



Gichina v County Government of West Pokot (Environment & Land Case 125 of 2016) [2022] KEELC 4844 (KLR) (22 September 2022) (Judgment)

Neutral citation: [2022] KEELC 4844 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 125 OF 2016
FO NYAGAKA, J
SEPTEMBER 22, 2022**

BETWEEN

ROBINSON MWANGI GICHINA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE JOSEPH GICHINA MUHORO PLAINTIFF

AND

COUNTY GOVERNMENT OF WEST POKOT DEFENDANT

JUDGMENT

1. I will start writing this judgment by giving an excerpt from the judgment of a five-judge Bench in *Patrick Musimba v National Land Commission & 4 Others* [2016] eKLR where, when looking at a similar issue, it was stated as follows:

“Human endeavour whether through mutual or unilateral physical development often leads to conflict. There is always therefore a need for provision to ensure that disputes and conflicts do not evolve out of any individual or national endeavors. National endeavors geared towards development will naturally touch on public as well as private property and with it an obligation to protect any proprietary rights.”

2. This suit was instituted by way of a plaint dated August 15, 2016 and filed on the same date. It sought the following reliefs:
 - a. The defendant be permanently restrained from entering the suit property namely Land Parcel No West Pokot/Keringet “A”/62.
 - b. The sum of kshs 13,000,000.00 damages;
 - c. Mesne profits at kshs 120,000.00 per month from August 2014 up to the time of vacation.



- d. Revocation of any administrative orders or action relied on by the defendant for entry into the plaintiff's land.
 - e. General damages and exemplary damages.
 - f. Costs.
 - g. Interest.
 - h. Any other relief this honorable court may deem fit to grant.
3. The defendant entered appearance on October 18, 2016 and filed its statement of defence on October 26, 2016. The defendant denied the averments contained in the plaint.
 4. Before the matter proceeded, the plaintiff went the way of his ancestors. Consequently on November 30, 2021, the plaintiff's name was substituted with that of the administrator of his estate, that is, one Robinson Mwangi Gichina, his surviving son. The matter thereafter proceeded for hearing.

The Plaintiff's Case

5. PW1, Robison Mwangi Gichina, adopted the evidence of Joseph Gichina Muhuro (now deceased). It was testified that the deceased was at all material times to the suit the registered proprietor of all that parcel of land namely West Pokot/Keringet "A"/ 62. The certified copy of the Title and an official search were produced in support of this assertion and marked P exhibit 1 and P exhibit 3 respectively. It was the evidence of PW1 that the deceased erected housing unit permanent structures on the suit land wherefrom he obtained rental income.
6. Further evidence was that, however, in or about August 2014, the defendant unlawfully and without the deceased's consent, entered the said parcel of land, demolished the deceased's buildings and constructed a public road through the property. That road continues to be in use to date. The deceased sought damages for the demolished houses, loss of income, restoration costs and distress and suffering. The estate was entitled to mesne profits at kshs 120,000.00 monthly a figure emanating from rent obtained from the rentals.
7. The deceased maintained that he was born in 1949 and had a stable income from the developments that he had erected on the suit land. As it stood, that acquisition of income was destabilized owing to the defendant's actions. He accused the defendant of acting in violation of the Constitution, the Land Act, the Land Registration Act and the Physical Planning Act. The estate further cited that the process of compulsory acquisition had not been followed in line with the law thus were unlawfully deprived of a portion of the property without compensation.
8. The deceased in his lifetime engaged the services of Richard K Kigen a valuer who testified as PW2. In support of his credentials confirming that he was licenced to practice in 2016, he produced his practicing certificate, single business permit, tax compliance certificate, gazette notice and insurance certificate all marked P exhibit 8 (a) - (e) respectively.
9. PW2 testified that he was instructed in that year to value the L-shaped property which occurred on July 9, 2016. He observed that there were structures on the suit land that included two (2) churches as well as permanent and semi-permanent structures. It had a small access road measuring approximately 6 - 9 metres; which excised about 0.2 acres from the suit land. The road, which commenced from a road adjacent to the property all the way to a river, passed in the middle of parcel No 62 but more closely leaning towards parcel No 1097.



10. PW2 testified that from observations of the google earth images delineating the property as it was before construction of the road, the existing remnants of foundations, structural damage to neighbouring structures and walls as well as the evidence of felled trees paved the way for road construction. He took photographs of the property as described from his visit. His conclusion was that the deceased suffered loss owing to the road construction as follows:
 - a. Loss of income from direct destruction and damaged houses;
 - b. Destroyed properties;
 - c. Land compulsorily taken from the deceased to create the road;
 - d. Trees and flowers cut down;
 - e. Construction of fences ;
 - f. Re-survey of the title to be amended since the proprietor could not use the title as collateral.
11. Based on the foregoing, PW2 assessed total loss at kshs 13,000,000.00. The Valuation Report bearing the photos and commentaries as testified was produced in evidence and marked P exhibit 2.
12. The deceased issued several demand letters to the defendant dated July 17, 2014, April 28, 2015, June 27, 2016 and July 19, 2019 all produced and marked P exhibit 4, P exhibit 5, P exhibit 6 and P exhibit 7 and respectively. The estate sought compensation for the actions of the defendant.

The Defendant's Case

13. The defendant elected not to call any witnesses to testify on its behalf. Consequently, the defendant closed his case.

Submissions

14. The plaintiff's submissions dated May 7, 2022 were filed on July 7, 2022. The plaintiff summarized the facts as testified in court. He cited *Halsbury's 4th ed*, Vol 45 at paragraph 26, 1503 fortifying that he was entitled to damages for trespass. He relied on several authorities in support of general damages assessing that he was entitled to kshs 10,000,000.00. On exemplary damages, he urged this court to exercise its discretion by relying on the case of *Mukidadi v Khaigan & another* [2004] eKLR. He urged this court to allow the plaint as pleaded.

Analysis and Disposition

15. I have carefully analyzed the pleadings and the documents relied on. I have also considered the plaintiff's submissions. The evidence on record satisfies that the deceased was the registered proprietor of all that parcel of land namely Land Parcel No West Pokot/Keringet "A"/62 which parcel has now devolved in his estate. The defendant put forth a weak or mere denial of this fact at Paragraph 3 of its statement of defence but failed to adduce evidence in support of that assertion. It is also undisputed that the property (now suit land) lies within the heart of Makutano town centre, and the said centre lies within the defendant's territorial limits.
16. A party is always bound by its pleadings. He will not be permitted to depart from them unless he amends them or files other pleadings specifically contrasting them and explaining so. A further analysis of the statement of defence shows that the defendant admitted in its pleadings it actually entered onto the parcel of land and did carry out activities complained of by the plaintiff. Paragraph 4(a) and (f) show this clearly. I will quote the two parts of the Defence here now to demonstrate this holding. "4. The



defendant denies the contents of paragraphs 4, 5, 6, 7 and 8 of the plaint and puts the plaintiff to strict proof thereof. More specifically, the defendant denies the following allegations: (b) That the defendant entered land parcel number West Pokot/Keringet “A”/62 without any legal and/or reasonable grounds; ... (f) That the defendant acted without the consent of the plaintiff.”

17. If the intention of the defendant was to deny the contents of the plaint as related to the two facts in issue, then it ought to have pleaded it clearly so and not to import a different meaning: the two lines should have been drafted differently but they were not. What the two parts of paragraph 4 reproduced above show are that the defendant is not disputing at (b) that it did enter the suit land. All it disputed is that it did so without any legal or reasonable grounds. It was upon it to adduce evidence to support the latter assertion. It did not. Moreover, at (f) the defendant asserted that it acted, but with the consent of the plaintiff unless the plaintiff proved to the contrary. The totality of the meaning of the two lines is that the defendant did enter the suit land. This poses a question this court must answer as it proceeds with the analysis: who owned the part of the land on which the road was constructed? To answer the question, the constitutional classification of ownership of land is the beginning point.
18. Article 61 (2) of *the Constitution* of Kenya, 2010 classifies land into three categories, namely, public, community or private. The subsequent article then defines what constitutes Public Land. Article 62(1), whose provisions are wide but of which I will single out for purposes of this judgment the relevant one, provides for identification purposes of public land that public land, at sub-articles (d) thereof is that part of the territory which “no individual or community ownership can be established by any legal process;” at (e) “land in respect of which no heir can be identified by any legal process;” at (m) “any land not classified as private or community land under this Constitution;” and at (n) “any other land declared to be public land by an act of parliament-
 - (i) in force at the effective date; or (ii) enacted after the effective date.”
19. It was upon the plaintiff to prove on a balance of probabilities that the suit land was private property, and if he did so, then it was upon the defendant to discharge the burden of proving that it took away the ownership thereof from him lawfully, once he showed that he never transferred its ownership to the State through the constitutionally and legally provides means which may be summarized, under article 62(1) (c) of the *Constitution*, 2010 to be “by way of sale, reversion or surrender”, and under the last of which means the process of compulsory acquisition of land by the State falls. Thus, the State which constructed the road through the suit land ought to prove that it acquired the land from the plaintiff by lawful means before it embarked on constructing it.
20. Furthermore, article 40 provides for the protection of the right to property. Sub-articles 3 and 4 thereof stipulate that
 - “(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.”
21. For purposes of understanding the issue in this suit further, before interests vested in private land are yielded to the national or county governments, the procedure as stipulated under part VIII of the Land Act, Act No 6 of 2012 [Rev. 2016] should be observed. Under section 107 of the Act, a preliminary notice of acquisition is issued by the respective cabinet secretary or county executive committee member to the National Land Commission of intention to acquire land on its behalf. Other processes such as entry and inspection of the land follow approval to do so. When all the steps stipulated in sections 107 to 110 have been complied with, then under sections 111-115 compensation is made in accordance with the law.
22. From the evidence adduced by PW1 and PW2, the part of the suit land in issue was not a road reserve. The property in it vested in private interests. It was registered in the name of the deceased, as has been established in paragraph 14 above. To the extent that that was the fact proven, the property is vested in estate of the deceased, and its taking away from him while alive or his estate upon his demise was subject to the legal procedures of acquisition as stipulated under article 40(3) of the Constitution and the relevant law.
23. It has also been established through evidence that there is a public access road passing through the suit land. That said road is used by the public. These facts were not disputed. During his cross examination, PW1 was challenged as to conclusively prove that the defendant was responsible for the road construction. The plaintiff’s witnesses’ testimony made the defendant to sit pretty that the plaintiff had not proved its case. I am, however, not convinced that the deceased would have sued the defendant for the sake of it. According to the plaintiff’s evidence, the road constructed on the suit land not only fell within the defendant’s territorial limits but was brought into existence by use of machinery owned and operated by the defendant. This evidence was not controverted by the defendant. It was proven in evidence that in fact, when the construction was commenced and carried out, the deceased complained to and wrote several letters to the defendant’s offices to make good the deceased’s claims but they were all ignored. The defendant did not counter this evidence.
24. From its pleadings, as analyzed above, and the evidence adduced, it is clear that the defendant did ingress upon the plaintiff’s property with a view to constructing a road for public use. The defendant acquired a portion of the plaintiff’s property constructing a road approximately 6 - 9 metres long as testified by PW2. There was no proof that the acquisition was lawful. While it is apparent that the defendant acquired a portion of the plaintiff’s property without consent and/or failing to adhere to any due process of the law, and which acts amounted to trespass, reverting the parcel of land to its original form would be an exercise in futility more so because it appears that the access road remains for public use.
25. The defendant’s actions squarely fell within the ambit of compulsory acquisition. Compulsory acquisition under the Land Act has been defined to mean “the power of the State to deprive or acquire any title or other interest in land for a public purpose subject to prompt payment of compensation”.
26. Article 40 (3) of the Constitution adopts the indispensability and importance of compulsory acquisition as a necessary tool towards progressive communal development of government projects in Kenya. It is a preserve of the State. Sub article (b) provides that a person shall not be deprived of his property unless such deprivation is for a public purpose or in the public interest. However, such



deprivation must be carried out in accordance with the Constitution}} and any Act of Parliament that requires prompt payment in full, of just compensation to the person and allows any person who has an interest in, or right over, that property a right of access to a court of law. The statute governing compensation is the *Land Act* with the relevant provisions to be found in section 117 through to section 133 of the *Act*.

27. Its process was tersely enunciated in *Patrick Musimba v The National Land Commission and 5 others* [2016] eKLR as follows:

“Under section 107 of the *Land Act*, the National Land Commission (the 1st Respondent herein) is ordinarily prompted by the national or county government through the Cabinet secretary or county executive member respectively. The land must be acquired for a public purpose or in public interest as dictated by article 40(3) of the *Constitution*. In our view, the threshold must be met: the reason for the acquisition must not be remote or fanciful. The National Land Commission needs to be satisfied in these respects and this it can do by undertaking the necessary diligent inquiries including interviewing the body intending to acquire the property.

Under sections 107 and 110 of the *Land Act*, the National Land Commission must then publish in the gazette, a notice of the intention to acquire the land. The notice is also to be delivered to the Registrar as well as every person who appears to have an interest in the land. As part of the National Land Commission’s due diligence strategy, the National Land Commission must also ensure that the land to be acquired is authenticated by the survey department for the rather obvious reason that the owner be identified, in the course of such inquiries, the National Land Commission is also to inspect the land and do all things as may be necessary to ascertain whether the land is suitable for the intended purpose.

The foregoing process constitutes the preliminary or pre-inquiry stage of the acquisition. The burden at this stage is then cast upon the National Land Commission and as can be apparent from a methodical reading of sections 107 through 110 of the *Land Act*, the land owner’s role is limited to that of a distant bystander with substantial interest.

Section 112 of the *Land Act* then involves the land owner directly for purposes of determining proprietary interest and compensation. The section has an elaborate procedure with the National Land Commission enjoined to gazette an intended inquiry and the service of the notice of inquiry on every person attached. The inquiry hearing determines the persons interested and who are to be compensated. The National Land Commission exercises quasi-judicial powers at this stage.

On completion of the inquiry, the National Land Commission makes a separate award of compensation for every person determined to be interested in the land and then offers compensation. The compensation may take either of the two forms prescribed, it could be a monetary award, it could also be land in lieu of the monetary award, if land of equivalent value, is available. Once the award is accepted, it must be promptly paid by the National Land Commission. Where it is not accepted, then the payment is to be made into a special compensation account held by the National Land Commission.

The process is completed by the possession of the land in question being taken by the National Land Commission once payment is made even though the possession may actually be taken before all the procedures are followed through and no compensation has been made. The property is then deemed to have vested in the national or county government as the case may be with both the proprietor and the land registrar being duly notified.



If land is so acquired, the just compensation is to be paid promptly in full to persons whose interests in land have been determined: See section 111 of the Land Act. This is in line with the Constitutional requirement under article 40(3) of the Constitution that no person shall be deprived of his property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation. The Constitution dictates that acquisition be in accordance with the provisions of the Constitution itself and any Act of Parliament. The itself only provides for just compensation being made promptly.

28. Compulsory acquisition is a constitutionally regulated process. From the dictates of the Constitution, its procedure must accord with the Constitution as the grund norm and by a statute which complies with the constitutional provisions. Its process must strictly align. So much so that the *Court of Appeal in Commissioner of Lands & another v Coastal Aquaculture Ltd Civil Appeal No 252 of 1996* KLR (E&L 264) stressed that in compulsory acquisition, the government is required to strictly adhere to the provisions of the Constitution and the Land Acquisition Act (now repealed by the Land Act).
29. In the present case, it is evident that the defendant failed to accord with the provisions of the Constitution and the Land Act. It has not been demonstrated that the defendant made any preliminary inquiries for acquisition and involved the plaintiff yet it was its intention to acquire a portion of the plaintiff's property compulsorily. Additionally, it was not demonstrated that the said acquired portion was a reserve land. Had the procedure been aptly adhered to, the culmination of the process would have led to adequate compensation upon the plaintiff. It is saddening to say the least that the acquisition procedures were marred with glaring irregularities and unconstitutional mechanisms. I adopt the reasoning in Arnacherry Limited v Attorney General (2014) eKLR where the court held:

“It is not expected that the State, in this age and time and with a robust Constitution such as ours, can actively participate in acts of impunity such as the forceful take-over of personal property without due compensation.”
30. By its actions, indeed, the defendant trespassed upon the plaintiff's property and constructed a road on a portion of the property without permission hence done so illegally. For this reason, the plaintiff is entitled to compensation for the damage caused.
31. The plaintiff, through PW 2, one R K Kigen, a Valuer practicing in the name and style of Afriland Valuers Limited, produced P Exhibit 2, a valuation report dated July 20, 2016. The same was elaborate. It captured the property's aerial pictures as well as the pictographic evidence on the ground including the demolished structures. It also assessed the loss of income, loss of land, loss of value as well as other quantifiable losses from the acquisition. It also quantified ancillary costs. It then tabulated the loss of income, destruction of property, loss of land and value remaining units, loss of flora, cost of re-securing the remaining property and other costs including amending the title and the costs of resurveys. The costs were consolidated to a total of kshs 13,000,000.00.
32. PW2 testified that he carried out the inspection of the suit land and property on 9/06/2016. This was after the said destruction of the plaintiff's property and construction of the road. He stated that the road was constructed along the section of the property. It was a marram road. He attached to the report at pages 7-10 a number of photos which showed structures adjacent to the road. Some of the photos showed tree stumps which to him were uprooted after trees were cut down by the defendant for the construction of the road.
33. The Valuer estimated the loss suffered by the plaintiff on a number of heads, namely:



- (a) Loss of income from the destruction of houses pulled down and those adjacent to the road, which he placed at kshs 2,400,000/=.
 - (b) Properties destroyed, which he placed at kshs 2,400,000/=.
 - (c) The land itself and value of remaining housing units which was taken away from the owner, which he placed at kshs 4,800,000/=.
 - (d) Other quantifiable losses such as trees cut down, which he placed at kshs 1,800,000/=.
 - (e) Cost of re-securing the properties, which he placed at kshs 1,000,000/=.
 - (f) The cost of resurveying the land, which he placed at kshs 600,000/=.
34. On cross-examination the Valuer confirmed that he inspected the property in 2016 and he could not know when the road was constructed. Further, that by the time he visited the land, the road was already constructed. In re-examination he stated that the estimated part of the land that was lost was 0.2 acres.
35. I am convinced that the actions of the defendant caused loss and damage to the plaintiff. In assessing the damages payable, I will do the best I can, using the evidence before me to arrive at just compensation that *the Constitution* provides for. First, it is noteworthy that the inspection of the property and valuation of the loss was done on September 6, 2016. The alleged illegal ingress and destruction took place in August, 2014. The period of destruction of the property was pleaded at Paragraph 4 of the plaint. It was supported by the evidence of the demand letter issued on April 28, 2014 and the evidence of PW1. The intervening period is basically two years, shy of two months. This court cannot understand why and how it would be that destruction that took place two years before inspection could not be valued immediately so as to confirm the truthfulness or otherwise of the allegations in evidence that there existed structures on the ground at the material time (of destruction) as were alleged to be destroyed. The Valuer, through PW2 testified that he used coloured Google Earth Maps and Photographs, which he produced as part of P. exhibit 2 between pages 7 and 10 of the report. I anxiously scrutinized the photos in the Report. What is clear to me is that there exist temporary structures on the side of the suit land that is adjacent to the road and some consist of semi-permanent ones. These lie on the bottom of page 8 and the entire of page 9 and bottom of page 10 of the Report. That these properties needed re-securing is not in dispute from the evidence before me as they are exposed to the road. I would award the plaintiff the cost of re-securing them as proposed and given in evidence by PW2.
36. At page 7 and 8 of the report are three google earth maps, with two being on page 7. It is not clear and evidence was not adduced as to when the photos were downloaded and which period in history they referred to. It should not be lost sight of the fact that google earth maps are updated from time to time and thus photos taken therefrom ought to be indicated for which period in history they relate to. Moreover, from the Maps on page 7, specifically where they are encircled by a yellow oval to point out the specific position of and features on and on the alleged suit property, there is no evidence of tree cover along or over the said property so as to confirm that there existed trees on the land before construction of the road. What is shown on the photos is bare ground on the first map (which is printed "Plot" on it, and a structure with a white top, supposedly a rooftop). There are lines drawn in black ink to show the position of the plaintiff's property in an L-Shape starting from a marram road on the right middle to the left at the end of the left edge of the Map.
37. The second photograph which appears to be a magnification of the first Map there is clearly no tree cover on the plot but a L-Shaped structure which has a brownish top colour. In the third Map which has two oval shapes encircling the property in question, to which it is pointed an arrow it shows clearly



the part of the L-Shaped structure which apparently was in the middle of the property marked in an L-Shape on the first Map, which was said to have been destroyed due to the construction of the road. If the evidence of Google Earth Maps was anything to go by in proving that there existed structures on the part of the parcel of the land illegally acquired there was no corresponding aerial view or photograph to show how the property was at the time of inspection. There needed to be a photograph from the air or using a bird's eye view to evidence the extent of that destruction. Moreover, then two parallel lines drawn on the third map (the one at page 8) to show the extent of the road only shows two things: one, that is the position of the suit property as shown on the first Map in comparison with it as shown on the third Map is anything to go by, then the road was not constructed along the side of the property but only passed through it in the middle, at the base of the L-Shape, and thereby occasioned the destruction of the part of the property that was already constructed in an L-Shaped manner.

38. The totality of the analysis of the Valuer's oral testimony and documentary evidence above is that it shows confusion as to the claim that a large section of the property was acquired by the defendant and structures thereon destroyed. Thus, it is my view that only a section of the property was destroyed but not the extent alleged. Additionally, having not indicated to the court whether the structures destroyed were permanent or semi-permanent ones, and the value of each, this court cannot award the compensation on that aspect at the amount or figure proposed. Moreover, if the plaintiff wished to given cogent evidence on the value of the structures destroyed, nothing was easier for him to avail to this court Approved Building Plans and Bill of Quantities (BQs) by the county government or defunct county council of West Pokot, it would have been prudent for him to do so. Again, at page 6 of P. Exhibit 2 the Valuer indicated that Block 2 was partially destroyed, Blocks 4, 5 and 6 were completely destroyed and an Ablution block. He then went on to state as follows, "All the destroyed units were destroyed beyond clear evaluation as to size and accommodation." At section 4 which lies at page 6 of the Report the Valuer indicated that there Block 1 had three no housing units, Block 2 had 3 and Block 3 has 2. If this finding is anything to go by, there was no material placed before me to justify the counting of the missing units because elsewhere in the Report, on the same page as reproduced above, the same Valuer states that the destroyed parts could not be evaluated. One wonders how he arrived at the count of destroyed units without Approved building Plans, except that he relied on oral information as given to him by the instructing client/ customer. The court cannot vouch for such evidence. This court is of the view that without building plans and bills of quantities, and in light of the inability by the Valuer to ascertain the number of units destroyed, the court is only being called upon to proceed on guesswork and award the plaintiff on an unsubstantiated specific loss. In my view, any structures on the plot and destroyed as alleged must have been unapproved temporary ones as those in the photos at pages 8-10. Thus, they could not be as costly! It can only award a global sum, which I fix at Kenya Shillings Five Hundred Thousand (kshs 500,000/=) only. This is in respect of destruction of property in form of housing structures.
39. With regard to the award of loss of income, no material was placed before me to base the award. Not tenancy agreement were produced to show who occupied the housing units and how much they paid for rent. I disallow that claim.
40. The valuer stated that the land lost was 0.2 acres. He did not guide the court on how he arrived at the value he placed on the 0.2 acres. In my view there is need to measure the land lost and value it. This should be done at the time of re-surveying the land, as proposed by the plaintiffs. The cost of re-surveying the land, valuing it, issuing new title documents and the value of the part of land lost to the construction of the road are values which can only be ascertained as the actual actions are taken. They cannot be based on estimates whose values are not shown how they were arrived at. In the circumstances this court directs that the same be carried out jointly by the parties herein but ALL at the cost of the defendant within sixty (60) days or, in default of cooperation (whose efforts are to



be evidence in writing) from the defendant, by the plaintiff and the cost and value be borne by the defendant. The Deputy Registrar shall be given a report thereon for noting compliance and execution of the relief, after the expiry of the period.

41. The plaintiff pleaded that he was entitled to mesne profits, of kshs 120,000.00 per month from August 2014 until the time of vacation. A claim for mesne profit is a claim akin to special damages meaning it must be pleaded and proved [*Mohammad Amin and Ors v Vakil Ahmed and Ors* 1952(1) SCR1133].126]. This is in line with the provisions of order 21, rule 13 of the Civil Procedure Act. The Court of Appeal in *Peter Mwangi Mbutia & another v Samow Edin Osman* [2014] eKLR held:

“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... That being so, it must be very hard on the applicant to be forced to pay an amount which had not even been pleaded in the first place, and on which the first respondent offered no evidence at all.”

“We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”

42. While the plaintiff pleaded the said sum, he did not adduce evidence to establish how he arrived at that figure. He did not present documentary evidence or any other evidence of weight for the benefit of this court. Moreover, the plaintiff cannot claim compensation of a violation of his right to property by way of illegal acquisition, the value of the property acquired and also mesne profits at the same time. I am thus inclined to deny that relief.

43. On general damages, the plaintiff submitted that he took into account the fact that the damage occurred in a rather expansive chunk of land situated in a rural area. He thus urged this court to award the sum of kshs 10,000,000.00 as general damages. It is not gainsaid that the defendant trespassed upon the plaintiff's property. He is therefore entitled to general damages. In awarding damages, the important point to bear in mind is that the purpose of these is to put the injured party to a position where he should have been had the injury not occurred. It is not for purposes of punishing the person who infringes the right of the injured. I exercise my discretion as stated above and award a sum of kshs 500,000.00 in general damages for distress and suffering.

44. On exemplary damages, I am fortified by the holding of the Court of Appeal in *Godfrey Julius Ndumba Mbogori & another v Nairobi City County* [2018] eKLR which held as follows:

“Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes v Barnard* [1964] AC 1129 where Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are: i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government, ii) cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and iii) where exemplary damages are expressly authorized by statute”.

45. As stated earlier, the defendant acted in a manner that was unconstitutional and illegal. Guided by the above authority, I do hold and find that the plaintiff is entitled to exemplary damages and award the sum of kshs 2,000,000.00.



Orders and Disposition

46. Having found that the plaintiff has proved his case on a preponderance of the evidence adduced, I make the following orders:
- a. A declaration that the plaintiff's protected right to property has been violated by the defendant's acts of encroachment onto, trespass upon and damage to the plaintiff's property.
 - b. A declaration that the encroachment onto, trespass upon and damage of the plaintiff's property known as Land Parcel No West Pokot/Keringet "A"/62 by the defendant for the creation of a public access road without consultation of the plaintiff was illegal and unconstitutional.
 - c. That the plaintiff is entitled to compensation over Land Parcel No West Pokot/Keringet "A"/62, and the same to be ascertained and paid after a re-survey, valuation and ascertaining the registration fees and costs of the remaining property in the name of the plaintiff, all as stated in paragraph 40 above.
 - d. The plaintiff is awarded compensation for re-securing the property in the sum of kshs 600,000/=.
 - e. The plaintiff is awarded kshs 500,000.00 in general damages for distress and suffering.
 - f. The plaintiff is awarded kshs 2,000,000.00 in exemplary damages.
 - g. The plaintiff is awarded costs of the suit with interest thereon at court rates and on the sums awarded.
 - h. This suit be mentioned on December 8, 2022 before the Deputy Registrar to confirm compliance with relief (c) above.

Orders accordingly.

JUDGMENT, DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 22ND DAY OF SEPTEMBER, 2022.

DR. *IUR* FRED NYAGAKA

JUDGE, ELC, KITALE

