



Baburam & 3 others (Suing as the Legal Representatives of the Estate of Rael Chemeli Baburam) v Suereca East Africa Limited & another (Environment & Land Case 2 of 2019) [2022] KEELC 2494 (KLR) (14 July 2022) (Judgment)

Neutral citation: [2022] KEELC 2494 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 2 OF 2019
A OMBWAYO, J
JULY 14, 2022**

BETWEEN

**JACKSON SAGLIRAM BABURAM 1ST PLAINTIFF
SIRIRAM BABURAM 2ND PLAINTIFF
DAVID JAGATRAM BABURAM 3RD PLAINTIFF
CAROLSATYA BABURAM STADELL 4TH PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF RAE
CHEMELI BABURAM**

AND

**SUERECA EAST AFRICA LIMITED 1ST DEFENDANT
LAKE VICTORIA SOUTH WATER SERVICES BOARD 2ND DEFENDANT**

JUDGMENT

Brief Facts

1. Jackson Sagliram Baburam, Siriram Baburam, David Jagatram Baburam And Carolsatya Baburam Stadell (Suing as the Legal Representatives of the estate of Rael Chemeli Baburam), the Plaintiffs herein vide a Plaint dated 17th January 20219 and filed on 21st January 2019 and averred that land title number Kisumu/Municipality Block 4/112 in Tom Mboya Estate, in Nyerere Highway/Indusi Road measuring 0.3234 hectares was registered in the name of Rael Chemeli(deceased) and that the Plaintiffs are the Legal Representatives of the deceased. The Plaintiffs further averred that the suit property was and is still a residential cum commercial property which comprises of 2 residential blocks and 1 outbuilding. That the 1st Defendant was acting as an agent of the 2nd Defendant. The Plaintiff alleged that in June 2013, the employees and /or agents of the 1st Defendant without prior notification



- or consent from the Plaintiffs, illegally and violently destroyed the perimeter wall and entered into the suit property, excavated and installed a huge water pipe which runs from Kajulu to Kibuyu Water Reservoirs.
2. It is the Plaintiffs case that the entry of the employees and/or agents was done without following due process of the law which includes notifying and/ or obtaining the Plaintiffs' prior consent as well as providing compensation. That the illegal invasion of the suit property by the 1st Respondent and laying of huge pipes without due notice, consent and compensation amounted to damage to property, trespass, nuisance, illegal acquisition of property and breach of constitutional right to property.
 3. The Plaintiff prayed that Judgment be entered against the Defendants jointly and severally for:
 - a) Permanent orders of mandatory injunction compelling the Defendants to restore and/or reinstate Title Number Kisumu/Municipality Block 4/112, Tom Mboya Estate, Junction of Nyerere Highway and Indusi Road , Kisumu City in Kisumu County , to its original form before invasion and installation of the water wayleave/pipe , and in particular to uproot and/or remove the wayleave /pipe that runs through the aforesaid property and cover any consequent excavations as well restore any destruction of the perimeter fence or otherwise.
 - b) In the alternative to (a) above, permanent orders of mandatory injunction compelling the Defendants to enter into an appropriate wayleave agreement with the Plaintiffs with attendant compensation for the acquisition of the wayleave in respect of Title Number Kisumu/Municipality Block 4/112, Tom Mboya Estate, Junction of Nyerere Highway and Indusi Road, Kisumu City in Kisumu County.
 - c) In the alternative to (a) and (b) above, orders compelling the Defendants to compensate the Plaintiffs for the portion of Title Number Kisumu/Municipality Block 4/112, Tom Mboya Estate, Junction of Nyerere Highway and Indusi Road, Kisumu City in Kisumu County, which portion was acquired for laying of the pipe.
 - d) Orders compelling the Defendants to compensate the Plaintiffs for loss of value of Title Number Kisumu/Municipality Block 4/112, Tom Mboya Estate, Junction of Nyerere Highway and Indusi Road Kisumu City in Kisumu County.
 - e) General damages for trespass, nuisance and breach of rights to property.
 - f) Costs of this suit.
 - g) Interest on (b),(c) and (d) at court rates ;and
 - h) Any other or further relief that this Honourable Court may deem fit and just to grant.
 4. The 1st Defendant filed a Defence on 15th February 2019 and alleged that its obligations were to supervise the contractor laying down pipelines to improve the performance of sewer networks in Kisumu City by ensuring that the sewer effluent reached the sewer treatment ponds as well as to rehabilitate and refurbish new pumps to improve the existing water supply, distribution and sanitation.
 5. The 1st Respondent averred that the Plaintiffs were offered compensation by the paying parties to wit the 2nd Defendant through the contractor but the Plaintiffs declined and demanded unreasonable and unjustified compensation. That the suit property was not the only one affected by the public interest project.



6. The 1st Defendant alleged that the construction work and laying of the pipeline was necessary in the development or utilization of the property so as to promote public benefit and that the injunction issued in this case would be issued against the public interest.
7. The 1st Defendant prayed that the suit be dismissed with costs.
8. The 1st Defendant herein filed a Chamber Summons Application dated 31st May 2019 seeking to be struck out from the suit and the Application was canvassed by way of written submissions. The said Application was dismissed with costs.
9. The 2nd Defendant did not enter appearance nor file a Statement of Defence.
10. This matter came up for hearing where the prosecution case was heard while the Defendants did not call any witness. The court directed parties to file and serve submissions.

Plaintiffs' submissions

11. The Plaintiffs filed their submissions on 2nd March 2022 where the following issues were raised for determination:

- i. Whether the Defendants trespassed into the Plaintiff's property

The Plaintiffs relied on the Blacks Law Dictionary 10th Edition, Article 40 of *the Constitution*, section 3(1) of the *Trespass Act* and section 6 (1) of the *Water Act* and submitted that the Defendants failed to notify the Plaintiffs of the works that were intended to be done on their property and instead trespassed into the Plaintiffs' property. That the action of gaining entry without consent into the property, excavating and later on laying pipes is trespass as was held in the case of *John Kiragu Kimani vs Rural Electrification Authority* (2018) eKLR.

- ii. Whether the Plaintiffs are entitled to prayers sought in the Plaintiff.

It was submitted that one of the Plaintiffs Siriam Baburam who resides in the property with his children witnessed the ordeal which traumatized him and the children who watched bulldozers bringing down their fence, destroying their garden and trees and later excavating while not communicating what they were doing.

It was stated that Defendants' actions led to security risk as the suit property is adjacent to the Kakamega-Kisumu Highway and the Plaintiff and his children live in fear due to exposure which has forced them to contract the services of day and night guard causing unnecessary expenses. That the Defendants after undertaking their works, left the property in a bad state as there were heaps of soil and debris such that the Plaintiff could not access their compound using their vehicles and had to leave them outside the compound. It was submitted that liability was admitted and the pending issue was the assessment of Damages for purposes of compensation.

The Plaintiffs testified that there was a huge sewer pipe, one meter in diameter laid down by the Defendants across the Plaintiffs' property and therefore the Plaintiffs cannot undertake any development on the said portion of land. That the Plaintiffs engaged services of Legend Valuers where the valuer prepared a report after visiting the property and inspected the damage caused. The valuer undertook a computation of the area that was damaged as a result of the installation of the pipes and found out that the land value of the land taken up by the Defendants installation of pipes amounted to Kshs. 15,000,000/= and the damage of the site works amounted to kshs. 1,500,000/=.



It was further submitted that the Plaintiffs suffered disturbance in terms of access to their home, noise by the excavators and other machines, dust and therefore compensation for the said disturbance was computed at Kshs. 2,475,000/=. That based on the evidence given the court should award damages of Kshs. 18, 975,000/=.

It was further stated that the Plaintiffs are seeking general damages for trespass, nuisance and breach of property rights as was held in the case of *John Chumia Nganga v Attorney General & Another* (2019) eKLR. That the Plaintiffs are also entitled to exemplary damages of Kshs. 4,000,000/= as the Defendants are making use and gaining profits from the sewer pipes that were laid in their property.

It was submitted that the Plaintiffs should be awarded general damages of Kshs. 10,000,000/= and the court should be guided by the case of *Duncan Ndegwa v Kenya Pipeline HCC No. 2577 of 1990* and *Park Towers Limited vs John Mithamo Njika & 7 Others* (2014) eKLR.

iii. Who should bear costs of this suit.

It was the Plaintiffs' submission that costs be awarded to the Plaintiffs as per section 27 of the [Civil Procedure Act](#).

The Plaintiffs therefore prayed that their claim be allowed as prayed in the Plaint.

Defendants' Submissions

12. I have perused the file and do confirm that the Defendants failed to file their submissions.

Analysis and Determination

13 I have carefully considered the pleadings, the evidence and the submission of parties herein and I am of the view that the following issues need to be determined:

- a. Whether the Defendants trespassed into the Plaintiffs' property.
- b. Whether the Plaintiffs are entitled to the prayers sought.

14. It is not in dispute that land title number Kisumu /Municipality Block 4/112 belongs to the Plaintiffs' mother now deceased where Plaintiffs are the Legal Representative of the deceased estate. It is also not in dispute that the Defendants herein without notice or consent from the Plaintiffs illegally destroyed the perimeter wall and entered into the suit property, excavated and installed a huge water pipe which runs from Kajulu to Kibuyu Water Reservoirs.

Section 3 (1) of the [Trespass Act](#), defines trespass as follows;

“Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

Clark & Lindsell on Torts, 18th Edition on page 923 defines trespass “as any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to prove that the Defendant invaded his land without any justifiable reason”.

15. Although the 1st Defendant has stated in his Defence that his obligations were to supervise the contractor laying down pipelines to improve the performance of sewer networks in Kisumu City, it has not provided evidence to show that the Plaintiffs gave them a consent to enter to their parcel of



land so that the pipes can be laid down. Based on the evidence on record, it is clear that the Defendants herein trespassed into the suit property and laid down pipes.

16. On the issue of whether the Plaintiffs are entitled to the prayers sought in the Plaint; this court has established that the Defendants trespassed onto the suit property and demolished the perimeter wall and destroyed the suit property. That the actions of the Defendants amounted to nuisance as there was dust and noise arising from the excavation.

17. In Clerk and Lindsell on Torts, 17th Edition page 1354 paragraph 24. It is stated;

“Nuisance” is defined as an act or omission which is an interference with, disturbance of or annoyance to, a persons rights used or enjoyed in connection with land. It is caused usually when the consequences of a person’s actions on his land are not confined to the land, but escape to his neighbours land causing an encroachment and causing physical damage or unduly interfering with the neighbour’s use and enjoyment of his land”.

18. Although the 1st Defendant has alleged that the Plaintiffs were not the only ones affected by the said project as those who were affected were being compensated but the Plaintiffs declined to be compensated, there is no evidence to show how much the Defendants had offered to the Plaintiffs as compensation.

19. *The Constitution* of Kenya under Article 40 provides as follows:

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

(a) of any description; and

(b) in any part of Kenya.

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

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

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

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.



(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya. (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

20. This court is of the view that the Plaintiffs right to property was infringed under Article 40 of *the Constitution* as the Defendants herein did not give notice to the Plaintiffs about the demolitions and that since the Plaintiffs are entitled to enjoy their right to property, they were deprived of the same as the Defendants did not follow the law on wayleaves and easements in the purported project of the 2nd Defendant.
21. The Defendants herein destroyed the perimeter wall of the Plaintiffs’ property and that the installation of the pipes left the suit property in a bad state as there were heaps of soil and debris which made the Plaintiffs not access their suit property as before. The said constructions works has affected the Plaintiffs in that they cannot make any developments on the suit parcel.
22. The Plaintiffs therefore prayed for damages as they have suffered loss as a result of the said excavation and installation of pipes and demolition of the perimeter wall. It is evident that the Plaintiffs engaged a Valuer and as per the Report from Legend Valuers Limited which was prepared in 2018, he computed the area taken up by the Defendants by installing pipes and found out that the land value of the same was Kshs. 15,000,000/= and that the damage of the site works which entailed the perimeter wall, clearing the soil and debris amounted to Kshs. 1,500,000/= and on for the noise and disturbance, the Valuer computed the same to Kshs. 2, 475,000/=.
23. In the case of *Livingstone vs Rawyards Coal Co.* [1880] 5 App cases 25 the court defined the measures of damages as: -

“that sum of money which will put the injured party in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation”
24. This court has found out that the Defendants trespassed the suit property destroyed it as per the evidence produced. The suit property is a prime property since it is located on the Kisumu -Kakamega Highway and therefore I am of the view that for the value of the of land that was taken up by the Defendants, parties herein should engage a government surveyor and valuer to ascertain the value of property and thereafter the Plaintiffs should be compensated.
25. On damage of the perimeter wall, clearing of the soil and debris, this court is of the view that Kshs. 500,000/= is sufficient.
26. On general damages, I am guided by the following cases:

In the case of *Park Towers v Moses Chege & Others* (2014) eKLR where the court held as hereunder;

“I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case. As observed in the cases referred to there is no mathematical or scientific formula in such cases for assessment of general damages. However, in the case before me I consider that the suit properties are sizeable parcels sitting on nearly three quarters of an acre of land located in the Central Business District (CBD). This is a prime property in the City Centre and



any unlawful act of aggression and/or intrusion that prevents the rightful owner of the property from enjoyment of his ownership rights of possession and use is to be frowned at and is punishable by way of an award of damages.”

in the case of *Philip Ayaya Aluchio v Crispinus Ngayo* [2014] eKLR where it was held as follows:

“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 after the trespass or the costs of restoration, whichever is less See *Hostler – VS – Green Park Development Co.* 986 S. W 2d 500 (No. App. 1999).

Nakuru Industries Limited v S S Mehta & Sons [2016] eKLR where the court faced such a similar situation it was held as follows:

“A similar situation pertains in the present case. The exact value of the land before and after the trespass is not proved. However, I have found the defendants did trespass onto the plaintiff’s land and conduct some excavation. For this reason I award the defendant damages in the amount of Ksh 500,000/= (five hundred thousand only) plus interest and costs of this suit from the date of this judgment until payment in full.”

In the case of *Willesden Investments Limited vs. Kenya Hotel properties limited* NBI H.C.C. NO. 367 of 2000 (a case cited by the plaintiff), the court stated that;

“There is no mathematical or scientific formula in these types of cases and that the guiding factors are the circumstances in each case. It is my considered view that Ksh. 10 000 000 is a reasonable award for general damages”.

27. In the instant case, the value of the entire suit property has not been ascertained. However, the Valuer valued a portion of the land that has been taken up by the Defendants at Kshs. 15,000,000/=. Based on the circumstances of this case, this court has to exercise discretion in awarding general damages for trespass and I am of the view that Kshs. 6,000,000/= is reasonable.

28. The Plaintiffs also prayed for exemplary damages since the Defendants are making use and gaining profits from the sewer pipes that were laid on the suit property while the Plaintiffs cannot make use of the suit property since pipes are running through. This court will exercise discretion in awarding exemplary damages and am also guided the case of *Mikidadi –vs- Khaigan and Another* [2004] eKLR 496 where Ochieng J stated that:

“Exemplary damages are only to be awarded in limited instances namely. (a) oppressive arbitrary or unconstitutional action by servants of government. (b) Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff, or (c) Cases in which the payment of exemplary damages is authorized by statute.”

29. It is true that that the actions of the Defendants were unconstitutional however the Defendants are body corporates and not government institutions. The Plaintiffs were not able to provide evidence to show how much profit the Defendants are making as a result of the said installation of the pipes. This court therefore declines to award exemplary damages.

30. This court therefore enters Judgment in favour of the Plaintiff as against the Defendants jointly and severally for:



1. Permanent orders of mandatory injunction compelling the Defendants to enter into an appropriate wayleave agreement with the Plaintiffs with attendant compensation for the acquisition of the wayleave in respect of Title Number Kisumu/Municipality Block 4/112, Tom Mboya Estate, Junction of Nyerere Highway and Indusi Road, Kisumu City in Kisumu County.
2. An order compelling the Defendants to compensate the Plaintiffs for the portion of Title Number Kisumu/Municipality Block 4/112, Tom Mboya Estate, Junction of Nyerere Highway and Indusi Road, Kisumu City in Kisumu County, which portion was acquired for laying of the pipe.
3. Orders compelling the Defendants to compensate the Plaintiffs for loss of value of Title Number Kisumu/Municipality Block 4/112, Tom Mboya Estate, Junction of Nyerere Highway and Indusi Road Kisumu City in Kisumu County after valuation by the Government Valuer.
4. General damages for trespass, nuisance and breach of rights to property of Kshs. 6,000,000/= and Kshs. 500,000/= on damage of the perimeter wall, clearing of the soil and debris.
5. Costs of this suit.

DATED AT KISUMU THIS 14TH DAY OF JULY 2022

ANTONY OMBWAYO

JUDGE

