



**Nzomo (Suing as the Legal Representative of the Estate of the Late Daniel Nzomo Wambua) v Makueni County Government (Environment & Land Case 355 of 2017) [2022] KEELC 2394 (KLR) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2394 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND CASE 355 OF 2017**

**CG MBOGO, J**

**MAY 31, 2022**

**BETWEEN**

**THOMAS MATEE NZOMO ..... PLAINTIFF  
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE  
DANIEL NZOMO WAMBUA**

**AND**

**MAKUENI COUNTY GOVERNMENT ..... DEFENDANT**

**JUDGMENT**

1. Vide the amended plaint dated August 3, 2018, the plaintiff has sought the following orders against the defendant: -
  - a) Eviction order do issue to evict the defendant, its agents, employees, servants, and/or tenants from parcel number Makueni/Unoa/1573 and the same be carried out by Court bailiffs and/or licensed auctioneers and the OCS Makueni Police Station to provide security;
  - aa) In the alternative to prayer (a) above, the defendant be ordered to compensate the plaintiff for the portion of land it is occupying measuring 0.8147 hectares and comprised within Makueni/Unoa/1573 at the current market value of Kshs. 62,000,000/= (Sixty-Two Million);
  - b) A perpetual injunction order to issue to restrain the Defendant, its agents, servants and or tenants from entering, subdividing, occupying or alienating any portion of LR. No. Makueni/Unoa/1573;
  - c) Mesne profits in respect of what was formerly LR. No. Makueni/Unoa/135 now LR. No. Makueni/Unoa/1573 with effect from 1990 of Kshs. 55,000,000/= up to the date of payment;
  - d) General damages for trespass to land;



- e) Interest on (aa), (c), (d) above at court rates with effect from 1990 up to the date of payment;
  - f) Costs of this suit.
2. The plaintiff's suit is opposed by the defendant vide the amended statement of defence dated October 11, 2012. It is prayed that the suit be dismissed with costs. In response, the plaintiff filed a Reply to the amended Statement of Defence dated November 28, 2012.
  3. The plaintiff called two witnesses. The plaintiff, Thomas Matee Nzomo, adopted his statement dated November 9, 2018 as his evidence in chief. He also produced his bundle of documents of even date which was marked as PEX Nos. 1 – 10 respectively. He stated that the late Daniel Nzomo Wambua was his father. That the Wote Town Council was succeeded by County Government of Makueni. He stated that the purchase price for the suit property was Kshs. 2,800,000/=. That in 2003, his former advocates, Kyalo & Associates, wrote to the Town Clerk demanding immediate payment of the purchase price for the suit property failure to which the Defendant would be evicted.
  4. The plaintiff further stated that no money had ever been paid to the plaintiff after an initial payment of Kshs. 500,000/= was refunded vide cheque No. 001364 by the plaintiff's advocates to the defendant's advocates and the same acknowledged on April 29, 2004. That the sale agreement for the suit property indicated that the last instalment of the purchase price was to be made in July 2003. Because the same was not done, the Plaintiff seeks to be compensated at the current market price or in the alternative, the Defendant vacate the suit property which it has been collecting revenue from since it took possession.
  5. In cross-examination, The plaintiff stated that his father died in 2006 and that it was his late father who signed the sale agreement. He proceeded to state that the sale agreement does not have a default clause. Again, that the sale agreement had no penalty or interest clause in the event of default. That he was not aware of any monies which were paid to Kyalo & Associates. That all in all, his late father, Daniel Nzomo Wambua, never received any payment.
  6. In re-examination, the plaintiff reiterated that his late father never received the purchase price and that Kshs. 500,000/= was refunded because it was not in line with the sale agreement.
  7. In his evidence in chief, Wilfred Mutuku Muindi (PW1), stated that he was a registered Valuer practicing his trade with Pro-Land Realtors. He added that Pro-Land Realtors received instructions from the plaintiff to undertake a valuation for the suit property measuring 2.2 acres which is part of Title No. Makueni/Unoa/1573. The suit property is occupied by the Wote Bus Park. Under the instructions of the plaintiff, Pro-Land Realtors was required to determine the market value of the suit property and the compensable amount for loss of income over a period of 16 years. PW1 went on to produce the valuation report marked as PEX No. 8. He arrived at a market valuation of Kshs. 62,000,000/= and a compensable amount of Kshs. 55,000,000/= for loss of income.
  8. In cross-examination, PW1 stated that the valuation report was signed by Nicholas Kimanthi and James Macharia. That he was with Mr. Macharia during the valuation exercise. He added that he valued 2.2 acres of the suit property which is what the plaintiff instructed. Lastly, PW1 stated that for his comparison approach which determined the market value of the suit property, he had not annexed any analysis of the cost of other surrounding parcels of land.
  9. In re-examination, PW1 stated that the total size of Title No. Makueni/Unoa/1573 is 19.3 acres. That the suit property was at the centre of Wote Town and that page 11 of the valuation report shows images of other properties within the area.
  10. The defence called two witnesses. The first witness was Shadrack Mulanga (DW1), the County Director of legal services. He adopted his statement dated November 16, 2018 as his evidence in chief.



The witness also produced the exhibits marked as DEX Nos. 1 – 7 and 11 – 12 respectively under the bundle of documents dated November 16, 2018. That the defendant had taken over the assets of Wote Town Council. He added that the sale agreement for the suit property did not provide for the payment of interest by any party and neither did it conform to the Law Society Conditions of sale.

11. DW1 also produced the documents numbered 13, 26, 27 and 28 in the bundle of documents dated 3<sup>rd</sup> February, 2020 as DEX Nos. 13, 26, 27 and 28 respectively. He stated that the sale agreement acknowledged that there was a fully constructed bus park facility on the suit property. Again, he averred that there was no provision for the payment of interest, penalty or surcharge. He concluded by stating that the defendant is ready and willing to pay the agreed purchase price and prayed that the court declines the prayer for eviction. He added that the defendant is not willing to pay compensation of Kshs. 40,000,000/=.
12. In cross-examination, DW1 stated that there was no letter showing that the two cheques marked DMFI 9 and DMFI 10 were forwarded to the plaintiff's former advocates. That there was no evidence of payment of the cheque amounts. He added that the sale agreement did not make provision for extension of time to pay the purchase price. That no payments were made to the plaintiff within the agreed timelines. DW1 also confirmed that the plaintiff gave notice of lapse of the sale agreement in PEX No. 4 under paragraph 2 thereof. The plaintiff also threatened to sue for non-compliance within 15 days. He added that the plaintiff demanded for payment of mesne profits because as at April 27, 2004, the sale agreement stood terminated.
13. DW1 further stated that in PEX No. 5, the plaintiff gave the defendant notice to repossess the suit property. That as at April 24, 2004, the defendant had not vacated the suit property. That the defendant did not move to court for leave of extension of time. That DW1 did not see any agreement between the plaintiff and the defendant indicating that payment was to be through exchange of land. That from the sale agreement, there was nothing to show that the plaintiff authorized payment of the purchase price through an advocate. That the defendant did not have a record of audited accounts to disprove the plaintiff's valuation of the suit property. That PEX No. 1 is a copy of the plaintiff's title deed in absolute ownership of the suit property.
14. In re-examination, DW1 stated that the sale agreement was a private treaty and that it did not provide for a dispute resolution mechanism. That in the sale agreement, time was not of the essence.
15. The last defence witness, was Rael Muthuka (DW2) who adopted her statement dated January 23, 2020. She stated in her evidence in chief that she was the acting County Secretary of the defendant. That the process of handing over the assets and liabilities of the defunct local authorities had not been completed. She added that, while in office, she came to learn that the defunct Wote Town Council entered into a sale agreement for the suit property with the plaintiff.
16. In cross-examination, DW2 stated that she could not trace the minutes of Wote Town Council when it was agreed that the plaintiff be compensated. She added that she was also not able to get an allotment letter to show that the plaintiff was allocated alternative land in Nguu Ranch. That the defendant collects fees and cess from matatu operators and traders and there are official records to ascertain the said collections. That for purposes of this case, she did not obtain the records of revenues collected from the bus park. DW2 added that she did not have evidence to show that the cheques issued in favour of the plaintiff cleared. Lastly, she stated that she was not aware if any application had been made by the defendant to deposit any payment for the suit property to the plaintiff in court.
17. In re-examination DW2 stated that the custodian of minutes which approved the bus park was the District Commissioner who is no longer part of the devolved county government. That KCB Bank



- Wote Branch failed to provide proof of payment of the cheques that were drawn to the Plaintiff's advocates as requested in DEX No. 26.
18. The plaintiff filed his submissions on June 30, 2021. Four issues were identified for determination namely: -
- i) whether the defendant breached the sale agreement;
  - ii) whether the agreement was terminated;
  - iii) whether the refund can be construed as a constructive termination of the agreement; and
  - iv) whether the plaintiff can claim mesne profits.
19. It was argued that the defendant's failure to pay the purchase price within the agreed timelines constitutes breach of contract on the part of the defendant. Again, it was submitted that the defendant's admission that it was unable to pay the purchase price in time due to unavailability of funds vitiated the contract. Further, it was argued that vide PEX No. 5, the plaintiff made time of the essence by giving 14-days' notice to the defendant to immediately pay the purchase price in default of which the plaintiff would take steps to repossess the suit property. That the defendant fell in breach of the sale agreement due to its failure to comply with the plaintiff's notice, and thus the agreement was lawfully terminated.
20. Submitting on the claim for mesne profits, the plaintiff urged that he was wrongfully deprived of the use of the suit property. That the valuation report assessed such mesne profits at Kshs. 55,000,000/= . That the said assessment was not controverted by an officer from the defendant's finance department and, therefore, an adverse inference must be made against the defendant.
21. In support of his claim, the plaintiff relied on the following authorities: -
- i) *Margaret Ngina Kamau v Christopher Karanja Muchai & another* [2021] eKLR;
  - ii) *Stima Investment Co-operative Society Limited v David Waiganjo Kigwe* [2020] eKLR;
  - iii) *Nebart Njeru Munyi v Nicholas Muriithi Zakaria* [2015] eKLR;
  - iv) *George Njenga Kagai v Samuel Kabi Njoroge & another* [2019] eKLR; and
  - v) *Fredrick Korir v Soin United Women Group (Sued through Eunice Towett, Jane Mwolomet, Lucio Chebocho* [2018] eKLR
22. In the defendant's submissions dated August 2, 2021, the following issues were identified for determination: -
- i) whether there was a valid sale agreement;
  - ii) whether the plaintiff breached the contract;
  - iii) whether the plaintiff is entitled to mesne profits; and
  - iv) who bears costs of the suit.
23. The defendant argued that the sale agreement dated December 5, 2002 was invalid because it was not witnessed by the Chairman of the Wote Town Council as required in the by-laws that were in force then. It was thus submitted that the sale agreement was unenforceable for want of proper attestation. Again, it was submitted that as a result of the plaintiff's refusal to accept two cheques for Kshs. 1,010,000/= and Kshs. 250,000/=, the essential element of consideration in the contract did not pass.



- Thus, the sale agreement was invalid. Further, the defendant submitted that the failure to deliver up the balance of the purchase price of the suit property per the appointed dates was not unlawful because there was no provision in the sale agreement that made time of the essence.
24. Adding to the above submission, the defendant argued that the plaintiff's refusal to accept the balance of the purchase price constituted a breach of contract on the part of the plaintiff. Submitting on the claim for mesne profits, the defendant submitted that its entry and possession of the suit property was done with the full knowledge and consent of the plaintiff. That mesne profits are akin to special damages which must be specifically pleaded and proved. That the plaintiff did not prove how he had arrived at his Kshs. 55,000,000/= assessment of mesne profits.
25. Lastly, it was submitted that costs should be awarded to the defendant because it had demonstrated that it was the plaintiff who breached the sale agreement by refusing to accept payment of the purchase price of the suit property.
26. The defendant cited the following authorities: -
- i) *Leo Investment Ltd v Estuarine Estate Ltd* [2017] eKLR;
  - ii) *Gurdev Singh Birdi & another v Abubakar Madhbuti* [1997] eKLR;
  - iii) *Richard Mugaa v Cyrus Muthui Mwaura* [2021] eKLR;
  - iv) *Peter Mwangi Mbutia & another v Samow Edin Osman* [2014] eKLR; and
  - v) *Chief Land Registrar & others v Nathan Tirop Koech & 4 others* [2018] eKLR
27. From my disposition of the salient features of this case, the undisputed facts are as follows: -
- i) The suit property measures 0.8147 hectares and is part of Title No. Makueni/Unoa/1573 (formerly Title No. Makueni/Unoa/135) and registered in the name of the plaintiff;
  - ii) The Plaintiff entered into a sale agreement for the suit property with the defunct Wote Town Council (WTC) on December 5, 2002;
  - iii) The agreed purchase price was Kshs. 2,800,000/=;
  - iv) The purchase price was to be paid in three installments the first being Kshs. 1,000,000/= payable in January 2003 and the last being Kshs. 800,000/= payable in July 2003;
  - v) By end of July 2003, the purchase price had not been paid;
  - vi) A cheque for Kshs. 500,000/= was drawn by Wote Town Council in favour of Kyalo & Associates Advocates on behalf of the plaintiff and receipt thereof was acknowledged on March 16, 2004;
  - vii) The said amount was refunded less Kshs. 1,250/= up-country cheque clearing fees, reason being lapse of the sale agreement and receipt thereof was acknowledged on April 29, 2004; and
  - viii) The assets and liabilities of Wote Town Council have been taken over by the defendant.
28. I have isolated the issues for determination as follows: -
- i) whether the sale agreement herein was valid;
  - ii) which party is in breach of the sale agreement;
  - iii) whether the plaintiff is entitled to the remedies sought;



and

- iv) who ought to bear costs of the suit.
29. Firstly, an agreement for the disposition of an interest in land must be confined within the scope of section 3(3) of the Law of Contract Act. The said provision outlines as follows: -
- No suit shall be brought upon a contract for the disposition of an interest in land unless—
- (a) the contract upon which the suit is founded—
- (i) is in writing;
- (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party: ...
30. On the facts of the case before me, the sale agreement which was produced as DEX No. 1, readily conforms to the above statutory requirement. Contrary to the contention by learned counsel for the defendant, I am convinced that sale agreement was signed by the parties herein and properly witnessed by the District Commissioner, Makueni District and hence it is legally binding on the parties herein.
31. In addition, the elements that constitute a valid contract as contained in Halsbury's Laws of England (4<sup>th</sup> Ed) paragraph 203 are:-
- i. There must be two or more separate and definite parties to the contract;
- ii. Those parties must be in agreement, that is there must be a consensus ad idem;
- iii. Those parties must intend to create a legal relationship in the sense that the promises of each side are enforceable simply because they are contractual promise; and
- iv. Consideration, or some other factor which the law considers sufficient must support the promise by each party.
32. Again, all the above elements are encompassed in the sale agreement. Further to that, both parties treated and acted on the sale agreement with an intention of making it legally binding. It is however the performance of the final element of consideration that is the bone of contention in this matter.
33. Turning to the second issue, indeed it is apparent that the last instalment of Kshs. 800,000/= was to be paid by the Defendant in July, 2003. It was not paid. It is also manifestly clear that the sale agreement did not contain a provision which made time of the essence. That notwithstanding, I am in agreement with the dictum of Newbold JA. in *Aida Nunes v John Mbiyo Njonjo and Charles Kigwe* [1962] 1 EA 88 wherein the Court of Appeal held that: -
- “When time has not been made the essence of the contract and the circumstances are not such as to make it obvious that time is the essence, it is clear that, at least in contracts relating to the sale of land and the grant of leases, a party to the contract cannot avoid it on the ground of unreasonable delay by the other party until a notice has been served after the unreasonable delay making time the essence – see *Halsbury's Laws of England* (3rd Edn), Vol 8, p 165, para 282 and the cases there cited.”
34. It is not in doubt that the defendant was apathetic in the performance of its obligation to pay the contractual purchase price as per the agreed timelines. So much so was the payment delayed that the



- Plaintiff wrote PEX No. 5 on April 2, 2003, a notice demanding that the defendant pays the first instalment of Kshs. 1,000,000/= which had been due in January, 2003. That notice required that payment be made within 14-days thereof failing which, the plaintiff would take steps to repossess the suit property. that notice was duly received by the defendant.
35. The defendant did not respond to the notice within the time that was given. Despite being four months late on the first instalment, the defendant was aware of the ramifications of such default in payment. This is evidenced by the letters dated June 19, 2003 and November 27, 2003 marked as DEX Nos. 6 and 7 respectively. In both letters, the defendant acknowledged that it was facing financial difficulties in paying the debt owed to the plaintiff, and was apprehensive of the litigation that had been threatened. Those letters were addressed to the Permanent Secretary, Ministry of Local Government. It is doubtful from the evidence produced whether information about the financial constraints faced by the defendant was brought to the plaintiff's knowledge.
  36. In the ensuing eleven months since PEX No. 5 was issued, the plaintiff again wrote to the defendant bemoaning the presence of small-scale traders in the suit property. The plaintiff decried the actions of the defendant of collecting levies from the said traders stating that the suit property was his land and that the traders must negotiate individual contracts with him. That letter is dated March 4, 2004 and was produced as DEX No. 4.
  37. Afterwards, the defendant replied to DEX No. 4 in the letter dated March 12, 2004 and produced as DEX No. 5. Most critical is the fact that the Defendant stated that it had remitted Kshs. 500,000/= towards the purchase price to the Plaintiff's former advocates. Indeed, that money was received (DEX No. 12) with the plaintiff's former advocate insisting that the money was received on a without prejudice basis pending formal instructions from the plaintiff.
  38. Duly instructed, the plaintiff's former advocate replied to the defendant's former advocate through the letter dated 13<sup>th</sup> April, 2004 and produced as PEX No. 4. Therein, the Plaintiff's advocate refunded the Kshs. 500,000/= earlier on paid based on the reasons that the sale agreement had lapsed due to the defendant's breach. While shutting the door on further discussions over the sale agreement, the plaintiff's former advocate advised that the plaintiff was open to discussing a lease on the suit property. An assessment of mesne profits since 1994, to be borne by the defendant, is also demanded failure to which eviction proceedings are threatened at the expiry of 15 days.
  39. From the above discourse, it is clear that there was a default by the defendant in its obligation to pay the purchase price. Again, my view of the sale agreement is that there was every intention by the parties to make it legally binding. When the parties failed to insert a provision making time of the essence in the sale agreement, it did not automatically become void if the timelines for payment therein were not honoured. However, it became voidable at the election of the party that had performed all its obligations under the sale agreement.
  40. In this case, the defendant was under a contractual obligation to pay the purchase price in three instalments between January, 2003 and July, 2003. It was not done. The Plaintiff had already accepted the offer of Kshs. 2,800,000/= in exchange of 0.8147 hectares of the suit property that was already under the defendant's occupation. Evidently, the plaintiff made time of the essence under the sale agreement after issuing the notice dated April 2, 2003. The Defendant did not do all that was needed to be done by the time the notice expired on April 16, 2003.
  41. I am satisfied that the plaintiff's notice was justified as there was unreasonable delay by the defendant in performing its obligations. The notice period was also reasonable. By the time mitigation efforts were being made on or about 1 March 2, 2004, the agreement had irredeemably lapsed on account of the defendant's breach.



42. Having found that the defendant was in breach of the sale agreement, the question of the remedies available to the plaintiff is in the offing. Eviction orders, compensation at market rates, mesne profits and general damages for trespass have all been sought.

43. Section 2 of the [Civil Procedure Act](#) defines mesne profits as: -

“...in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession.”

44. The Court of Appeal in [Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees](#) [2020] eKLR held as follows: -

“It is settled law that where a party claims for both mesne profits and damages for trespass, the court can only grant one and not both. Mesne Profits is defined as the profit of an estate received by a tenant in wrongful possession between the dates when he entered the suit property and when he leaves (See: *Black’s Law Dictionary* 9th edition). Mesne Profits must be pleaded and proved. In the case *Peter Mwangi Msuitia & another v Samow Edin Osman* [2014] eKLR, this court held as follows:

“As regards the payment of mesne profit, we think the applicant has an arguable appeal. No specific sum was claimed in the Plaint as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded...”

In the case of *Inverugie Investment v Hackett* (Lord Lloyds [1995] 3 ALLER 842 it was held thus:

“Our understanding of the above persuasive authority is that once the learned Judge made the award under the subhead “mesne profits” there was no justification for him awarding a further Kshs.10 million under the subhead “trespass” since both mean one and the same thing...”

The above decision was followed by this Court’s decision in the case of *Kenya Hotel Proprietors Ltd v Willesden Investments Ltd* [2009] KLR 126.”

45. To avoid belabouring the issue, the plaintiff pleaded Kshs. 55,000,000/= as mesne profits with effect from 1990 up to the date of payment. In the valuation report produced as PEX No. 8, paragraph 2 at page 5 states that the Defendant took possession of the suit property in 2002. In PEX No. 9, a letter addressed to the plaintiff by the defendant and dated December 20, 1999, paragraph 3 thereof notes that contractors are capitalising on the bus park. In my view, the time when the defendant took possession of the suit property is indeterminate from the pleadings. I shall not grant a speculative award of mesne profits.

46. As for compensation at current market rates, PEX No. 8 determined the market value of an eighth of an acre plot (0.125 acres) at Kshs. 2,500,000/= within Wote Town. Hardly was the said figure contradicted and or refuted by the Defendant with evidence. 0.8147 hectares that is occupied by the suit property measures approximately 2.013 acres. The market value therefore works out as follows: -

2,500,000 multiplied by 2.013 = 5,032,500

Then 5,032,500 divided by 0.125 = 40,260,100

Thus, market price is approximately Kshs. 40,000,000/=



47. I have already found that the sale agreement herein lapsed on or about 16/4/2003 after expiry of the notice issued to the defendant to immediately pay the purchase price. Consequent to that, the defendant's possession of the suit property became unlawful since it no longer enjoyed possessory rights under the contract. More so, consent to remain in possession was rescinded by the plaintiff vide PEX No. 5 and DEX No. 4.

48. It is not lost on me that the suit property serves as a public utility housing a bus park and a public toilet. The defendant has however remained in wrongful possession for roughly twenty years. The suit property is private property, registered in the name of the plaintiff who has absolute proprietorship. That prior to the sale agreement, the plaintiff had exclusive possession. In my view, the plaintiff has demonstrated an action for trespass to land. *Black's Law Dictionary* (9<sup>th</sup> Edn) page 1643 defines trespass to land (*trespass quare clausum fregit*) as follows: -

1. A person's unlawful entry on another's land that is visibly enclosed. This tort consists of doing any of the following without lawful justification: (1) entering upon land in the possession of another, (2) remaining on the land, or (3) placing or projecting any object upon it. 2. At common law, an action to recover damages resulting from another's unlawful entry on one's land that is visibly enclosed.

49. For the said trespass, the Plaintiff is entitled to general damages. The Court of Appeal in *Kenya Power & Lighting Company Ltd & another v Ringera & 2 others* (Civil Appeal E247 & E248 of 2020 (Consolidated)) [2022] KECA 104 (KLR) (Civ) (4 February 2022) (Judgment) endorsed the finding of E. Obaga J. in *Philip Ayaya Aluchio v Crispinus Ngayo* [2014] eKLR, where the Environment and Land Court aptly observed as follows: -

“The defendant has constructed on the plaintiff's land. This in itself is damage and wastage of the plaintiff's land. The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the plaintiff's property immediately before and immediately after the trespass or the cost of restoration, whichever is less. See *Hostler v GreenPark Development Co 986 S W 2d 500* (No ct App 1999).”

In my Judgement, I am of the view that Kshs.2,000,000/- would be adequate compensation for general damages and this is the amount I shall award the plaintiff.

50. Lastly, regarding the claim for the defendant's eviction from the suit property, it is generally accepted that an eviction order is in the nature of a mandatory injunction. I have adopted the incisive approach taken by the Court of Appeal in *Kamau Mucuba v Ripples Ltd* [1993] eKLR, where it was observed that: -

“In all the treatises, precedents and court arguments etc whenever an issue of a mandatory injunction arises it is clearly understood and accepted that such an injunction should issue in the clearest and special cases only. It should issue with utmost care and even reluctance. This court appreciates this stance well. The rationale of this stance should be that the effect of an order for a mandatory injunction is that the party against whom the order is made should do or undo something. Many side effects may follow such an act. So it is well understood as to why Courts issue such orders with care and even reluctance.”



51. From the preponderance of evidence, the plaintiff has established his case on a balance of probabilities. Accordingly, I shall enter judgment in the plaintiff's favour. Wary of the fact that the suit property serves as a public utility and to ensure that the operations thereat are in no way paralyzed so that hardship is visited on the general public, the orders which commend themselves are as follows:-

- a) The defendant is hereby ordered to compensate the plaintiff for the portion of land it is occupying measuring 0.8147 hectares and comprised within Makueni/Unoa/1573 at the current market value of Kshs. 40,000,000/= (Forty Million) within One Hundred and Twenty (120) days hereof;
- b) In default of (a) above, an eviction order shall issue in terms of prayer (a) of the Amended Plaint;
- c) For good measure, the Plaintiff is hereby awarded Kshs. 2,000,000/= general damages for trespass in default of (a) above;
- d) Costs and interest at court rates;

52. It is so ordered.

**SIGNED, DATED AND DELIVERED AT NAROK VIA EMAIL THIS 31<sup>ST</sup> DAY OF MAY, 2022.**

**MBOGO C.G.**

**JUDGE**

**31/5/2022**

Court Assistant: Mr. Timothy Chuma

