of prohibition. The same was duly served.

4 That the buildings that the Plaintiff was constructing on the suit premises were all approved by the 3rd Defendant and other Government Agencies required to approve building plans.

5. On 6th March, 2003 the Meru Central District Physical Planning Officer and the Clerk to the Municipal Council of Meru while acting jointly and severally unlawfully, wrongfully, illegally, and without any reason at all or the permission of the Plaintiff demolished or caused to be demolished the Plaintiffs buildings which were under construction on plot No. Meru Municipality Block 1/230 and Block 1/231. The said callous and illegal demolition was carried out on a Saturday and in disobedience of a Court Order issued and served vide H.C MISC. Civil Application Number 33 of 2003.

6. The Plaintiff avers that the demolition of the suit premises was not only, illegal but also malicious.

7. As at the time of demolition of the buildings and structures being erected upon the Plaintiff's plot, substantial development had been accomplished upon Meru Municipal Block 1/230 and 1/231 valued at Ksh. 1,610,000 (Kenya Shillings One Million Six Hundred and Ten Thousand only) for each of the respective plots making a total of Kshs, 2,850,000 (Kenya Shillings Two Million Eight Hundred and Fifty Thousand Only).

8. By a letter reference CCL/DOL/1/65 OF 17/05/2005 the 2nd defendant registered a restriction on the suit premises converting the suit premises into a "TOWN GREEN PARK" without giving the Plaintiff any notice or a chance to be heard when such a decision or resolution was being made.

9 The conversion and /or acquisition of the suit premises by the Defendant's jointly and severally without following the due process of land acquisition Law and or the Constitution of Kenya was illegal, unlawful, Malicious and infringement of the Plaintiff's Constitutional rights to property.

10. After demolition of the suit premises, the workers and employees of the 3rd Defendant who were present at the site carried away all the materials they had demolished.

11. The plaintiff's claim against the Defendants jointly and severally is for a sum of Ksh. 2,850,000/= (Kenya Shillings One Million Eight Hundred and Fifty Thousand only) being the value of the property and/or building demolished and destroyed by the Defendants and general damages, exemplary and aggravated damages and costs of the suit.

12. While the suit was still pending in Court the 3rd Defendant has forcefully acquired and /or snatched the suit premises from the Plaintiff maliciously, illegally and unlawfully by changing User of the said property from the Plaintiff and has Changed User from a Commercial Plot to a Town Green Park.

13. The Plaintiff sets down what he deems to be the particulars of the Defendants' malice as:-

- a. Changing User of the Plaintiff's Premises without giving him a chance to be heard.
- b. Changing User of the Plaintiff's Premises without giving the Plaintiff any notice of the intended change.
- c. Acquiring the Plaintiff's land without following the due process of the law.
- d. Infringing on the Plaintiff's Constitutional right to owning property.
- e. Disobeying Court's Order issued vide High Court Miscellaneous Application No. 33 OF 203 Order dated March 05, 2003.

14. As a result of the aforesaid, the Plaintiff suffered loss and damages for material waste of the construction demolished by the Defendants jointly and severally and loss of anticipated potential profits for the unexpired term of leases

15. Despite demand and notice of intention to sue the Defendants have failed, neglected, and/or refused to settle the Plaintiff's claim thereby rendering this suit necessary.

16. Save for H.C Misc Civil Application No. 33 of 2003 there are no other pending suits between the parties on the same subject matter.

17. This Court has the Jurisdiction to hear and determine this suit.

18. For the above reasons the Plaintiff prays that this Court enters Judgment against the defendants jointly and severally for:-

- a) Kshs. 2,850,000/= being the value of the demolished and destroyed building /property.

b) Loss of User of the Premises for 89 years being the period of unexpired lease totalling Kshs. 126,200.000.00.

c) General damages.

d) Exemplary and aggravated damages

e) Costs of this suit.

f) Interest on a , b, c, d and e above

19. The Plaintiff has submitted that on 23rd February, 1996 he entered into a land sale agreement with one Charity Gatwiri Kirimi alias Purity K. Mwiti in which the said Purity K. Mwiti purported to sell the Plaintiff a parcel of land registered as plot No. Meru Municipality BLOCK 1 /230 and the consideration was Kshs. 550,000/= . The Plaintiff produced Exhibit No. Exh.3 to support this assertion .

20. He continues to say that on 13th December, 1996 he entered into another similar agreement with the same person in which the said PURITY K. MWITI alias CHARITY GATWIRI KIRIMI purported to sell the adjoining plot to him at a consideration of KES. 500,000 /= vide plaintiff's Exhibit Number P.Exh. 4 .

21. Before the Plaintiff agreed to proceed with the negotiation to buy the said plots, he had made an official Search at Nairobi Lands Registry at Ardhi House and had found out that the vendor, namely Ms. PURITY K. MWITI was the Allottee for the said two (2) plots. She (vendor) provided him with a copy of the letter of allotment dated 11th May, 1995, vide plaintiff's Exhibit Number, P.Exh. 7.

22. Having been satisfied that the said plots existed on the ground and that they were duly allotted to the said vendor, the Plaintiff proceeded with the purchase culminating to the transfer of the said plots to him by the Commissioner of Lands. Ultimately, the plaintiff was duly registered with the ownership of leasehold of the said plots for 99 years commencing 1st May, 1995. [Plaintiff's exhibit Numbers; P.EXH.1 and P.EXH.2 which are copies of Certificate of lease for Meru Municipality Block 1/230 and 231 respectively were proffered as evidence].

23. To ascertain the existence of the two plots on the ground, the Plaintiff offered as evidence a PDP produced as the Plaintiff's exhibit Number , P. EXH.5 . The same was duly approved by the District Physical Planning Officer on 29.10.2002. The said PDP contained an approved change of user for both plots.

24 The Plaintiff further submits that he was duly registered owner of the suit premises and continued paying holistically the requisite rent and rates to the Municipal Council of Meru as shown by the Plaintiff's Exhibit Numbers; P.EXH.6,8,9,10,11,12,13,14,15,16,17,18,19,20,21,22,23,24 & 25.

25. The Plaintiff gave evidence that on 26th February, 2003 a Mr. B.E.G. Njage being the Town Clerk of Municipal Council of Meru wrote a letter to him purporting to stop him from continuing with the development of the suit premises. The said letter prompted the Plaintiff to file a Judicial Review suit Number Meru H.CC Miscellaneous Application No. 33 of 2003, vide his exhibit Number. P. EXH.28.

26. Through the said JR, the Plaintiff was issued with an order dated 5th March, 2003 which also contained a punitive clause. The same was as follows:-

1. THE PLAINTIFF ISAIAH M'MUGAMBI M'MUKETHA BE AND IS HEREBY granted leave to apply for an order of Prohibition to restrain, prevent and/or inhibit the Applicant from constructing, developing and/or in any other way enjoying quiet possession and leasehold ownership of land Parcel Number MERU MUNICIPALITY/BLOCK 1 /230 & 231.

2. THIS GRANT OF LEAVE shall and DOES HEREBY operate as a stay on the said Order in

question made by the town Clerk until determination of the Application for Orders of Prohibition.

27. The Plaintiff testified that the said Order was served upon the Municipal Council of Meru on the same date it was issued, to wit, 5th March, 2003.

28. The Plaintiff gave evidence that on 6th March, 2003, the Defendants descended unto the suit premises with tractors and demolished the constructions that were going on, despite the Court Order served on the defendants the previous day.

29. The Plaintiff told the Court that no notice was given to him before the Defendants descended to demolish his property and neither was he compensated for the same and this was the sine qua non for this suit.

30. The Plaintiff produced a certificate of official search for plot Numbers Meru Municipality Block 1/230 & 231. The said certificate which was certified by the Land Registrar, Meru shows an entry in the register to the effect that:-

“Restriction. Except under the order of the Chief Land Registrar no dealings with any part of the land shall be registered . This is a public utility land and is reserved for open space. See letter CLR/PUL/1/65 of 17/05/2005”.

31. The Plaintiff gave oral evidence and called two (2) witnesses, PW 1 and PW 2 who are both valuers. They both gave oral evidence and produced Exhibits marked P.EXH. 29,31 and 32 respectively,

32. The 1st Defendant called one witness Mr. Isaac Mbaabu Manyara-DW 1 who introduced himself as a Civil Servant holding a position of a Land Registrar, Meru. He told the Court that according to the records with the Lands Registry in Meru, the Plaintiff is still the registered proprietor of land parcels Number Meru Municipality Block 1/230 and 231. However , he pointed out that both parcels have been taken away by the Government and made a recreation ground. He produced three (3) Exhibits: two [2] being copies of the Registers [green cards] for Land Parcel Numbers Meru Municipality Block 1/230 and 231 marked as D.EXH.1A and 1B respectively and a copy of the Ndungu Report marked as D.EXH. 2. His evidence did not controvert the Plaintiff's case in any way but supported it.

33. The 3rd Defendant called one [1] witness, Mr. Joseph Mwithimbu-DW2. He introduced himself as an employee of the 3rd Defendant. He told the Court that the suit premises had been taken over by the 3rd Defendant and made a recreation ground under the name “NTEERE PARK”. His evidence did not controvert the Plaintiff's case in any way but supported it. DW 2 confirmed that the development plans produced by the Plaintiff's Exhibit Number P.EXH 30 were actually approved by the Municipal Council of Meru.

34. It is crystal clear that the Plaintiff's case is uncontroverted . He has proved his case on a balance of probability, and therefore he deserves to be compensated accordingly.

35. The Plaintiff says that Article 40 of the Constitution supports his case.

36 Article 40 of the Constitution of Kenya 2010 provides:-

“ 40. protection of right to Property.

1. Subject to Article 65, every person has a 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
 - (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 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”.

37. The Plaintiff claims that the 3rd Defendant has taken over his land illegally and unconstitutionally without following the due process of law. He says that the 3rd Defendant has denied him his Constitutional Guarantee to use and enjoy the suit premises Under Article 40 of the Constitution. He opines that it is trite law that Article 40 of the Constitution was meant to protect proprietary rights under the law. The Plaintiff avers that the issue in this suit is whether the state which has issued a title can assert a right inconsistent with the title without following the due process. He notes that the state in its pleadings had pointed out that the property was illegally acquired and hence it was entitled to occupy the property. The Plaintiff disagrees with this Submission.

38. The Plaintiff opines that, although Article 40 that protects rights to property must be read to exclude property found to have been unlawfully acquired under Article 40 (6), finding of “unlawful acquisition” referred to in Article 40 (6) of the Constitution must be through a legally established process and not by forceful occupation of property by state institutions.

39. The Plaintiff further asserts that the 2nd defendant acted ultra vires in taking over his property through lodging a restriction in the register of the Plaintiff's property without observing the rules of Natural Justice. In accordance with the Constitution and the relevant statutory provisions, a registered proprietor's title of land cannot be arbitrarily cancelled without the proprietor being afforded an opportunity of being heard. He asserts that the constitution and the existing jurisprudence on the subject of Natural Justice demands that no party should be condemned unheard whenever a decision that is adverse or adversely affects him is being made. He submits that the decision of the Chief Land Registrar was clearly tainted with irrationality, illegality and procedural impropriety. The said decision, he opines, was clearly ultra vires, since there were no grounds disclosed by the defendants for taking such actions.

40. Laconically, the Plaintiff says that it is now settled law that the state cannot deprive a person of property of any description except when this deprivation 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 5 of the Constitution, or the deprivation is for public purpose or in the public interest and is carried out in accordance with the Constitution and any Act of Parliament that requires prompt payment in full of just compensation to the person .

41. On the issue of quantum of damages and compensation thereof, the Plaintiff relies on apposite valuation as supported by the three (3) valuation reports marked as plaintiff's Exhibits Number P.EXH. 29, 31 and 32. The same is made out as follows:-

| | |
|--|---------------------------|
| (a) (i) Plaintiff 's Exhibit P.EXH. 29 | KES 126,200,000 |
| ii. Plaintiff's Exhibit P.EEXH. 31..... | KES 1,240,000 |
| iii. Plaintiff's Exhibit P.EXH 32..... | KES 1,610,000 |
| TOTAL..... | <u>129.050,000</u> |

b) General Damages in the discretion of the Judge

c) On exemplary and aggravated damages, he opines that they are awarded in actions where **Damages are at large**, such as in cases of defamation, intimidation, false imprisonment etc where damages are not limited to the pecuniary loss that can be specifically proved. He says that Such awards are compensatory to punish the defendant and vindicate the strength of the law. He continues to say that they are awarded in actions of tort and address oppressive, arbitrary or unconstitutional actions of Government servants. He asserts that they are awarded mainly against the Government or bodies exercising functions of Governmental nature because “ the servants of Government are also servants of the people and the use of their powers must always be subordinate to their duty of service”. He cites the case of *Ahamed -vs- the Municipal Council of Mombasa*, Civil Suit Number 290 of 2000, judgment of Maraga, Judge, (as he then was) delivered on February 24, 2004 and reported in the Daily Nation of 29/11/2004. He asks the Court to award appropriate damages.

42. The Plaintiff proffered the following cases as his authorities:-

1. Evelyn College of Designs Ltd versus Director of Children Department and Attorney General [Nairobi HCCC Petition No. 228 of 2013]

2. Ahamed Versus Municipal Council of Mombasa Civil Suit No. 290 of 2000 [delivered on February 24, 2004; Reported in Daily Nation on 29/11/2004].

3. Adan Abdirahasani Hassan & 2 others versus Registrar of Titles Ministry of Lands and 2 Others [2013] e KLR, High Court of Kenya at Nairobi ,Petition No. 7 of 2012.

4. Kuria Greens Ltd Versus Registrar of Titles & Another [2013] IEA 162.

5. Republic versus The Registrar of Titles Exparte Dedan Njuguna Gichuru [2013] 2 EA 285.

43. The 1st and 2nd defendants recount the evidence of the Plaintiff as that, he bought the suit parcels from one Charity Gatwiri Kirimi and that prior to completing the purchase, he made out an official search at Nairobi Lands Registry at Ardhi House which confirmed the vendor's interest.

44. The say that the Plaintiff did not produce a copy of the receipt or even the search certificate to prove this. The result was, according to them, an unregistered document under the name of a letter of allotment. The Plaintiff they say, also conveniently carried out the search in Nairobi as opposed to the Meru Central Lands Registry in an attempt to sanitize a process not diligently done . They also state;

“Further what the Plaintiff sought to suggest was that the vendor was the “registered” owner of the suit parcels. To the contrary one of the exhibits D. Exh1A and B by the defendants showed the Plaintiff as the 1st “registered” owner of the suit parcel. He could not therefore be a bona fide purchaser as he wished to be known. There are no search results that can yield a letter of allotment as the register deals with registered land”.

45. The 1st and 2nd Defendants say that the Plaintiff's evidence also seemed to suggest that there was a transfer of the suit parcel to him. They argue that there was no evidence of such and this only adds veracity to their argument that the ownership was contaminated. They conclude that the Plaintiff therefore fails on this issue.

46. Turning to the second issue of the impeachability of the Plaintiff's title, they submit that the doctrine of indefeasibility of title is subject to the doctrine of public trust and public interest. They submit that in John Peter Murithi & 2 others -vs- Attorney general & 4 others (2006)e KLR, Justice J.G Nyamu posed the question;

“...`how for instance are the Courts going to deal with land grabbers who stare at your face and wave to you a title of the grabbed land and loudly plead the principle of indefeasibility of title? Are the Courts going to stay away and refuse to rise to the greater call of unravelling the indefeasibility and holding that such title perhaps issued in order to grab a public utility plot such as a hospital by individuals violates the Public or national interest and is therefore a violation of the Constitution. I venture to suggest that such titles ought to be nullified on this ground and, thrown into the dustbins”.

47. The 1st and 2nd Defendants Submit that what emerges from this succinct elucidation of the law is that the doctrine of public trust was recognized and provided for by the former Constitution. They opine that it covers all common property and resources. They assert that the doctrine of indefeasibility is a statutory concept and as such a title can be nullified as the Constitution is the Supreme law. They cite the case of Republic -vs- Permanent Secretary, Ministry of Public Works & Housing Ex-parte Tom Mallachi Sitima (2004) e KLR.

48. They say that in the instant suit, it was shown that the restriction was placed on the suit property after recommendations were made by the Ndung'u Report. They further state that the suit property had been reserved for a public utility. They opine that the Plaintiff further presented contradictory evidence with regard to his acquisition of ownership. I quote what they say:

“He claimed to have bought the same yet the register shows he was the first registered owner. The Plaintiff further had a letter of allotment which shows he was the original allottee by the former Municipal Council of Meru. The said letter of allotment does not confer any proprietary interest subject to the strict conditions set out therein which would normally include accepting the offer within a stipulated period of time. The offer is directed towards a specific purpose and cannot be transferred”.

49. The 1st and 2nd Defendants submit that even if the Municipal Council had issued the said letter of allotment, it was in contravention of the Constitution and in particular the doctrine of public utility, They say:

“There was no evidence that the correct procedure was followed for alienating public land. The actions of the Municipal Council were therefore a nullity (and they cited the case of Henry Muthee Kathurima -vs – Commissioner of Lands and Director National Youth Service: Civil Appeal No. 8 of 2014 in the Court of Appeal at Nyeri)”.

50.They submit that the Constitution of Kenya, 2010 Article 40 (6) which safeguards proprietary rights provides as follows:-

“ (6) The rights under this Article do not extend to any property found to have been unlawfully

acquired.”

51. They submit that this particular provision is further reinforced by the Land Registration Act , 2012 particularly section 26 (1) which states that:

“26 (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor shall be taken to be the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except:

a. On the ground of fraud or misrepresentation to which the person is proved to be a party or

b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

52. The 1st and 2nd Defendants say that under the above provision, a first registration does not enjoy the protection previously accorded to it under the repealed Registered Land Act, Cap 300, Laws of Kenya. They say that in the instant case the suit parcel was illegally and unprocedurally acquired, and submit that the Plaintiff cannot be shielded by the doctrine of indefeasibility of title. They submit that it has further been held that in order to determine whether a particular proprietary interest is valid, It must be demonstrated that it was properly acquired. They argue that this is not the case in the instant suit. They say that this onus would be higher where an interest has been challenged as in *this case where the Ndung'u Report was produced.* (They cited the cases of *Ndegi Njiru & Another -vs- Leonard Gatei (2014) e KLR*) and that of *Daudi Kiptugen -vs- Commissioner of Lands Nairobi, Lands & 4 Others (2015) e KLR*).

53. Turning to the issue of whether a restriction amounts to a process of compulsory acquisition they submit that it does not, and say that Section 136 of the repealed Registered land Act , provided that:

“136(1) For the prevention of any fraud or improper dealing or any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge....make an order.. restricting dealings with any particular land, lease or charge.”

54. I quote them as stating:

” From this provision it is evident that the law empowers the Registrar to place a restriction on any land. This power was exercised pursuant to the directive by the Chief Lands Registrar which was informed by the recommendations of the Ndung'u Report which was a public inquiry. The same does not amount to an acquisition of any sort since it can be lifted when appropriate inquiry showing otherwise is made. The Registrar did not in any way turn on issues relating to compulsory acquisition as he is not empowered by Law. The Plaintiff has also not shown that the process of acquisition had been triggered in any way. The Chief Lands Registrar was merely acting in public interest with a view to preserving a public utility as shown in the Register produced by the Defense. The decision of the registrar has also been successfully challenged by an order of Certiorari”.

55. On whether the Plaintiff is entitled to the remedies or orders sought, they submit that he is not. They say that they have demonstrated that the suit parcel was illegally and unprocedurally acquired by the Plaintiff. They say that the Plaintiff's title does not enjoy the protection of the law under either the repealed Constitution by dint of the doctrine of public trust and public interest or even under the Current Constitution by virtue of Article 40(6). They further say that Section 26(1) of the Land Registration Act, 2012 reinforces this proposition. They also say that the restriction was placed by the Chief Lands Registrar in public interest in exercise of his statutory powers and the same does not amount to compulsory acquisition.

56. The 1st and 2nd Defendants argue that the suit, in relation to the order sought offends the elementary Principles of Law relating to proof of damages. I quote them as saying:

“It is trite law that special damages must be both pleaded and proved before they can be awarded by the Court. The rationale has been found to be on the doctrine of restitutio in integrum which served to restore a plaintiff to where he was prior to the commission of tortuous acts. This would usually be the case where documentary evidence has been produced . Special damages are such that the law will not infer them from the nature of the act. They do not follow the ordinary course and cannot be presumed. They are exceptional in their character and for that reason must be claimed specifically and proved strictly.(they cite the case of Zacharia Waweru Thumbi -vs- Samuel Njoroge Thuku [2006] e KLR”).

57. I quote the 1st and 2nd defendants in their Submissions regarding damages as saying:

“with regards to prayer (a) there was no documentary evidence adduced showing the costs supposedly incurred to the point of the alleged demolition. This documentation which is strict proof requires production of the actual costs incurred and which is being sought to be recovered. This would thus amount to restoration proper. The particulars of these special damages were also not pleaded in the Plaint. Further there is no evidence on record associating or attributing the Chief Lands Registrar, the second defendant with the said acts of demolition”.

58. I also Quote them as further stating:

”With regard to prayer (b) on the supposed loss of user, this prayer also falls under the head of special damages. In this case the particulars were not pleaded. The particulars would be in the form of loss of actual business, specific contracts and even loss of specific customers, acquisition of relevant permits among other issues. In the absence of this degree of certainty special damages would be rendered speculative. With respect and based on the principle that special damages must be specifically proved , there is thus no basis for this prayer which should be dismissed”.

59. On exemplary and aggravated damages, the defendant says:

“we reiterate our submissions as set out above that there is no evidence that shows that the Chief Lands Registrar, 2nd Defendant , was involved in the said demolition exercise. The only sin attributed to the 2nd Defendant was the placing of the restriction which we have shown does not amount to compulsory acquisition. The same can be removed at any time. Further there is no evidence that the decision placing the restriction on the suit parcel has ever been successfully contested by way of Judicial Review proceedings with the effect of quashing the same. The restriction is thus for all intents and purposes valid”.

60. On costs, they submit that the same ordinarily follow the event. They submit that given the issues raised and the answers given, the costs should be granted to the 2nd Defendant.

61. The 1st and 2nd defendants have proffered the following authorities in support of their assertions:-

a. Henry Muthee Kathurima Versus Commissioner of Lands & Director of National Youth Service, Civil Appeal No. 8 of 2014, Court of Appeal, Nyeri.

b. James Joram Nyaga & Another Versus The Hon. Attorney General & Another (2007) EKLR.

c. Republic Versus Permanent Secretary, Ministry of Public Works & Housing, Exparte Tom Maliachi Sitima (2004) Eklr.

d. David Kiptugen Versus Commissioner of Lands and 4 others, Nairobi -[2015] e KLR.

e. Esther Ndegi Njiru & Another Versus Leonard Gatei [2014] e KLR.

f. John Peter Murithi & 2 others Versus Attorney General & 4 others [2006] eKLR

g. Zacharia Waweru Thumbi Versus Samuel Njoroge Thuku [2006] eKLR.

62. The 3rd Defendant admitted that the Plaintiff had lease documents. He admitted that the Plaintiff's property was demolished on 6th March, 2013 and seemed to deny involvement in the demolition. It laconically claimed that the Municipal Council of Meru had obeyed orders issued in Misc Application Number 33 of 2003.

63. The 3rd Defendant said that it had no responsibility in the registration of the restriction placed against the Plaintiff's properties by the Chief Land Registrar.

64. It is the 3rd defendant's case that the pleadings herein and the evidence on record do not establish any liability on the part of the 3rd defendant. It argues that whereas under paragraph 8 of the plaint the plaintiff alleges that the Clerk of the Municipal was involved in the demolition there is no such averment in the latest amended plaint on record. It says that Indeed the paragraph containing that averment was struck out. His says that the amended Plaint merely states that the demolition was illegal. It asserts that under the particulars of malice set out in the plaint the only averment that remotely connects the Municipal Council is the allegation that the said Court Order was disobeyed.

65. The 3rd Defendant claims to be innocent since there have been no contempt proceedings for any disobedience of Court orders.

66. The 3rd Defendant says that It is the Plaintiff's word that his buildings were demolished by a Government motor vehicle. It says that the photographs exhibited in the valuation report by PW 3 lend credence to the evidence. It says that there is no evidence at all showing that the Municipal Council was involved in the demolition of the plaintiff's property.

67. The 3rd Defendant urges the Court to consider the evidence on record and to make a finding of fact to the effect that the Municipal Council of Meru was not involved in the demolition of the Plaintiff's property on the alleged date or on any other date.

68. The 3rd Defendant also says that the evidence before Court shows that restrictions were registered against the two parcels of land pursuant to a letter by the Chief Registrar. The registration was done in the year 2005. It says that no evidence has been led before Court to show that the Municipal Council was involved in the registration of the restrictions. It further argues that if the Plaintiff was aggrieved by the restrictions he ought to have challenged the same before a Court of law. It points out that this has not been done. It points out that the Plaintiff has not stated that he is not interested in the land.

69. The 3rd Defendant urges the Court to find that the Plaintiff has failed to prove his case against it and asks the Court to proceed to dismiss the same with costs.

70. I have perused the authorities proffered by the parties in their Submissions. They are good law in appropriate circumstances. The Question if or not the Plaintiff had grabbed the suit lands or had valid titles should have been determined by a Court of law. By demolishing the Plaintiff's property when there was a Court Order prohibiting such action, the defendants pre-empted and sabotaged the Judicial process which could have determined apposite issues. All the seven authorities proffered by the 1st and 2nd Defendants are distinguishable from the circumstances of this case in the fact that the parties in the suits had not disobeyed Court orders. In this case, the Defendants had contemptuously disobeyed a Court Order. The authorities proffered by the Plaintiff are relevant except that in this case, there was no purported cancellation or rectification of title.

71. It is true that the land Registrar had legitimate authority to place restrictions against the suit properties. The Question of the ownership of the properties could only be established by a Court of law

though a legitimate legal process. Placing restrictions against the suit property did not entitle the defendants to destroy the Plaintiff's property. Nor did that action entitle them to exhibit egregious disobedience of Court Orders.

72. Although the Defendants' actions were not couched in the form of Compulsory Acquisition, the demolition of the Plaintiff's property and the carting away of his building materials, amounted to constructive compulsory acquisition. Of Course, what the Land Registrar did by registering a restriction against the suit lands, did not amount to a rectification of the Title. This Court notes that this suit evinces sui generis circumstances, in that the suit lands, as confirmed by the Land Registrar, Meru, are still registered in the name of the Plaintiff.

73. The Plaintiff filed issues for determination as follows:-

- 1. How did the Plaintiff acquire title to the premises?**
- 2. Was the acquisition of title to the suit premises by the Plaintiff Irregular, unlawful and/or grabbing?**
- 3. Was the suit land a Public Utility Land on 13 May 1996 when the Plaintiff acquired title to the same?.**
- 4. Was the plaintiff a bona fide purchaser for value without notice, or not?.**
- 5. Was the Chief Land Registrar right to compulsorily acquire and convert the suit land into a Public Green Park without giving the Plaintiff at least a hearing or a right to be heard and to adequate and prompt compensation? .**
- 6. Were the Plaintiff's buildings under construction on the suit land illegally , unlawfully and negligently demolished by the Defendants and/or their agents, workers and/or servants?.**
- 7. Was that acquisition and conversion of the suit land legal or illegal?.**
- 8. Did the Plaintiff suffer any damages or loss or infringement of his Constitutional Right to own property??.**
- 9. Is the Plaintiff entitled to general damages, special damages, aggravated and exemplary damages?.**
- 10. Is the Chief Land Registrar empowered and/or obliged to rectify the register of a land registered under Registered Land Act, Cap 300 (repealed) without following the due process of the law?.**
- 11. Was the due process of the law on compulsory acquisition of land or the rectification of the register complied with by the Defendant for this particular suit land?.**
- 12. If the answer to No. 9 above is answered in the affirmative how much damages, loss and/or compensation is the Plaintiff entitled to?.**
- 13. Who should pay the costs of this suit?.**

74. The Defendants did not file their issues for determination. They, however, did not challenge the issues as framed by the Plaintiff. I do consider that determining the issues as framed by the Plaintiff will not prejudice the other parties in this dispute. I will not answer the framed questions one by one. I deem it that the answers I will give will substantially address pertinent issues.

75. I find that the Plaintiff bought the suit properties from the Original allottee. He paid the agreed

consideration of Ksh, 1,050,000/=. Title documents were duly issued. Prima facie, the Plaintiff had valid documents. If there were allegations, as in the Ndung'u Report that the acquisition of the suit properties by the Plaintiff was irregular, unlawful or land grabbing, due process should have been followed so that a Court of law could make a determination .

76. This is a unique case. The Plaintiff filed Judicial Review Proceedings vide Misc. Civil Application No. 33 of 2013. The Court when granting leave to file Judicial Review Proceedings, by an order dated 5th March , 2003, directed the leave to operate as a stay until the application for orders of prohibition was heard and determined. This order was served upon the Town Clerk, Municipal Council of Meru.

77. On 6th March, 2013, the defendants using Government machinery and in total contempt of a Court Order descended upon the suit premises and demolished the constructions that the Plaintiff had embarked upon. By doing so, they did not allow the pertinent issues concerning the acquisition of the suit lands by the Plaintiff to be heard and determined by the High Court. The claim that the suit properties were public utility land was therefore not canvassed. Of Course, in demolishing the plaintiff's property the defendants did not follow due process. The Court notes that building plans and all apposite procedural matters had been cleared by the legally mandated parties/institutions.

78. From the evidence on record, I do not hesitate to find that the Plaintiff was a bona fide purchaser for value. I also find that, against the rules of Natural Justice, the forceful occupation of the suit properties by the defendants, was done without affording the Plaintiff a hearing and without offering him adequate and prompt compensation .

79. DW1, the Land Registrar, Meru, told the Court that although a restriction had been registered against Land Parcel Numbers Meru Municipality Block 1/230 and 231, the Plaintiff is still the registered owner. He further told the Court that both plots had been taken away by the Government and had been converted into a recreation ground. Effectively ,therefore, the suit properties had been constructively acquired compulsorily, through the back door and without obeisance to the laid down legal procedures.

80. The 3rd defendant called one officer who said that he was its employee. He told the Court that the properties in dispute had been taken over by the County Government and had been made a recreation ground. It is veritably pellucid that this witness did not controvert the Plaintiff's case that he had been denied ownership of the suit properties. He also confirmed that the development plans the Plaintiff was using to put up the demolished constructions had been approved by the Municipal Council of Meru.

81. Legitimate coercive force is donated to the Central Government Statutorily and Constitutionally. This being the case , I opine that the Plaintiff had no choice but to watch his property being destroyed by the defendants with the support of the police force. This coercive power, which should be used legitimately, was used illegitimately. In the circumstances, I do not find the 3rd defendant's Submission that the Plaintiff should have challenged the restrictions placed against his properties instead of filing this suit, as lacking serious evidential propriety. Already, the defendants had egregiously ignored Court Orders.

82. The claim that the Plaintiff had no case against the 3rd defendant because the restriction was registered by the Land Registrar and not by the Municipal Council of Meru does not persuade me that the 3rd defendant was innocent. It is the letter by the Town Clerk of the Defunct Municipal Council of Meru that set the ball rolling. It must have been at the instigation of the 3rd defendant that the Plaintiff's Constructions on the suit properties were demolished . Indeed, DW 3, the 3rd defendant's only witness admitted that the 3rd defendant had converted the suit lands into a recreation park.

83. I do find that the Plaintiff has suffered damages /losses and that his Constitutional right to own property had been savaged by the defendants. I do not agree with the defendants that the Plaintiff had not proved his claim for special damages.. The Plaintiff produced Valuation Reports prepared by recognized valuers. These reports were not effectively controverted by the defendants. I do accept Plaintiff's exhibits 31 and 32 as proof of the damages he suffered through the illegitimate demolition of his property.

84. Regarding Plaintiffs Exhibit 29, I do note that the valuers, GM Gitonga, Aritho Associates, in arriving at their valuation for compensation for loss of unexpired leaseholds made several assumptions. Among them was that the Plaintiff would have been able to complete the proposed buildings. Another one was that their projections regarding the income to be generated over the remainder of the lease period would be achieved mechanically. However, business is always fraught with uncertainties, including vagaries such as earthquakes, war and the changing faces of all business environments. This is not a matter that can be established with precision or divine exactitude. Whereas, I do not doubt that the Plaintiff was in a position to complete the developments he had intended to put up in the suit properties, I find myself unable to agree with the figure proffered by the Valuers. I will discount it appropriately.

85 I find that the Plaintiff has proved his case . I enter judgment for the plaintiff against the defendants jointly and severally as follows:-

- 1. Kshs. Two Million and Eight hundred and fifty Thousand (Ksh. 2,850,000) being the value of the demolished and destroyed building/property.**
- 2. Loss of User of the intended premises for 89 years being the period of the unexpired lease in the sum of Kshs. Sixty Three Million One Hundred Thousand (Kshs. 63,100,000/=).**
- 3. General damages in the sum of Ksh. One Million (Kshs. 1,000,000/=)**
- 4. Exemplary and aggravated damages in the sum of Ksh. Two Million (Ksh, 2,000,000/=).**
- 5. Costs of this suit.**
- 6. Interest on 1,2,3, 4 and 5 above from the date of delivery of this Judgment.**

DELIVERED IN OPEN COURT AT MERU THIS 27TH DAY OF APRIL, 2016 IN THE PRESENCE OF :-

CC: Daniel/Lilian

Riungu for the Plaintiff

Gatari Ringera for the 3rd defendant

No appearance for 1st and 2nd defendants

P.M. NJOROGE

JUDGE