



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO 40 OF 2019

AMINA ACHIENG OCHIENG.....1ST PLAINTIFF

TILAPIA BEACH RESORT LTD.....2ND PLAINTIFF

VERSUS

KENYA PORTS AUTHORITY.....1ST DEFENDANT

KENYA RAILWAYS CORP.....2ND DEFENDANT

COUNTY GOVT OF KISUMU.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

BACKGROUND

This suit was preceded by the demolition of the once famous Tilapia Beach Resort situated next to the lake within Kisumu town on 8/8/2019. This was done ostensibly to pave way for expansion of the Kisumu Port.

SUMMARY OF FACTS

Vide the Plaint dated 24/10/2019 the 1st Plaintiff claims that she is the registered owner of the property known as **KISUMU/MUNICIPALITY/BLOCK 3/181** and that she covenanted with the 2nd Plaintiff to use the land for purposes of establishing a hotel. That on or about the 8/8/2019 late at night the Defendants acting in concert entered the suit property with bulldozers flattened the buildings therein and proceeded to fence off the plot. The Plaintiffs now bring this suit seeking a declaration that the Defendants acted maliciously and unlawfully in destroying their property, to the tune of Kshs 108,427,818/= for the 1st Plaintiff and Kshs 170,270,014/= for the 2nd Plaintiff. They also seek general damages for trespass, costs and interest.

In response the 1st Defendant via their Defense dated 15/1/2020 denied knowledge of the demolition and averred that they had nothing to do with the events of 8/8/2019 as alleged by the Plaintiffs.

The 2nd Defendant also filed a Defense dated 19/11/2019 denying the Plaintiffs' proprietary interest. On the contrary they averred that the land belonged to them and was therefore not available for allocation in the first place. They equally denied demolishing the hotel and/or fencing off the suit property.

The 3rd Defendant on its part via a defense dated 15/11/2019 denied the Plaintiffs' claim in its entirety. They contended that they had nothing to do with the alleged demolitions and called for dismissal of the Plaintiffs' suit with costs.

The 4th Defendant in their Defense dated 21/1/2020 denied participating in the destruction of the Plaintiffs' property. In addition, they averred that they do not possess any machinery for destruction of property nor is it their function to engage in demolitions. They contended that the Plaintiff had neither shown any cause of action against them nor on any other specific Government Officer or Department.

ANALYSIS OF EVIDENCE AT TRIAL

PW1 the 1st Plaintiff herein testified that she used to be a business lady within Kisumu town. That the Tilapia Beach Resort was demolished by the Kenya Ports Authority, Kenya Railways and County Government of Kisumu, with the support of the 4th Defendant. That she has a certificate of lease in her name and she has been paying rent and rates to the County Government of Kisumu. That an environmental impact assessment test was carried out and approved by NEMA, and an approval for construction was also granted by the Kisumu County Government.

It was her further testimony that the bulldozer was being directed by the then City Manager one Doris Ombara accompanied with armed police officers, and officers from the County.

That after the destruction the plot was fenced off by Kenya Railways. She stated that as a result of the Defendant's action she lost the suit property valued at Kshs 27,000,000/= plus improvements of Kshs 20,756,602/= while the 2nd Plaintiff lost Kshs 114,526,850/= together with interest of Kshs 5,869,798/=.

On cross-examination she stated that she did not receive a notice to vacate the property. Further that Kenya Railways fenced the plot after demolition. She also contended that she did not know the agency that sent the bulldozer to the site.

Further that it was Kenya Ports Authority and The County Government of Kisumu that carried out the demolitions and she only sued the Attorney General because of the presence of Police Officers. That she did not have proof of payment for the allotment letter.

PW2 LUKE OKEYO MADENDE testified that he is a valuer practicing under A.D.B property consultants. That he received instructions to carry out valuation on the suit property to ascertain the cost of damages thereon. That he was able to decipher that the value of the suit property was Kshs 27,000,000/= while Kshs 20,400,000/= was for the costs of improvements thereon. He produced the valuation report as PEXH 23. On cross examination he stated that he did not get any information from the contractor while coming up with the report. That he valued the trees at Kshs 625,000/= but he did not state the species of the trees. That he further factored in an additional 15% charge for the compulsory acquisition of the suit land.

PW3 ARCHELAS ARCHIELAU NOKWE ADIEGE testified that he is an accountant working with Nokwe Adienge & Company. He stated that he valued the property at Kshs 47,400,000/= while the lost income was 56,933,333/= making a total of 104,689,935/=. He produced the 1st Plaintiff's report as PEXH 24(a).

With regard to the 2nd Plaintiff he testified that the value of the lost assets was Kshs 49,873,366/=, loss of income was ksh 114,526,850/= while interest was Kshs 5,869,987/=. He produced the 2nd Plaintiff's report as PEXH 24 (b). On cross-examination he stated that the 1st Plaintiff was a separate business entity from the 2nd Plaintiff and that there was no tenancy agreement between them. That the 1st Plaintiff's claim was only rental income.

The 2nd Defendant's DW1 GEOFREY WEKESA NYONGESA testified that he was a cartographer with Kenya Railways Corporation. That vide the survey plan known as FR 43/53 of 1935 the Kenya Uganda Railway and Harbors was vested with land within Kisumu municipality measuring approximately 237 acres which area included the suit property. That none of this land had ever been surrendered back to the government for re-allocation.

That the 1st Plaintiff's title was irregular. He testified that Kenya Railways was in no way involved in the demolition of the Plaintiffs' property. He produced the vesting order as DEXH1 and the survey report as DEXH2. It was his further testimony that the demolition was carried out by a multi-agency team together with a Government security team, and that Kenya Railways was part of the team that conducted the fencing.

On cross-examination he stated that Kenya Railways did not have a title for the piece of land. That the bringing down of the Hotel was part of the revival of the Kisumu Port. That eviction of people within Kenya Railways land was done by the Managing Director and Railways security together with Kenya Police.

The 1st Defendant's DW1 CHARLES KATU, testified that he was the Port Manager Kisumu in charge of port operations. That Kenya Ports Authority was not involved in the demolition as there was no plan to expand the Kisumu Port. That the 1st Defendant does not intend to acquire the suit property herein for purposes of rehabilitation of the port. On cross-examination he stated that the rehabilitation work was limited to the area owned by Kenya Ports Authority which is within a walled area.

The 3rd Defendant's witness STEPHEN SULE testified that he is the head of City Planning Kisumu County. He stated that the suit property belongs to Kenya Railways Corporation. That the Plaintiff's purported title is illegal and fraudulent. It was also his testimony that evictions from the suit property were done procedurally after issuance of the requisite notice. He stated that the County Government did not play any role in the eviction of the Plaintiff, as such the County Government was wrongly sued.

ANALYSIS OF PARTIES SUBMISSIONS

PLAINTIFFS' SUBMISSIONS

The Plaintiffs filed submissions dated 26th July 2021 whose gravamen is that the wanton destruction and their deprivation of the suit property was contrary to the provisions of the Constitution, especially Article 40 and 65 on the right to own property. They also relied on Section 26(1) of the Land Registration Act which states that a Certificate of Title can't be challenged unless on grounds of fraud, misrepresentation and or where it has been acquired illegally unprocedurally or through corrupt schemes. On the strength of this they called upon the court to find the 1st Plaintiff's title indefeasible.

It was their submission that the Defendants flouted Section 155 of the Land Act which states that Notice must be personally served. Further that the unlawful eviction and damage to property attracts compensation. To buttress this point, they relied on **STELCO PROPERTIES LIMITED & ANOR VS NJUGI VENTURES & ANOR**, where Kshs 2,000,000/= was awarded for trespass and Kshs 10,000,000/= for exemplary damages. They also placed reliance on the Supreme Court Case of **MITU-BELL WELFARE SOCIETY VS KENYA AIRPORTS AUTHORITY & OTHERS** where compensation was awarded for illegal and unlawful eviction and demolition of property. They called for the court to allow the Plaintiff's claim as presented in the Plaintiff.

1ST DEFENDANT'S SUBMISSIONS

The 1st Defendant on their part filed submissions dated 8/11/2021, where she argued that the Plaintiffs had not established the presence of their agents on the suit property during the demolitions hence there was no basis for the suit against them. Further it was their submission that the Plaintiffs had not provided any Gazette Notice to show expansion of the plot as they alleged. They relied on the case of **MOURINE MUKONYO VS EMBU WATER & SANITATION COMPANY [2020] eKLR**.

They further submitted that a land title derives its validity from the process of its acquisition, hence the suit property doesn't belong to the 1st Plaintiff, since she could not satisfactorily explain how she acquired the land. They relied on the case of **DAVID WAHOME GITONGA VS MARY NYAKIO KANINI [2020] eKLR**, to support this point.

The 1st Defendant further relied on the case of **TERESIA WANGARI MBUGUA VS JANE NJERI NDUATI & ANOR [2020] eKLR** where it was stated that where ownership of property is called into question then the owner should show the root of its ownership.

They also submitted that the Plaintiffs have not proven the loss and damages allegedly suffered, since projected income could not be ascertained by an accountant but by an actuarial scientist. That there was no basis of how the goodwill of Kshs 48,866,270/= was arrived at. They likened the damages to special damages and relied on the case of **AFRICAN GOSPEL CHURCH CHEBOCHO VS PAUL MUTAI [2017] eKLR**, where it was stated that special damages must not only be specifically pleaded but also strictly proved and should not be inferred from the act.

They concluded their submissions by stating that the Plaintiffs have not discharged their burden of proof and urged the court to dismiss this claim. They relied on the case of **MBUTHIA MACHARIA VS ANNAH MUTUA NDWIGA & ANOR [2017] eKLR** where the court stated that the legal burden of proof normally rests upon the party desiring the court to take action. They urged the court to dismiss the suit against them.

2ND DEFENDANT'S SUBMISSIONS

The 2nd Defendant via their submissions dated 18/8/2021, outlined the following issues for determination.

- 1. Whether the suit is competent,**
- 2. In whose hands is the proprietary interest of the suit property**
- 3. Whether the orders sought can be issued in the circumstances.**
- 4. Who is to pay the costs of the suit.**

On the first issue the 2nd Defendant submitted that this suit commenced prematurely as the Plaintiffs did not wait for the statutory one month notice to end before filing this suit, as stipulated by Section 87 of the Kenya Railways Corporation Act. They relied on the case of **ANN WANJUNU VS MWIHAKI WARUIRU & 2 OTHERS eKLR** which stressed the need to follow procedure. They also relied on the other case of **JULIUS NDOLO & 128 OTHERS VS KENYA RAILWAYS CORPORATION & ANOTHER [2009] eKLR** where the court dismissed the case on the ground that the Plaintiff failed to comply with Section 87 of The Kenya Railways Corporation Act.

On the second issue they submitted that the 1st Plaintiff's title was not acquired through lawful means hence it wasn't indefeasible. They relied on **HENRY MUTHEE KATHURIMA VS COMMISSIONER OF LANDS & ANOTHER (2015) eKLR**, together with other authorities in which it was generally held that a title acquired irregularly is defeasible. It was their further submission that the allotment letter was irregular, having not been paid for, they relied on the case of **DR JOSEPH M.K. NGOK VS MOJO OLE KEIWUA & 4 OTHERS (1997) eKLR**. Where it was held that an allotment letter must meet the conditions of its issuance as specified on the letter. The 2nd Defendant further submitted that the 1st Plaintiff had not sufficiently demonstrated transfer by transmission from her husband to herself as the same was done before the completion of the succession proceedings. They relied on the case of **DANIEL KIRAGU KINYUA VS CONSOLATA KIPSOI [2020] eKLR** where the court held that no good title can pass where the transfer was effected in the absence of a grant of letters of administration.

On the covenant between the 1st Plaintiff and the 2nd Plaintiff counsel for the 2nd Defendant submitted that any purported dealings between the Plaintiffs prior to the year 2005 should be rendered null and void given the fact that the 2nd Plaintiff was incorporated on 15/11/2005. In support of their interest in the suit property the 2nd Defendant submitted that the evidence of their Defense witness together with DEXH 1,2 and 3 coupled with the fact that the Plaintiffs irregularly acquired the land, were sufficient proof that the land has always belonged to the 2nd Defendant since time immemorial.

It was their further submission that the Plaintiffs contention that they were not issued with vacation notices was a lie as evidenced by the notices as at pages 236 and 237 of their own list of documents. That further given that PW1 did not identify any officers from Kenya Railways during the demolitions clearly demonstrates that they weren't involved.

They also urged the court to disregard the evidence of PW2 and 3 since they did not produce certification to prove that they were a licensed Accountant and Valuer respectively. Further that the Kshs 300,000/= being sought for the audit and valuation reports were unsubstantiated as there were no receipts produced. It was their contention that no company resolutions were furnished to show that the 2nd Plaintiff had instructed PW2 and 3 to draft the reports. The 2nd Defendant further contended that the sum of Kshs 20,400,000/= for improvements had no basis. On the amount of Kshs 625,000/= for the fallen trees, counsel submitted that the same should not be awarded as it was an estimation without any basis as the species of the trees was unknown.

On the fourth issue of costs, counsel submitted that costs follow the event as set out in section 27 of the Civil Procedure Act and urged this court to dismiss the suit with costs to the 2nd Defendant.

3RD DEFENDANT'S SUBMISSIONS

Vide their submissions dated 22nd October 2021 the 3rd Defendant outlined the following issues for determination.

1. Whether the 3rd Defendant took part in the demolitions of the Plaintiffs' property?
2. Whether the Plaintiffs are the legitimate proprietors of the suit land.
3. Whether the Plaintiffs are entitled to orders sought.
4. Who should bear the costs of this suit?

On the first issue counsel submitted that the Plaintiff filed herein had not placed any blame for the demolition on the 3rd Defendant. That parties are bound by their pleadings and the fact that the Plaintiff's testimony alluded to the then town Manager Doris Ombara was a mere afterthought and should be disregarded. He relied on the case of **RAILA AMOLO ODINGA & ANOR VS IEBC & 2 OTHERS** as cited in the case of **DANIEL OTIENO MIGORE VS SOUTH NYANZA SUGAR CO.LTD [2018] eKLR**. Where it was held that parties should not be permitted to travel beyond their pleadings and that courts should not be allowed to frame issues that are not in the pleadings.

On the second issue counsel submitted that the evidence produced by the 2nd Defendant was uncontroverted hence the property rightfully belonged to the 2nd Defendant. He relied on the case of **JOHANNES AKELLO OMBOTO & ANOR VS KENYA RAILWAYS CORP & 4 OTHERS [2020] eKLR**, where the court held that transfer of the 1st Respondent's land without their involvement was illegal null and void.

It was their further contention that the allotment letter was equally null and void for want of payment of the standard land rent as stipulated by the letter itself. He relied on the decision of **MBAU SAW MILLS VS ATTORNEY GENERAL & TWO OTHERS**, where the court held that an allotment letter does not confer any property rights unless there is acceptance and payment of the stand premium and ground rent.

On the third issue counsel for the 3rd Defendant submitted that all the amounts claimed for the suit land, for improvements, damaged buildings and site works, value of the assets and the valuation reports were special damages and were supposed to be specifically proved. It was counsel's contention that none of the above was proved by way of evidence.

On the fourth issue counsel submitted that the Plaintiff should pay costs of the suit as they had failed to prove their case on a balance of probabilities.

4TH DEFENDANT'S SUBMISSIONS

The 4th Defendant vide their submissions dated 22nd September 2021 outlined the following issues for determination.

1. Whether the 1st Plaintiff acquired good proprietary interest?
2. The mandate of security Agencies
3. Whether the Plaintiffs are entitled to any of the reliefs sought?

On the first issue the 4th Defendant submitted that the Plaintiffs title was not indefeasible as the same was dubiously acquired. They relied on the case of **KENYA ANTI-CORRUPTION COMMISSION VS SINDO DISTRIBUTORS LTD & 27 OTHERS** whereby various leases and allotments were canceled by the court due to unprocedural issuance.

On the second issue counsel submitted that the mandate of the National Police Service was maintenance of law and order protection of life and property. That further in instances such as the present one of demolitions the presence of police was vital in preventing looting and attacks on workers. It was counsel's further submission that the presence of police is usually requested periodically by Government Agencies. She relied on **MARIKO NDWIGA VS EDITH MUTHANJE [2020] eKLR** where the court stated as follows with regard to security.

“The court's understanding is that whereas the eviction order is to be executed by appointed court bailiffs, the role of the police service shall be confined to maintaining law and order to enable the court bailiffs to perform their duties.

It was therefore counsel's contention that security agencies did not take part in the demolitions as alleged by the Plaintiffs. Hence they didn't contribute to the alleged losses suffered by the Plaintiffs.

On the third issue counsel submitted that the Plaintiffs were not deserving of the orders sought as they have not demonstrated valid title to the suit property.

LEGAL ISSUES FOR DETERMINATION

1. Who holds proprietary rights over the suit property
2. Whether the Defendants' were responsible for the demolitions on the suit property.
3. Whether the Plaintiffs were issued with sufficient notice to vacate the suit property.
4. Whether the Plaintiffs are entitled to any damages.
5. Who is to bear the costs of the suit.

WHO HOLDS PROPRIETARY INTEREST OVER THE SUIT PROPERTY

It was PW1, the 1st Plaintiff's testimony that she was the owner of the suit property, she produced a copy of the lease agreement and an allotment letter. She however failed to prove that an application for allotment was done, that the requisite payment for the allotment letter had been made. DW1 on behalf of the 2nd Defendant on his part testified that the suit property was vested on Kenya Railways way back in the year 1935. He produced the vesting order and the survey report as DEXH1 and DEXH2 respectively.

It is not clear how the suit property changed hands from land reserved for Kenya railways Corporation to the 1st defendant. This process is indeed shrouded in mystery, coupled with the facts that the requisite payment in compliance with the terms of the allotment letter together with the lack of proof of transfer by transmission of the plot to the 1st Plaintiff from her husband it is safe to say on a balance of probabilities that the 1st Plaintiff has not proved ownership of the suit property.

From the evidence on record there is clearly no basis for the 1st Plaintiff's claim to the suit property, as the 1st Plaintiff has failed to prove the authenticity of the Allotment letter. This was the holding of the Court Of Appeal in the case of **Philemon L. Wambia v Gaitano Lusitsa Mukofu & 2 others [2019] eKLR**

WHETHER THE DEFENDANTS WERE RESPONSIBLE FOR THE DEMOLITION IN THE SUIT PROPERTY

It was PW1's testimony that in the middle of the night of the 8/8/2019 she went to the suit property and found the then city manager Doris Ombara at the scene, that she was in the company of police officers, enforcement officers from the county government and officers from the Kenya Ports Authority. It was her further testimony that there was also a bulldozer on site.

On cross-examination by counsel for the 1st Defendant she stated that she found three other people on site and upon questioning them they informed him that they were from the Kenya Ports Authority. It is not clear whether these people were actively involved in the demolition or not.

There is mention of officers of the 2nd Defendant in fencing the suit property afterwards. Moreover, the witness for the second defendant admitted that the demolition was carried out by a multi-agency team together with a Government security team, and that Kenya Railways was part of the team that conducted the fencing.

From the foregoing it is evident that there was the involvement of the Defendants in the demolitions save the 1st defendant. The 2nd Defendant on their part have not controverted the evidence of PW1 as to the involvement of its officers in the demolition. The Kenya police should desist from being hired by any person or agency to supervise and protect any eviction unless authorized by a court order otherwise they attract a penalty from the court. I therefore find that the Defendants were responsible for the demolition of the buildings on the suit property. The fourth defendant's agents known as the Kenya police were present during eviction armed with guns, to ensure that the demolition was properly and smoothly done despite the fact that there was no court order allowing the defendants to forcefully evict the plaintiffs from the property. In conclusion on this issue I do find that the 2nd to 4th defendants are liable. I also find that the defendants' action was irregular, arbitrary, oppressive and carried out with impunity.

WHETHER THE DEFENDANTS COMPLIED WITH THE LAW ON EVICTIONS.

It was the 1st Plaintiff's testimony that she was not issued with any notices to vacate the suit property. She however produced in court two notices as at pages 236 and 237 of the Plaintiffs' bundle of documents. The notices are however not dated; there is really no proof that the same were delivered and or brought to the attention of the Plaintiffs. A cursory look at the notices shows that they emanated from the 2nd Defendant. Hence the onus was on them to prove that indeed the notices were brought to the attention of the Plaintiffs and that they ignored and/or disregarded them. The legal provision for an eviction notice from public land is provided for in **Section 152G of the Land Laws Amendment Act 2016**. It states that any evictees from public land should be notified in writing, *by notice in the Gazette and in one newspaper with nationwide circulation and by radio announcement, in a local language, where appropriate, at least three months before the eviction.*

The Kenyan Constitution establishes a non derogable bill of rights, and establishes the National Land Commission to manage public land on behalf of national and county governments. The Constitution does not however have an article dealing with eviction. It therefore must be construed together with other international principles which have been allowed under Article 2(6) and include international law dealing with human rights which protect evictees or those about to be evicted.

Treaties and conventions ratified in Kenya form part of Kenyan law and are therefore binding to Kenya and can be interpreted as such by

Kenya Courts. The Courts have recognised the UN Covenant on Economic, Social and Cultural Rights (CESCR); UNGA, The Right to Adequate Housing which require the state to refrain from forced evictions. However, where there is unlawful occupation, forceful eviction must be carried out in a humane manner. The procedures to be followed during forced evictions include:

- a) an opportunity for genuine consultation with those affected;
- b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;
- c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;
- d) especially where groups of people are involved, government officials or their representatives to be present during an eviction;
- e) all persons carrying out the eviction to be properly identified;
- f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise;
- g) provision of legal remedies; and
- h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts

Other international treaties which Courts have relied on include the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (Banjul Charter) that seek to protect the fundamental rights of persons.

From the foregoing it is quite evident that the Statutory Procedure on evictions was not followed and that the Plaintiffs were not given sufficient notice.

WHETHER THE PLAINTIFFS ARE ENTITLED TO ANY DAMAGES

The Plaintiffs have prayed for both general damages for trespass to property and for losses of Kshs 108,427,818/= and 170,270,014/= for the 1st and 2nd Plaintiff respectively.

Having found that the Plaintiffs' do not have proprietary interest over the suit property it follows that the prayer for damages for trespass should also fail together with the amounts sought for the value of the land, improvements thereon, lost income and interest.

Due to insufficient notice on the part of the 2nd Defendant I do find that the Plaintiffs are entitled to compensation for the value of the lost property as a result of the demolitions. This amount is Kshs 27,000,000/= as stipulated in the valuation report being the estimated costs of the buildings that were on the suit property. This amount is due with interest to the 1st plaintiff from the date of filing suit. The 2nd plaintiff on its part is awarded Kshs 49,873,366/= being the value of the lost assets only with interest from the date of filing suit. These amounts are payable by the Defendants number 2 to 4 jointly and severally.

SPECIAL DAMAGES

It is trite law that special damages must be specifically pleaded and proved. The Plaintiffs have pleaded special damages of Kshs 300,000/= being Kshs 150,000/= for the Valuation report and a further Kshs 150,000/= for the Audit report. However, they have not produced any receipts to show that they incurred these costs. In the absence of these receipts then there's absolutely no basis for award of the special damages as was held in the case of **RYCE MOTORS LIMITED & Another v ELIAS MUROKI [1996] eKLR**.

WHO IS TO PAY COSTS OF THE SUIT

It is trite law that costs follow the event, in this case therefore I find that the Plaintiffs pay the 1st Defendant's costs having failed to prove their case against them. On the other hand, the 2nd to 4th defendants should pay the Plaintiffs costs of the suit.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 24TH DAY OF FEBRUARY, 2022.

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE