



REPUBLIC OF KENYA



KENYA LAW
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Kirui v Kenya Airports Authority (Environment and Land Case Civil Suit 719 of 2011) [2022] KEELC 13284 (KLR) (30 September 2022) (Judgment)

Neutral citation: [2022] KEELC 13284 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 719 OF 2011
LC KOMINGOI, J
SEPTEMBER 30, 2022**

BETWEEN

PATRICK KIPTERER KIRUI PLAINTIFF

AND

KENYA AIRPORTS AUTHORITY DEFENDANT

JUDGMENT

1. By a Complaint dated December 15, 2011, amended on February 10, 2012 and further amended on October 17, 2012, the Plaintiff prays for judgement against the Defendant for;
 - a. A permanent injunction against the Defendant, its agents, employees and whosoever is acting on its instructions from further interfering with the Plaintiff's lawful re-entry and occupation of the property LR 9042/57.
 - b. Spent.
 - c. A mandatory injunction do issue restraining the Defendants and /or agents from trespassing, and /or from occupying the Plaintiff's premises and /or in any other way laying claim to the Plaintiff's property known as LR No 2042/567.
 - d. Spent.
 - e. A declaration that the Defendant has no right to invoke statutory powers to evict and/or trespass over constitutionally protected private property and/or dealing with the Plaintiff's property in any way.
 - f. General damages.
 - g. Specific special damages. (Particulars to be adduced at the hearing thereof) as set out in paragraph 4 totaling Kshs 12, 629,292/=.



- h. Aggravated and/or exemplary damages.
 - i. Mesne profits at the rate of ksh 70, 000/= per month until vacant possession is delivered.
 - j. Loss of business at the rate of Kshs 30, 000/= per day from December 13, 2011.
 - k. A declaration that the Defendant's actions are unconstitutional.
 - l. Any other relief this Honourable Court may deem apt and fit to grant.
 - m. Costs of this suit.
2. The Plaintiff averred that on May 1, 1994, the Government of Kenya issued him with a grant IR No68496, LR No 9042/567 vide Deed Plan Number 196458. He stated that he took up possession and erected a dwelling house and a medical facility in the name and style of Santa Rosa Health Care.
 3. It is the Plaintiff's case that on or about December 13, 2011, the Defendant illegally and maliciously evicted him from the suit property. He averred that he sustained loss of business, household goods and medical equipment which loss he particularized at Kshs 12, 629,292/=. He contended that the Defendant's actions were in gross violation of the constitution and particularized the Defendant's alleged acts of malice and illegality.

The defendant's case

4. By the amended statement of defence dated October 16, 2012, the Defendant denied the allegations contained in the Plaint. It contended that the land and house claimed by the Plaintiff herein is within the confines and boundaries of the defendant's parcel of land known as LR Number 9042/667. It further averred that the said land and house forms part of the land previously owned by the Government of Kenya and on which parcel of land the Government of Kenya through the department of Aerodromes, under the office of the president constructed a housing estate known as Embakasi village.
5. The Defendant averred that it was established in 1991 vide The *Kenya Airports Authority Act*, Cap 395 Laws of Kenya and by virtue of the Kenya Airports Authority (vesting) order, 1994, all government property previously administered by the department of Aerodromes would vest in the Defendant.
6. It also contended that it is in possession of court orders issued in HCCC No 1661 of 1998 (Consolidated with HCCC NO 1683 of 1998) whereby the City Council of Nairobi was declared to have no legal right, interest or claim in or over any of the houses constructed and falling within the suit premises. It added that the issues herein having been dealt with in those suits, this matter is res-judicata. It also contended that in evicting the Plaintiff, it was implementing court orders issued in the aforementioned suit and its actions were within its powers under Sections 12, 14, 15 and 16 of the *Kenya Airports Act*.

Evidence of the plaintiff

7. PW1, Dr Patrick Kipterer Kirui the Plaintiff testified on November 27, 2017 and on June 24, 2019. He told the court that in 1992, while working as a civil servant with Ministry of Health and based at Kenyatta National Hospital, he approached the commissioner of Lands for a government residential house as it was a government policy to allocate civil servants houses they resided on or vacant houses. He further stated that in 1991, he got a letter of allotment for a plot at Embakasi and a government surveyor showed him the suit plot which had remnants of a burnt building.



8. It was his testimony that he was issued with a Grant to LR No 9042/567 by the government in 1994 and put up his dwelling house in 1995. He told the court that on December 13, 2011, at around 11 a.m, a group of fifty (50) persons invaded his house and business and threw away his items. He stated that he was evicted in a traumatic manner in the presence of his children and that there were about 10 or more patients waiting to be treated. He added that his patients were forced to run away when the doors of the clinic were brutally opened.
9. He stated that he was not party and was not aware of the existence of HCCC No 1683 /1998 and HCCC No 1661/1998. He testified that it is not true that all land in Embakasi Village belongs to the Defendant as there are other private properties including two churches, a petrol station and Wanandegge Sacco Offices. He produced a search which showed that as of November 7, 2017, he owned the suit property. He told the court that a vesting order was issued to the Defendant after he had been issued with a grant and that he pays rates and rent.
10. It was his testimony that he is a medical practitioner and that he registered his clinic, Santa Rosa Healthcare in 2003 and his income was growing. He added that he started acquiring equipment to run a small nursing home and would have been running a hospital by now if he had not been evicted. It was his testimony that he lost medical equipment worth Kshs12 million and that he did not salvage anything. He also stated that he used to see between 15-20 patients per day and would charge ksh 1000/= per patient. He testified that he had laboratory to do routine medical checkups/tests, a pharmacy and antenatal clinic and that he would make Kshs 30,000/= in a day.
11. PW1 also told the court that this Court's orders issued by Lady Justice Koome and Lady Justice Mwilu's of January 24, 2012 which directed the Defendant to reinstate the Plaintiff on the suit property were ignored by the Defendant. He added that his house was allocated to someone else. He stated that his house is on LR 9042/567 and it was first designed as a residential house at the cost of Kshs 2million in 1995 but in 2003, his architect designed a clinic and a residential part with three (3) bedrooms. He further stated that at the start of this case, the residential house would fetch Kshs 70, 000/= in rent and the clinic which had a reception, laboratory, minor theatre and an observation room would fetch Ksh 50,000/= in rent per month.
12. He urged the court to consider that he earned his livelihood from the suit property and had employed a receptionist, a health record officer, a lab technologist, a clinical officer, a pharmaceutical technologist and a part time doctor and he was able to pay them but he now lacks that income since the eviction. He also urged the court to consider that the business had prospects of growing and expanding and to also consider that Defendant defied this court's orders. He called on the court to punish it for contempt after illegally, evicting him, causing him to have ill health due to the stress it caused him and defaming him.
13. When he was cross examined, he stated that he worked at Kenyatta National Hospital until 1994 and that at the time, he was employed by the Ministry of health and was residing in a government rented house at Donholm but he retired in 2002.He added that a policy of allocation of houses to civil servants existed in 1992 where civil servants could apply be allocated houses by the Commissioner of lands.
14. He stated that Embakasi village was not meant for airport staff as the commissioner of lands allocated him the plot and after paying he statutory fees he was issued with a title deed. When referred to the special conditions contained in the grant, he stated that condition No5 provided for construction of one dwelling house up to 2002. He further stated that his building plans were approved but most of the documents got lost during the cruel eviction.



15. He stated that after 2002, he got permission to modify his residential house and ran a medical practice. He added that he got authority from the Ministry of Health to run a medical practice. He stated that his vision was to run a nursing home and a hospital but he was stopped midway from achieving that dream. He also stated that the whole area where his property sits is known as Embakasi village and that the whole area was Government land. He added that the neighborhood has dwelling houses but some properties have been converted for commercial use and he was going to apply for change of user of his land with time.
16. He stated that he was not aware that his being evicted was due to ministerial orders and that his items were placed outside and most of them were destroyed as he was not able to salvage anything. He added that he ought to have been given notice in order to transfer his medical equipment /drugs to safer places.
17. When he was re-examined, he stated that he was issued with a title on May 1, 1994 while the Defendant's title was issued on May 1, 1998 and that he has not surrendered his title and neither was it cancelled. When referred to condition No 7 of the Special Conditions contained in his title, he stated that the clinic was not a dangerous/offensive activity. He also stated that the eviction was covered by the press and that since receipts were damaged during eviction, he got a quotation from his medical suppliers. He stated that he was on the property for eighteen (18) years. He also stated that in 1994, the Defendant did not exist and Aerodromes department was under the Ministry of public works. When referred to Min 14/78 of the Minutes of October 26, 1978, he stated that he is not aware the land was allocated the Defendant for its employees.
18. PW2, Robert Kogi Theuri, the Plaintiff's electrician testified on June 24, 2019. His witness statement dated February 20, 2012 was adopted as part of his evidence in chief. He told the court that he knew the Plaintiff through his driver and that the Plaintiff was his family doctor. He testified that an older house that sat on the land got burnt and the roof sank in but the Plaintiff constructed a new house between 1995 and 1996 and he is the one who did the electrical wiring for him.
19. He also stated that in 2002, the Plaintiff renovated the house and built toilets at the back and front and partitioned it to create a clinic. He stated that he is the one who did the electrical wiring after renovation.
20. When he was cross-examined, he stated that he learnt about the eviction of the Plaintiff on KTN news but he did not know who had evicted him. He also stated that the Plaintiff's house was fenced and after he did the electrical wiring for him, he must have applied to Kenya power for electricity connection.

Evidence of the defendant

21. DW1, Margaret Munene, the Defendant's legal Counsel testified on December 17, 2019. Referring to minute 9/7 of the minutes of the Inter-Ministerial Committee meeting on accommodation of staff of Nairobi Airport held on June 21, 1978, she told the court that the said minutes were addressing the issue of accommodation for staff working within Jomo Kenyatta International Airport (formerly Nairobi Airport) and that 200 acres at Embakasi Village were found suitable for that purpose.
22. Referring to Minute 14/78(i) of the minutes dated October 26, 1978, she stated that the land identified at Embakasi was sufficient for 2800 housing units and Minute 14/78(ii) stated that LR 40/7 and LR 40/3/R would be acquired by the government. She stated that Minute 2/79 of the minutes of March 1, 1979 and the letter dated January 31, 1980 addressed to the Permanent Secretary, Office of the President from the Commissioner of Lands shows the land at Embakasi village was reserved for houses for airport staff and that they were subsequently put up .



23. She told the court that as early as the 1970's, Embakasi village belonged to Aerodromes Department but it was only registered in the Defendant's name in 1996. She testified that the land has never been degazetted to be private property. She stated that there was a dispute in Nairobi HCCC No1683 of 1998, between the Defendant and Nairobi City Council which was claiming ownership of the houses on the land and a decree was issued in Nairobi HCCC No1661 of 1998 (Consolidated with Nairobi HCCC No1683 of 1998) that the Plaintiffs therein do give vacant possession of the houses in Embakasi village and particularly in LR No9042/667 since it belonged to the Defendant herein.
24. She stated that the house claimed by the Defendant is within Embakasi village and it is known as House NoC7. She added that according to a list of Embakasi village tenant welfare group, the said house NoC7 was occupied by one Teresiah Waitthera Kariuki since 1970 but the occupant vacated in 2013 after the judgement of Justice Ransley in Nairobi HCCC No1661 of 1998 (Consolidated with Nairobi HCCC No1683 of 1998).
25. She stated that Special condition No5 of the grant issued to the Plaintiff provided for construction of one dwelling house yet the Plaintiff was using it as a clinic without the permission of the Defendant to carry out any alterations.
26. She stated that around 1988, issues of irregular occupation of Aerodomes department department's houses arose and when the Defendant was established in 1991, land administered by Aerodomes department was transferred to the Defendant by virtue of Legal Notice No201 ,being the Kenya Airports Authority (vesting) order, 1994. She also stated that at one time, the suit premises was destroyed by fire and it is after that incident that the Plaintiff illegally moved into the suit premises.
27. DW1 also stated that the issue of ownership of the suit premises and other house units within the Embakasi village had been the subject of debate in Parliament wherein the Minister of state, Office of the President confirmed on July 16, 1988 that the houses within Embakasi village were constructed by Aerodromes department and transferred to the Defendant.
28. DW1 also stated that a casual glance o the Embakasi Village print out from Google maps shows that the suit premises is within the Defendant's land and it is next to other similarly constructed houses within the Defendant's parcel of land.
29. When cross-examined and referred to the letter dated January 10, 2012 addressed to the Commissioner of lands by M/s Nyiha Mukoma Advocates, seeking to authenticate the Plaintiff's title, she stated that she is not sure whether the Commissioner of lands replied to the said letter.
30. When referred to the online search on LR No9042/567, he stated that it indicates that the Plaintiff is the proprietor and it falls within Embakasi village but the Defendant has not taken steps to challenge the Plaintiff's title in this suit. She added that the Defendant did not file a counterclaim or take out 3rd Party Proceedings against the Government of Kenya. When referred to the Kenya Airports Authority (vesting) Order, 1994 in the Gazette Notice dated June 7, 1994, she stated that the order was issued by Mr Jackson Kalweo, Minister of State, Office of the President but the Minister could not allocate land. She also stated that the land that comprises Embakasi village had already been allocated by the Commissioner of lands to Aerodromes department and it included LR No 9042/665-LR No 9042/670 but they was transferred to the Defendant and titles were issued in 1996 and 1998.
31. When referred to Minute 14/78(ii) of the Ministerial Minutes of August 1, 1978, she stated that it was resolved that LR No 40/7 and LR No 40/3/R would be acquired by the government and the rest would go to private developers. She stated that there are private developments at Embakasi village being AIC, Catholic Church, a Petrol station and Wanandege Sacco.



32. When referred to Nairobi HCCC No 1661 of 1998 (Consolidated with Nairobi HCCC No 1683 of 1998), she stated that the said suits do not involve the Plaintiff and there was no eviction orders against the Plaintiff in those suits.
33. DW2, Rodgers Wanyonyi Manana, an investigator working at the Defendant's security department testified on October 19, 2021. His witness statement dated May 4, 2013 was adopted as part of his evidence in chief. He stated that the house C7 sits on the suit property which is part of LR No9042/667. He told the court that it is a requirement for airport staff to live within the airport since they work in shifts. He stated that Aerodromes constructed houses for airport staff but those who retired would lease their houses to non-staff which led to insecurity in the village. He pointed out that one John Mathai who was the Defendant's staff member was murdered at the time.
34. It was his testimony that it became apparent that non-staff members had to be removed from Embakasi village and a case was filed by the occupants being Nairobi HCCC No1661 of 1998 (Consolidated with Nairobi HCCC No 1683 of 1988). He added that the outcome was to issue notices to persons who were illegally occupying the Defendant's houses to vacate .He further stated that house C7 was occupied by one Teresiah Waithera but she vacated.
35. It was his testimony that in 2011,the Government of Kenya initiated a process of recovering the Defendant's property which had been illegally acquired by private individuals. He testified that on the material day that the Plaintiff was evicted, he was on his way to work when he saw police protecting property as the eviction was carried out. He stated that the Plaintiff requested for time to carry his belongings and that he got a vehicle that moved his equipment and goods.
36. When he was cross-examined, he stated that the Plaintiff packed his equipment. When referred to the letter dated January 10, 2012 addressed to the Commissioner of lands by M/s Nyiha, Mukoma Advocates seeking to authenticate the Plaintiff's documents, he stated that he did not see the response to that letter by the Commissioner of lands. He also stated that it was not possible for the Plaintiff to have acquired the land as it already belonged to the Defendant. He added that there are portions of land set out for public utility at Embakasi village but a residential /dwelling house is not a public health facility.
37. At the close of the oral testimonies, parties tendered final written submissions.

The plaintiff's submissions

38. They are dated November 30, 2021.Counsel for the plaintiff submitted that the following issues arose for determination;
 - a. Whether the Plaintiff's title is absolute and indefeasible.
 - b. Whether the Plaintiff was issued with notice prior to eviction.
 - c. Whether the Defendant can validly claim the premises/property after expiry of 12 years.
 - d. Whether the Defendant's action amounts to trespass of property.
 - e. Whether the Defendant has pleaded and particularized fraud in its pleadings.
 - f. Whether the decrees and orders in (i) Nairobi HCC No1683 of 1988 (Kenya Airports Authority) and City Council of Nairobi); Nairobi HCCC No1661 of 1998 are binding on the Plaintiff herein who was not a party to the said suits.
 - g. Whether the Plaintiff suffered damages.



- h. Whether the Plaintiff is entitled to reliefs sought.
39. Counsel for the Plaintiff submitted that the Gazette Notice dated June 7, 1994 vesting all government's property previously administered by the Department of Aerodomes, Office of the President to the management of the Defendant did not transfer any government land to the Defendant since a vesting order under the provisions of *Kenya Airports Authority Act* is incapable of creating title to land and / or conveying the same.
40. It was counsel's submission that the Plaintiff's ownership of a private residential cum medical center in Embakasi village properly fits in the government policy of the area that private development would run alongside those developed by government as per Min 9/78 of the Minutes of Inter – Ministerial Meeting on Accommodation of August 1, 1978. He pointed out that there are other private establishments in the area and submitted that the Defendant cannot claim that it owns the entire land.
41. Counsel also submitted that the Plaintiff claims for mesne profits of Kshs 70,000/= per month since the property invaded by the Defendant was both a business and a residential premise which would have fetched an income of over Kshs 70,000/=. He added that the figure would have gone up by at least 10 % per annum and thus would currently fetch at least Kshs 120,000/= per month.
42. It was counsel's submission that the Defendant has no basis to claim ownership of a building that it did not construct and its action to take over possession of the Plaintiff's house amounts to arbitrariness and is an act of impunity. He relied on the case of Ibrahim Sangor Osman v Minister of State for Provincial Administration and Internal Security, Embu Petition No2 of 2011 to submit that eviction without a notice is a forced eviction and is contrary to the law and a serious human rights violation. He submitted that his right to a home under Article 43(1)(b) of the *Constitution* was also violated. He added that DW3's assertion that the Plaintiff requested for time to transport his belongings does not amount to notice known to law.
43. Counsel submitted that Defendant's claim of being in possession of a title document over the Plaintiff's parcel did not give him any valid reason in law to evict the Plaintiff without notice as it ought to have invoked the right procedures in law thus its actions amounted to trespass. Relying on the case of *Embakasi Properties Limited and Another v The Commissioner of Lands and another* [2019] eKLR, and the case of *Wreck Motors Enterprises v Commissioner of Lands* [1997] eKLR, counsel submitted that when a court is faced with an issue of double allocation, the 2nd allocation should be declared a nullity. He pointed out that he was 1st to be issued with title on May 1, 1994 while the Defendant was issued with its title 4 years later, on May 1, 1998.
44. It was counsel's submission that during the hearing of this matter, the official search indicated that the suit property belongs to the Plaintiff and since the Defendant did not call the Registrar of Titles and/ or Commissioner of Lands to prove otherwise, the suit property belongs to the Plaintiff.
45. On the issue of limitation, counsel submitted that since the Plaintiff is the registered proprietor of the suit land, he was protected under Section 23 of the Registration of Titles Act (repealed) and Section 25 (1) and 26(1) of the current applicable law being the *Land Registration Act, 2012*. He further submitted that since the Plaintiff has been in the property for more than 12 years, the limitation period for a claim or recovery of land is capped at 12 years by the *Limitation of Actions Act* thus if it had any claims they were extinguished by the law.
46. Relying on the case of *Vijay Morgaria v Nansing Madhusingh Durbar, Halushi Nawasingh Darabar Naro* Civil Appeal No106 of 2000 and the case of *Tanganyika Farmers Association Limited v Unyamwezi Development Corporation Ltd*(1960)EA, counsel submitted that a party is bound by his/



her pleadings. He pointed out that the Plaintiff's title has not been challenged by way of a counterclaim and particularizations of fraud/misrepresentation. He relied on the case of *John Mbuguo Getao v Simon Parkoyer Mokare & 4 others* to submit that that fraud was not proved during tendering of evidence either.

47. On the issue of arbitrary eviction and forceful occupation, counsel submitted that Article 40 of the *Constitution* bars arbitrary dealings in land matters. He added that the Defendant misapplied the *Kenya Airports Authority Act* since while it spells instances wherein the Defendant can enter land, it does not condone entry to evict and assume ownership without due processes of the law.
48. Counsel also submitted that due to the Defendant's conduct of disobedience of court orders of December 16, 2011 and January 20, 2012 and acting with impunity, it is liable to pay exemplary/ aggravated damages.

The defendant's submissions

49. They are dated September 5, 2022. They raise six issues for determination;
 1. Does the Defendant (Kenya Airports Authority) own the parcel of land within which House C7 is situate?
 2. Was the premises House No C7 available for allocation to the Plaintiff?
 3. Was the Defendant divested of its ownership of the subject property?
 4. Does the principle of absolute and indefeasibility of title apply?
 5. Was the Plaintiff properly evicted?
 6. Has the Plaintiff specifically proven the damages sought?
 7. Has the Plaintiff proven the claim for general and aggravated damages?
50. By an Inter-ministerial Committee Meeting held on June 13, 1978 and 1st August 1978 the Ministry of Works, the Aerodromes Department, the Physical Planning Department, the Nairobi City Council, the Ministry of Foreign Affairs, the Ministry of Housing and Social Services, the Office of the President (police) together with the Treasury met to specifically discuss and came up with a solution concerning the accommodation of staff members of Nairobi Airport (now Jomo Kenyatta International Airport).
51. By the Minutes of June 21, 1978 the Inter-Ministerial Technical Committee recommended that about 200 hectares of land be set aside for housing development enough to accommodate 2,000 houses for Nairobi Airport staff. The parcel of land and development houses was termed as Embakasi Village.
52. Vide a meeting held on March 21, 1979 the technical committee confirmed acquisition of LR 20/7 and LR 40/8 which would be utilized for housing development. The two parcels of land were acquired for this purpose. By a letter dated January 31, 1980 from Commission of Lands wrote to the office of the President (within which the Aerodromes Department was then situated) and informed the office that vide an ID Plan No 51776/358A the part of land measuring approximately 53.38 ha had been reserved for the development of pool houses for the airport staff.
53. The houses were constructed and completed and subsequently occupied by the airport staff as intended. The suit premises the subject matter of this suit, is one such house referred to as House C7 in the Defendant's record.
54. By an Act of Parliament enacted in 1991 the Kenya Airport Authority was established. The Defendant, was the succession in title of the Department of Aerodromes. A department within the office of the



- President. The vesting order provided that all government property previously administered by the Department of Aerodromes, were to transfer to the Defendant herein.
55. It is further submitted that even though a formal title had not been acquired for the said Embakasi Village, the land with its dimensions and abutments had been delineated as LD Plan No 51776/358A and the same duly transferred to the Defendant as per the vesting order.
 56. In 1998, the Defendant caused a formal survey to be carried out on the land comprising of Embakasi Village and a Deed Plan thereof and subsequent thereto, title deeds in respect of the land were issued. The land office designated LR No 9042/665, LR No 9042/667, LR No 9042/668, LR No 9042/669 and LR No 9042/670 as Embakasi Village whose titles were issued on May 1, 1998. DW1 testified that the acquisition of titles by the Defendant was a means of securing its land which had already become a subject of illegal occupation by others not airport staff.
 57. It is further submitted that House C7, the subject matter of this suit is situated within the parcel of land surveyed as Embakasi Village as per the map produced by the Defendant. That from 1978, when the Inter-Ministerial Technical Committee met, the intention and subsequent action has always been that houses were to be constructed for staff workers working at Jomo Kenyatta International Airport in order to comply with the international civil aviation organization standards of providing safe and proximal living quarters for airport staff.
 58. It is further submitted that the Plaintiff's case is that he was working as a civil servant based in Kenyatta National Hospital when he approached the Commissioner of Lands for allocation of a Government House. He was then allocated the suit property in Embakasi Village. His case is that he was subsequently issued with a title on February 22, 1996 being IR No 68496 LR No 9042/567.
 59. It is submitted that 1996, the premises was part of land that had already been delineated, houses constructed and allocated to airport staff housing and vested in the then Aerodromes Department under the office of the President. That the vesting order of June 7, 1994 served to transfer all government property previously administered by the erstwhile Aerodromes department were vested in the Defendant notwithstanding that no formal letter had been issued in respect thereof.
 60. It is further submitted that once the land has been set aside by the President for government use under the Government Lands Act (then applicable, now repealed) the same is no Longer unalienated land and the same could not have been available for allocation to another. Counsel has put forward the cases of *James Joram Nyaga & Another v AG & Another* [2007] e KLR; *Milankumarn Shar & 2 Others v City Council of Nairobi & Others* HCCC 1024 of 2005; *Satima Enterprises Ltd v KRA & Another* [2022] e KLR.
 61. Counsel further submitted that the Plaintiff did not produce a letter of allotment. His claim that it was lost during the eviction is inconsequential since the land had been alienated and could not have been available for alienation. Counsel has put forward case of *KAA v Wambua Mila & 1066 Others* [2021] e KLR. The Plaintiff could not explain how the property situated in a residential area and permitted for such use has become a clinic/hospital where as no documents for change of user were produced. The root of Plaintiff's title is not clear. House No C7 was unlawfully allocated to the Plaintiff and the same ought to be cancelled.
 62. Counsel further submitted that courts are replete with authorities that guides the court on the applicability of Section 23 *Registration of Titles Act (Repealed)*. He has relied on the cases of *Funzi Island Development Ltd & 2 Others v County Council of Kwale & Others* [2014] e KLR; *Kassim Ahmed Omar & Another v Anwar Ahmed Abed & 2 others*; Malindi ELC 18 of 2015. The title held by the Plaintiff was not only irregularly acquired having been surveyed on land already alienated for



government use, with no letter of allotment or part development plan, with no proof of how the change of user was carried out, the certificate of title held by the Plaintiff does not meet the threshold of an indefeasible title hence this claim fails by the way side.

63. DW2, Rodger Wanyonyi Manana told the court that there had been a lot of encroachment into the houses by outsiders and other government bodies like the Nairobi City Council staff culminating into the Defendant filing suits for eviction. The suits HCCC 1683 of 1998, KAA v Nairobi City Council; HCCC 1661 of 1998; James Gatu & others v KAA were heard and determined and a decree issued requiring delivery of vacant possession of the houses to the Defendant.
64. The Plaintiff claims to have occupied the premises undisturbed and without knowledge of the Defendant's fights against illegal occupants whereas the issue was widely discussed to a point that it was a subject of debate in Parliament. House C7 occupied by the Plaintiff was part of the Defendant's staff houses within Embakasi Village. DW2 further stated that the illegal occupants had been notified of their illegal occupation of the airport houses and had been notified to vacate. Through the area chief, Mr. Johnstone Chege, notices were circulated to all houses including the Plaintiff's for illegal occupants to leave. That on or about November-December 2011 the Government through the Kenya Police embarked in an exercise dubbed "removal of illegal structures around the airport and other strategic installations and facilities".
65. DW2 further stated that on December 13, 2011, he witnessed police officers around Embakasi Airport houses, wherein he investigated and established that evictions were being carried out jointly by the Provincial Commissioner Nairobi, Provincial Police Office, Nairobi, Deputy PPO and OCPD Embakasi as the enforcing arm of government. The Plaintiff was one of the persons being evicted as he was illegally occupying house No C7.
66. DW2 further stated that the Plaintiff requested for three (3) hours to carry his belongings which request was granted by the police officers with the intervention of DW2. This was corroborated by the Plaintiff's own newspaper cutting being "The Standard of December 14, 2011 in page 9 for the Plaintiff's further Documents where it was observed that "Dr. Patrick Kirui who owns Santa Rosa Health Centre in Embakasi packs his belongings after being evicted". DW2 stated that the Plaintiff was able to cart away his belongings after the house was closed at 5 pm. Counsel put forward the cases of KAA v Wambua Mila (Ungani settlers) (Supra); Mitubell Welfare Society v KAA.
67. Counsel further submitted that there was no legislation on forcible evictions in place, the Defendant has demonstrated that the eviction was carried out properly by allowing the Plaintiff adequate notice to remove his personal items and other belongings from the suit property prior to eviction.
68. Counsel submitted that there was sufficient notice given to the trespasser's including the Plaintiff through the local administration channels vide the area chief Johnstone Chege. The Plaintiff had opportunity to undertake an organized move under the premises but open not to, on the claim that he owned the property.
69. Specific damages must be specifically pleaded and strictly proven. The Plaintiff did not prove that the special damages of Kshs 12,629,292/- were actually incurred. There were no records in form of receipts or ownership certificates provided to prove that the Plaintiff indeed owned the medical equipment and drugs whose value has been claimed. He has put forward the case of *Richard Okuku Oloo v South Nyanza Sugar Co Ltd* [2013] e KLR. This claim ought to be dismissed. Counsel submits that the Plaintiff's case has not met the standards required as laid down in *Rookes v Barnard* [1964] 1 ALL ER 367 as regards the claim for general exemplary and aggravated damages. He has also put forward the case of *Mikidadi v Khaigan & Another* [2004] e KLR. The Defendant has demonstrated that the suit premises - House C7 was repossessed for use by airport staff as it had been initially set aside. The



Plaintiff has benefitted from the unlawful trespass and illegal use of the Defendants house by running a profit making business to the detriment of the airport staff. He prays that the Plaintiff's claim for damages be dismissed. He also prays that the Plaintiff suit be dismissed.

Analysis and determination

70. I have considered the pleadings, the evidence on record, the written submissions on record and the authorities cited. The issues for determination are:-
- a. Is LR 9042/567 private property belonging to the Plaintiff?
 - b. Whether LR 9042/567 forms part of LR 9042/667 and whether it was acquired by the government for purposes of construction of airport staff houses.
 - c. Whether the Plaintiff was procedurally evicted.
 - d. Could the Defendant invoke statutory power to evict the Plaintiff?
 - e. Is the Plaintiff entitled to special damages, mesne profits and punitive damages?
 - f. Who should bear costs of this suit?
71. It is the Plaintiff's case that he was working as a civil servant at Kenyatta National Hospital, when he requested the Commissioner of Lands to be allocated a government house. It is his case that on May 1, 1994 the Commissioner of Lands, issued a Deed Plan No 196458; IR No 68496; LR No 9042/567. The suit property had a burnt down structure. It is further his case that the Commissioner of Lands invoked the relevant provisions of the law, alienated the land and issued a valid Title to him on 22nd February 1996.
72. The Plaintiff told the court that when he was allocated the suit property, he found a burnt down structure. He then constructed his own residential house which he later modified to serve as a residential house and a medical clinic in 2003. He then operated a medical clinic by the same Santa Rosa Health Care. He stated that he operated the said clinic until he was unlawfully evicted in the year 2011.
73. From the foregoing it is clear that the Plaintiff was allocated the suit property by the Commissioner of Lands. As to whether this was procedural or not will be addressed in the later paragraphs.
74. The Defendant's case is that the land and the house claimed by the Plaintiff is within the confines and boundaries of the Defendant's land parcel LR No 9042/667. That the said land and house form part of the land previously owned by the Government of Kenya. The Defendant's claim arises out of an Inter-Ministerial Committee meeting held on 13th June 1978 and 1st August 1978 comprised of the Ministry of Works, the Aerodromes Department, the Physical Planning Department, the Nairobi City Council, the Ministry of Housing and Social Services, the Ministry of Foreign Affairs, the Office of the President together with the Treasury. They all met to specifically discuss and come up with a solution concerning accommodation of staff members of Nairobi Airport (now Jomo Kenyatta International Airport).
75. DW1 Margaret Munene, legal counsel with the Defendant adopted the written statement of Joy Nyaga. She gave a history in detail how the Defendant became the owner of the suit property.
76. Through the minutes of 21/6/1978 the Inter-Ministerial Technical Committee recommended that about 200 hectares of land be set aside for housing development enough to accommodate 2000 houses for Nairobi Airport staff. The parcel of land and the developed houses were termed as Embakasi Village. Subsequently the government acquired land parcel Nos 40/7 and LR 40/8 for this purpose. Houses



were constructed and completed. They were subsequently occupied by the Airport staff. The suit premises, the subject matter of this suit, is one such house referred to as House C7.

77. The said houses were vested in the Aerodrome Department under the office of the President which by then was the office in charge of matters concerning aerodromes. The same were later transferred to the defendant when it came into operation in 1991.
78. The Plaintiff admits that when he was allocated the suit property there was burnt down house. He did not produce any letter of allotment and other related documents. It is the Defendant's case that LR 9042/567 was illegally and unlawfully issued to the Plaintiff as at all times the suit property was part and parcel of Embakasi Village which is a collection of houses within Kenya Airports Authority Land. By virtue of a vesting order of June 7, 1994 all property administered by the Aerodromes Department was transferred to the Defendant. In the case of *James Joram Nyaga & Another v AG. & Another* [2007] e KLR it was held thus:-

“The above section clearly limits the power of the Commissioner to executing leases or, conveyances on behalf of the President and the proviso to the section specifically limits the power to alienate unalienated land to the President. We find and hold that the Commissioner of Lands had no authority to alienate the disputed plot to the Applicants as he purported to do vide the letter of 18th December 1997. That was the preserve of the president. It follows that the Commissioner of Lands could not have made any grant under the Government Land Act Cap 208 Laws of Kenya nor could he pass any registrable title under the Registration of Titles Act Cap 281 of the Laws of Kenya”.

79. I agree with the Defendant's submissions that once land had been set aside by the President for government use under the Government Lands Act, (now repealed) the same was no longer unalienated land and the same could not have been available for allocation to the Plaintiff. I therefore find LR No 9042/567 is not private property and does not belong to the Plaintiff.
80. The Defendant has demonstrated that by 1996 when the Plaintiff acquired title to the suit property the same had already been delineated, houses constructed and allocated for airport staff housing.
81. In 1998, the Defendant caused a formal survey to be carried out on the land comprising of Embakasi Village and Deed Plans and Title Deeds were issued. There now exist LR Nos 9042/665, LR No 9042/667, LR No 9042/668 LR No 9042/669 and LR No 9042/670. The said titles were issued on 1st May 1998. The Defendant was able to demonstrate that house No C7 the suit property claimed by the Plaintiff as LR No 9042/567 was part of LR No 9042/667. The same is Part of the land which had been acquired for construction of houses for Airport staff. In the case of *KAA v Wambua Mila & 1066 others* [2021] e KLR Okong'o J observed thus:-

“It is surprising that Uungani could be allocated land that was already surveyed and included as part of LR No 21919. It is even more shocking that the Director of Surveys could authorise a survey to be conducted for the purposes of subdividing LR No 14231 that was already included as part of LR No 21919 whose Deed Plan was authenticated and issued by the same Director of Surveys.”

“It is clear from the foregoing that the purported allotment of LR No 14231/1 to Uungani was marred with several illegalities and irregularities”.

“Uns. Agricultural Plot “b” Mavoko Municipality”/LR No 14231/1 that was allocated to Uungani was part of LR No LR No 3864 that was acquired by the Government for the



development of JKIA. The land was therefore reserved and set apart for future development of JKIA and as such was not available for allocation to Uungani or any other person.”

“The Government could not allocate any part of that land for others uses unless the needs of JKIA had been satisfied and JKIA no longer required the land.”

“In this case, as at the time of the purported allocation of part of LR No 14231 to Uungani, the whole of that land was already surveyed as part of LR No 21919 and a title issued to the plaintiff. LR No 14231 could not therefore be lawfully allocated to Uungani unless the title for LR No 21919 was cancelled and the purported land excised from it.”

“From the foregoing reasons, it is my finding that LR No 14231/1 was not allocated to Uungani lawfully”

The facts are similar to instant suit.

82. I find that the proper procedure was not followed in allocating the suit property to the Plaintiff as the same was acquired by the Government for purposes of construction of airport staff houses.

83. In the case of *Kassim Ahmed Omar & Another v Anwar Ahmed Abed & Others*; Malindi ELC No 18 of 2015 the court held that:-

“A certificate of title is an end product of a process. If the process that was followed in issuing the title did not comply with the law, then such a title can be cancelled by the court”.

84. The Plaintiff did not produce the Letter of Allotment and/or Part Development Plan. He was not able to prove that his title was issued procedurally. As stated above the land had already been surveyed and set aside for houses for airport staff.

85. DW2, Rodgers Wanyonyi Manana, an investigator with the Defendant in the security department, told the court that in the year 2011 the Government of Kenya initiated a process of recovering the Defendant’s property which had been illegally acquired by private individuals. That the Defendant initiated HCCC 1661 of 1998 as consolidated with HCCC 1683 of 1998 which suits were heard and finalized. The area chief was then tasked with the responsibility of issuing notices to people who were illegally occupying the Defendant’s houses. He stated that some illegal occupants heeded and vacated.

86. He confirmed that he saw a contingent of police who were there to ensure that the people vacated. He stated that the Plaintiff sought for three hours to move his items. He got a vehicle and was able to move his stuff.

87. When he was cross examined, by the Plaintiff’s counsel, he admitted that there was no notice asking the Plaintiff to vacate the suit premises. I find that the Plaintiff was entitled to be served with a notice to vacate. In the case of *KAA v Wambua Mila & 1066 Others* (supra) Okong’o J observed thus:-

“.....Furthermore, even if the defendants were to be evicted, the eviction had to be carried out in a humane and dignified manner. After watching the video clips that were played in court, I am in agreement with the defendants that their eviction was inhuman and the force used was excessive. The parliamentary committee reached the same conclusion in its report. The plaintiff had denied that it was involved in the eviction of the defendants. From the evidence before the court, the eviction of the defendants was carried out by various government agencies and ministries. In the parliamentary committee report they are named as, the plaintiff herein, the Provincial Commissioner, Nairobi, Provincial Police Officer Nairobi, Deputy Provincial Police Officer and the Officer Commanding Police Division



Embakasi. The land in dispute belonged to the plaintiff. It is the plaintiff who issued notices to those who were in occupation of the suit property to move out or risk eviction. The trespassers did not move and were forcefully evicted. I am satisfied from the evidence on record that the defendants were evicted from the suit property by the plaintiff with the assistance of the police. Since the defendants were evicted from the suit property in an inhumane manner in breach of their right to human dignity and security of their person, it is my finding that their eviction from the suit property was carried out unlawfully”.

Although the Plaintiff was wrong to hold onto the land, the defendant was not justified to evict him in the manner that it did.

88. Having found that the Plaintiff was illegally evicted he is entitled to general damages which I award at Kshs 1.5 million I think is reasonable.
89. Having found that the Plaintiff's title was illegally and or unprocedurally acquired, I find that he is not entitled to any other damages. DW2 told the court that the Plaintiff sought for time to cart away his property. The request was granted. He has produced a newspaper cutting showing what went on that day. There is a photo of him packing items into a vehicle.
90. Specific damages must be specifically pleaded and proved. I have gone through the Plaintiff's evidence and I find that he has failed to prove that he lost items worth Kshs12,629,292/-. There are no records in form of receipts or ownership certificate to prove that he owned the said medical equipment and drugs. In the case of *Richard Okuku Oloo v South Nyanza Sugar Co. Ltd* 2013 eKLR

“We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.

It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite the latest decision of this Court on this point which appears to be *Eldama Ravine Distributors Limited and another v Chebon* civil appeal number 22 of 1991 (UR). In the latest case, Cockar JA who dealt with the issue of special damages said in his judgement:

It has time and again been held by the courts in Kenya that a claim for each particular type of special damage must be pleaded. The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.”

91. I also find that the Plaintiff is not entitled to mesne profits as the title he holds was acquired unprocedurally.
92. I rely on the case of *Mikidadi v Khaigan & Another* [2004] e KLR to find that the Plaintiff is not entitled to general, exemplary and aggravated damages.



93. Under Section 27 of the *Civil Procedure Act*, costs follow the event and at the discretion of the court. I find that it would be unfair to burden the Plaintiff with costs of this suit. I do direct that each party do bear own costs.

94. In conclusion, all other prayers in the Plaint fail except the award of damages for illegal eviction which is Kshs1.5 million. Each party to do bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 30TH DAY OF SEPTEMBER 2022.

.....

L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the Plaintiff

Ms Wambui Koech advocate for the Defendant

Steve - Court Assistant

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